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### Contention One is Black Holes

#### The US Court of Appeals decision in Al Maqeleh v. Gates creates a legal black hole for detainees in an “active theater of war,” barring them from habeas protections under the Geneva Conventions

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Dilawar's horrific death was one of many prisoner abuses at Bagram Airfield since late 2001, thrusting the base into the national spotlight as the New York Times and other media outlets began to investigate the abuses at Bagram. 6 In the wake of this increased international scrutiny and the United States Supreme Court's decision opening federal courts to detainee habeas challenges from Guantanamo Bay Naval Base in Boumediene v. Bush, 7 detainees at Bagram filed habeas suits in federal court to seek release. 8 The United States District Court for the District of Columbia ("District Court") consolidated these cases into a single action, Al Maqaleh v. Gates, and held in August 2009 that the Bagram detainees could indeed seek habeas relief in domestic courts. 9 However, the United States Court of Appeals for the District of Columbia ("D.C. Circuit") reversed this decision in May 2010 because the detainees' location in an active "theater of war" precluded their access to federal courts under Boumediene. 10 The D.C. Circuit's reversal revealed a fundamental paradox in the government's approach to the Afghan conflict and the "war on terror." 11 Presidents Obama and Bush have insisted the nation cannot be at "war" with al Qaeda and therefore the protections of the Geneva Conventions and other international law [\*445] do not apply to nor protect captured persons. 12 When the Bagram detainees challenged the legality of their detentions, the D.C. Circuit deferred to the executive's judgment and denied habeas relief because Bagram was in an "active theater of war in a territory under neither the de facto nor the de jure sovereignty of the United States." 13 This paradox puts Bagram detainees in a legal "black hole" 14 where they cannot obtain relief through traditional military justice (like Geneva-governed military commissions) and domestic courts refuse to hear their habeas claims.

#### This decision left executive power open ended to detain without due process

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In this age of terrorism and moral relativism, one conclusion emerges clearly: Al Maqaleh endorsed a distinctly un-American view of the fundamental rights of prisoners. By refusing to extend Boumediene beyond Guantanamo, the D.C. Circuit invited the executive to implement an "ends justifies the means" thinking about wartime detention, a position that runs contrary to two and a half centuries of legal thought and humanitarian values. Prisoners are prisoners, whether they are Americans or foreign nationals; the human impact of indefinite detention knows no state or military boundaries. Were Dilawar an American, his suffering would not have been any less tragic and offensive to basic concepts of justice. However, with no access to federal courts, similarly situated prisoners will effectively remain banished inside the razor-wire fences of Bagram. The "practical concerns" at issue in Al Maqaleh may be compelling on their own, but taken in the context of the bigger picture of the United States' conduct during the war on terror, they provide a dire warning. The modern imperial presidency can prosecute military endeavors as it sees fit, with little oversight, be it judicial, legislative, or international, so long as it claims military necessity. The Al Maqaleh District Court tried to draw a firm line in the sand for limiting executive power, but the D.C. Circuit dipped its brush into the sanitizing white paint of executive deference and erased that line, staining it instead with the mark of War.

#### Obama’s speech has called on Congress to remove restrictions on detainment

Josh Rogin 13, senior correspondent for national security & politics for Newsweek and The Daily Beast, May 23, 2013, “How Obama Bungled the Guantánamo Closing” <http://www.thedailybeast.com/articles/2013/05/23/how-obama-bungled-the-guantanamo-closing.html>

.¶ Obama took that issue head-on Thursday when he called on Congress to remove restrictions on transferring prisoners to the U.S., announced the Defense Department will establish a domestic site for holding military commissions, defended the idea of trying alleged terrorists on U.S. soil, and lifted the ban on transferring Guantánamo prisoners to Yemen, which could greatly reduce the prisoner population in Guantánamo.¶ By announcing these steps, Obama is calling on the public to support his contention that the prison can be closed safely, in order to put pressure on Congress to change its tune, experts said.¶ “It looks like he’s learned some lessons from the last go-round,” said Ken Gude, chief of staff at the Center for American Progress, the think tank founded by former Clinton chief of staff John Podesta. “Starting by designating a site on a military base to hold commissions is a great first step. What is Congress going to say to the Defense Department? That it doesn’t think it can secure a U.S. military base inside the United States from potential attack by terrorists?”¶ The president’s new plan is only as viable as his willingness to fight for it, according to all those who witnessed its failure the first time around. It remains to be seen if Obama will use his political capital to make sure the job gets done, or if he will leave it to underlings who might not carry it out once more

#### Plan: The United States federal government should create a domestic terror court to resolve the legal status of persons detained in an Active Theater of War and apply the Geneva Conventions to persons detained in an Active Theater of War.

### Contention Two is Trials

#### We live in an age where modern counter terrorism operations fear trials.

#### As a citizen, Awlaki was entitled to due process as guaranteed by the Fifth Amendment of the U.S. Constitution, which states in relevant part: “No person shall be deprived of life, liberty, or property, without due process of law.” In almost all cases, that right has been construed as entailing the right of the accused to have an opportunity to present his or her case before a fair and impartial tribunal, i.e. a trial. Awlaki, who was never publicly charged with a crime and whose location in Yemen effectively rendered him removed from any “hot” battlefield, was deprived of a trial.

#### We should understand Hamdi not just as a form of legalism but also a cultural document that warns us about the dangers the culture faces from the war on terror.

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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 [\*98] consciousness, the more total is the power of the Sovereign, with the endgame being one that the world has already experienced, a system-sphere 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 nice-sounding 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 [\*99] 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-like 185 - 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 all- [\*100] 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 locution 189 - 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 [\*101] 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 bomb-shelter 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 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 so-called 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 [\*102] 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 non-instrumentalist 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 associated 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 [\*103] 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 "some 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 [\*104] 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 [\*105] 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-a-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

#### Even though the debate community has been historically suspicious of trials as a form of justice - we should understand legal processes as a source of value. If we’re going to fight for the law, we should realize that there is even something in the criminal justice system – in certain contexts - that deserves to be defended. Learning to adjudicate conflicts through jury trials can provids a telos for humanity.

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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 [\*111] 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.

#### Hamdi wanted a court indictment because it allowed him to defend himself. Without access to the courts, the government is not required to provide any justification for accusations of guilt or for punishment.

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The jury trial, in this sense, is a vitalizing expression of the Enlightenment project because it partakes in the Habermasian ideal of communicative action - or, to use Habermas's own locution, "universal pragmatics" 141 - in that the process of argumentation involved in such litigation entails the requirement to "redeem" every speech-claim with rational evidence that must, in the end, justify rational consensus of the community and the accused. What the jury trial thus expresses are the ambitions of a vibrant public sphere in a healthy democracy. And that expression, in turn, suggests that every instance where societal condemnation and punishment is re-conceptualized in an "MMDI" way threatens to corrode the societal commitment to this sort of public sphere. So, the criminal indictment to which Mr. Hamdi felt entitled was to do more than hail him into court and inform him of the charges; it was to solicit him to argue against the accusation and, most critically, promise [\*88] him that his own government will present rational arguments to persuade him as a rational agent that he is the offender and that his offense justifies the ensuing punishment. 142 Mr. Hamdi wanted an indictment rather than a governmental deeming of him as an "enemy combatant," because the indictment starts a process of rational argumentation that "respects and addresses [him] as a rational and autonomous moral agent." 143 The moral power of Mr. Hamdi's demand rests with the fact that a democracy transcends the "coercion problem" by transmuting coercion into consent. We should see from all this how democracy as an ideal is entwined with the Enlightenment project: democracy ideally expresses that facet of the Enlightenment project which highlights autonomy and consent as superior to external authority and coercion. What the above discussion implies is that our criminal justice system, as an institution within a democracy, must itself express that same facet of the Enlightenment project. The intriguing thing here, of course, is that the institutional ambition of the criminal justice system, it's raison d'etre, which is the punishment of the guilty (sometimes with death), rests upon violence and coercion. For that reason, the criminal-justice process poses the greatest challenge of legitimacy upon our democratic culture, as it is within that institutional sphere that coercion and violence is most manifest. The democratic ideal, then, is the moral basis for Hamdi's claim that he has a right not only to be tried in a criminal court, but also a right to be punished rather than merely locked away as an "enemy combatant." 144 To be punished is different than to be detained, and that difference is juridically significant.

#### Deferring to the executive because of foreign-policy expertise is a symptom of empire building. It is an avoiding of thinking out of deference for separated powers.

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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 [\*110] 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

#### Guantanamo is legitimizing segregation and confinement outside the criminal justice system

#### Self-imposed exile and fear of the public sphere is pushing us to the brink of annihilation

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Guantanamo-style detention arises as a reality (indeed, even as a possibility) within a society harboring a consciousness about itself as a functioning democracy, because the war on terror creates the specter that our communities are in peril by irredeemably dangerous jihadists who can infiltrate undetected into them. It is the same dynamic that characterizes the surveillance and detention of sex offenders who have served their prison terms - remarkable abridgement of liberties outside the criminal-justice apparatus upon those who have already paid their societal debts because the community is haunted by the specter of the irredeemably dangerous sexual predator. Detention of these sorts, outside the criminal-justice apparatus, depends upon the specter of the dangerous individual who must be segregated and confined in a fashion reminiscent of the way the town responded to the plague in Foucault's description of it in Discipline and Punish. 146 It is a form of detention that amounts to a vanquishing of the danger. Whether the danger is of the plague, a deadly virus, the sexual predator, or the Islamic jihadist, vanquishing the danger and the dangerous is put in terms of survival. What Hamdi signifies, within this perspective, is a disciplinary society where administrative processes dedicated to some modicum of accuracy (couched as "rights") are all that we demand, not the indulgent and lumbering communicative tribunal that characterizes the criminal-justice process, no matter how that process might vitalize our Kantian Enlightenment values. For what worth are those values in the life-and-death struggle to vanquish the danger and the dangerous? [\*90] B. The Underbelly of the Enlightenment Heritage - the Weberian Nightmare What has heretofore given a patina of acceptability to this modern-day Foucauldian "political dream of the plague" is the narrative idea of a wounded and vulnerable nation gripped in an existential crisis, seeking to protect itself against human "missiles of destruction." The descriptive (a threatened wounded nation) produces in this story the normative (the adjudicative assembly line for enemy combatants). The Foucauldian "political dream of the plague" is the Weberian nightmare. In Dialectic of the Enlightenment, Frankfurt School theorists Horkheimer and Adorno identify the Weberian nightmare of obsessive instrumental rationality as the dominant cognitive orientation in Western culture. 147 Whereas most Americans see as features of this means-ends orientation the awesome feats of science (the amazing technological prosthetics that drives humanity closer to becoming a God, as Freud observed), critical theorists like Horkheimer and Adorno saw what Weber saw 148 - a cognitive orientation that feeds into and fuels our obsessive drive to dominate and control all that surrounds us. 149 The salient point in the Dialectic of the Enlightenment, for our purposes, is that the instrumentalist orientation has been unleashed to devour the very idea of the "sacred" in life. 150 September 11th and the war on terror has only hastened a movement along an already existing trajectory. What we experience in our alienated, gadget-filled, but spiritually vacant existence - what Max Weber termed our "disenchantment with the world" 151 - is a reflection of what Horkheimer and Adorno diagnosed, and of how badly our capacity for reason has been corrupted by a fetish for means-ends rationality. 152 That corruption, which is on [\*91] full display in the overt means-ends reasoning of Hamdi itself, has led to what philosopher Albert Borgmann calls a "crucial debility" in our culture, characterized by the "expatriate quality of public life" where we "live in self-imposed exile from communal conversation and action." 153 There is, then, a certain blowback effect, where a mode of thinking that was supposed to lead to humanity's flourishing has been whipsawed back upon us as a powerful corrupting, even imprisoning, force. Whereas the Enlightenment, as exemplified by Rousseau, Voltaire, and Kant, promised freedom from irrationality and darkness, it has instead denuded the public sphere and bequeathed to us a technocratic language that debilitates the ability to conceptualize our way out of a disastrous course (ecologically and otherwise) on which our technocratic means-ends orientation has put us. 154 The quest for domination and control immanent within Enlightenment's fetish for means-ends reasoning, which supposedly promised a world of flourishing human rights (though pursued through the blood of ancient cultures, such as the native peoples in the Americas), drained modernity of the very vitality that modernist thinkers insisted [\*92] was distinctive about Enlightenment society. 155 It has instead taken us to the brink of annihilation in a world where the disparities of wealth are grossly appalling and human behavior slides so easily into barbarism and violence, usually in the service of preserving or further deepening those disparities. Whereas the Enlightenment broke the bondage of atrophied tradition, it has wrought a world where little is sacred, and what little remains is rapidly dwindling, where "what holds us all together is a cold and impersonal design." 156 We slaughtered cultures within our own country - Native American cultures that we still do not fully appreciate and comprehend - with the quintessential Enlightenment slogan, Manifest Destiny, only to bring about an ennui and despair that produces a nostalgic yearning for the sacred upon which those slaughtered cultures built their now-defunct way of life.

#### The advantage to the aff is not just a simple defense of the state. Criminal trials good for trust in the lifeworld – broadens our notions of the public sphere beyond organized politics

Williams 8 \*Daniel R, Associate Professor of Law, Northeastern University School of Law.

Penn State Law Review, Summer, 113 Penn St. L. Rev. 55

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 [\*96] 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 fact-finding 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.

### Contention Three is Geneva

#### Geneva is key- treatment of Vietnam prisoners prove it is reciprocated when the US follows the law.

Adjami et. Al, 2003 ( Mirna is from the Midwest Immigrant and Human Rights Center, “[Brief of Amici Curiae Retired Military Officers, Rasul v. Bush, 321 F.3d 1134 (D.C. Cir. 2003),](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=321%20F.3d%201134&countryCode=USA&_md5=00000000000000000000000000000000) cert. granted, [72 USLW 3171](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=72%20U.S.L.W.%203171&countryCode=USA&_md5=00000000000000000000000000000000) (U.S. Nov. 10, 2003) (No. 03-334).

Reciprocity has been especially significant in the context¶ of the Geneva Conventions of 1949. As noted earlier, the¶ Eisenhower administration, when urging Senate ratification of¶ the Conventions, stressed that American accession to the¶ Conventions would redound to the benefit of captured¶ American soldiers. Senators recognized the same thing. See¶ pp. 6-7, supra. In Vietnam, the American decision to apply¶ the Geneva Conventions’ principles to captured enemy¶ soldiers was driven in part by the desire to obtain “reciprocal¶ benefits for American captives.” Prugh, VIETNAM STUDIES at¶ 62-63. And American insistence that the enemy apply the¶ Geneva Conventions to American POWs in Vietnam saved¶ American lives:¶ [A]pplying the benefits of the Convention to those¶ combat captives held in South Vietnam did enhance the¶ opportunity for survival of U.S. service members held¶ by the Viet Cong and North Vietnamese. While the¶ enemy never officially acknowledged the applicability¶ of the Geneva Convention, and treatment of American¶ POWs continued to be brutal, more U.S. troops were¶ surviving capture. Gone were the days when an¶ American advisor was beheaded, and his head¶ displayed on a pole by the Viet Cong. On the contrary,¶ the humane treatment afforded Viet Cong and North¶ Vietnamese Army prisoners exerted constant pressure¶ on the enemy to reciprocate, and the American POWs¶ who came home in 1973 survived, at least in part,¶ because of [that].

#### Wars with American troops are INEVITABLE and the US will demand treatment pursuant to Geneva- modeling it now is key to make sure enemies reciprocate.

Adjami et. Al, 2003 ( Mirna is from the Midwest Immigrant and Human Rights Center, “[Brief of Amici Curiae Retired Military Officers, Rasul v. Bush, 321 F.3d 1134 (D.C. Cir. 2003),](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=321%20F.3d%201134&countryCode=USA&_md5=00000000000000000000000000000000) cert. granted, [72 USLW 3171](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=72%20U.S.L.W.%203171&countryCode=USA&_md5=00000000000000000000000000000000) (U.S. Nov. 10, 2003) (No. 03-334).

It is especially important to the members of America’s¶ armed forces that American courts have jurisdiction to¶ determine whether the treatment of the Guantanamo prisoners¶ comports with American military regulations incorporating the¶ “competent tribunal” guarantee of the Geneva Conventions.¶ American failure to provide foreign prisoners with the¶ protections of the Geneva Conventions may well provide¶ foreign authorities, in current or future conflicts, with an¶ excuse not to comply with the Geneva Conventions with¶ respect to captured American military forces.¶ This Court has observed that “[t]he United States¶ frequently employs Armed Forces outside this country—over¶ 200 times in our history—for the protection of American¶ citizens or national security.” United States v. Verdugo-¶ Urquidez, 494 U.S. 259, 273 (1990). See also Max Boot, THE¶ SAVAGE WARS OF PEACE xiv (2002) (“Between 1800 and¶ 1934, U.S. Marines staged 180 landings abroad”). In recent¶ decades, American armed forces have been engaged¶ somewhere abroad nearly every year. The historic pattern¶ shows no sign of abating; “America’s strategic situation today¶ presents more opportunities than ever before for \* \* \*¶ entanglements” in “small wars.” Id. at xix-xx.¶ It is, unfortunately, inevitable that some American military¶ personnel involved in future conflicts will be captured or taken¶ prisoner. When that happens, the United States government¶ and the families and friends of the detained service men and¶ women will share a strong interest: ensuring that American¶ personnel are treated humanely and fairly.¶ In past conflicts the United States has insisted that¶ American soldiers held by the enemy be accorded the basic¶ protections of the Geneva Conventions. See, e.g., Maj. Gen.¶ 23¶ 6 American invocation of the Geneva Conventions evidently had its¶ desired effect. “Following these declarations by the United States,¶ heavy-handed interrogations of Durant appeared to cease, the Red¶ Cross was allowed to visit him and observe his treatment, and he¶ was subsequently released by Aideed as a ‘gesture of goodwill.’” 44¶ HARV. INT’L L.J. at 310.¶ George S. Prugh, VIETNAM STUDIES, LAW AT WAR: VIETNAM¶ 1964-1973, at 63 (Dep’t of the Army 1975); 64 DEP’T OF¶ STATE BULL. 10 (Jan. 4, 1971) (White House statement¶ announcing President Nixon’s call for application of the 1949¶ Geneva Conventions to ease “the plight of American prisoners¶ of war in North Viet-Nam and elsewhere in Southeast Asia”).¶ The United States has also demanded application of the¶ principles codified in the Geneva Conventions to captured¶ U.S. service personnel, even when they were taken prisoner¶ under circumstances when the Conventions, technically, did¶ not apply. For example, following the capture of U.S.¶ Warrant Officer Michael Durant by forces under the control¶ of Somali warlord Mohamed Farah Aideed in 1993, the¶ United States demanded assurances that Durant’s treatment¶ would be consistent with the broad protections afforded under¶ the Conventions, even though, “ [u]nder a strict interpretation¶ of the Third Geneva Convention’s applicability, Durant’s¶ captors would not be bound to follow the convention because¶ they were not a ‘state.’” Neil McDonald & Scott Sullivan,¶ Rational Interpretation in Irrational Times: The Third Geneva¶ Convention and the “War On Terror,” 44 HARV. INT’L. L. J.¶ 301, 310 (Winter 2003).6¶ Invoking international human rights standards, the United¶ States also has condemned foreign governments that have held¶ detainees incommunicado, depriving them of the ability to¶ seek judicial review of their confinements. The United States,¶ for example, objected recently when the Liberian government arrested journalist Hassan Bility and held him incommunicado¶ on the purported ground that he was an “illegal combatant”¶ involved in terrorist activity. AFRICA NEWS, Jan. 3, 2003¶ (available on Nexis). In a statement issued by our Ambassador¶ in Monrovia, “[t]he United States call[ed] on the Government¶ of Liberia to release those political and other prisoners,¶ including those such as Hassan Bility \* \* \*, who are being¶ held without access to lawyers, the civil courts or independent¶ observers” in “violation of international standards of human¶ rights and legal protection, and contrary to Liberia’s basic¶ legal principles.” John W. Blaney, Nov. 21, 2002 Press¶ Conference statement (available at http://usembassy.state.¶ gov/monrovia/wwwh112102.html). The Ambassador¶ explained that “our reasons” for seeking the release of¶ Bility—who had “been held in prison for many months¶ without ever having been charged with any crime”—did “not¶ revolve around whether we thought Mr. Bility was or was not¶ guilty of any crime. That is not the point. An honest and¶ competent civil court should have judged that question, not¶ any individual or official.” John W. Blaney, Jan. 2, 2003¶ Statement (available at http://usembassy.state.gov/monrovia/¶ wwwhsp010203.html).¶ American officials condemn other nations for¶ detaining people indefinitely without access to a court or¶ tribunal, authoritarian regimes elsewhere are pointing to U.S.¶ treatment of the Guantanamo prisoners as justification for such¶ actions. Eritrea’s Ambassador to the United States defended¶ his own government’s roundup of journalists by claiming that¶ their detention without charge was consistent with the United¶ States’ detention of material witnesses and aliens suspected by¶ the United States of terrorist activities. Fred Hiatt, Truth-¶ Tellers in a Time of Terror, WASH. POST, Nov. 25, 2002, at¶ A15. See also Shehu Sani, U.S. Actions Send a Bad Signal to¶ Africa: Inspiring

#### They won’t respond to our demands unless we show we care about Geneva- hypocrisy makes them look weak.

Adjami et. Al, 2003 ( Mirna is from the Midwest Immigrant and Human Rights Center, “[Brief of Amici Curiae Retired Military Officers, Rasul v. Bush, 321 F.3d 1134 (D.C. Cir. 2003),](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=321%20F.3d%201134&countryCode=USA&_md5=00000000000000000000000000000000) cert. granted, [72 USLW 3171](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=72%20U.S.L.W.%203171&countryCode=USA&_md5=00000000000000000000000000000000) (U.S. Nov. 10, 2003) (No. 03-334).

¶ 27¶ Col. Fred L. Borch, Review of Honor Bound, 163 MIL. L.¶ REV. 150, 152 (2000).¶ In the current debate about the Guantanamo prisoners,¶ commentators have pointed out that “[t]he Geneva¶ Conventions operate on the principle of reciprocity,” Joan¶ Fitzpatrick, Sovereignty, Territoriality, and the Rule of Law,¶ 25 HASTINGS INT’L & COMP. L. REV. 303, 317 (2002), and¶ that if the United States does not apply the Geneva¶ Conventions, it heightens the risk that captured Americans¶ will be denied the protection of the Conventions by foreigners.¶ See Manooher Mofidi & Amy E. Eckert, “Unlawful¶ Combatants” or “Prisoners of War”: The Law and Politics of¶ Labels, 36 CORNELL INT’L L.J. 59, 90 (2003) (“Interpolating¶ unrecognized exceptions into the contours of prisoner of war¶ status \* \* \* undermines the Geneva Conventions as a whole,”¶ and could easily “boomerang to haunt U. S. or allied forces:¶ enemy forces that might detain U.S. or allied troops would¶ undoubtedly follow the U.S. lead and devise equally creative¶ reasons for denying prisoner of war status. By flaunting¶ international law at home, the United States risks undermining¶ its own authority to demand implementation of international¶ law abroad”); Steven W. Becker, “Mirror, Mirror on the Wall¶ . . .” : Assessing the Aftermath of September 11th, 37 VAL. U.¶ L. REV. 563, 572 (2003) (American failure to grant POW¶ status under the Geneva Convention “is placing U.S. military¶ personnel abroad in danger, as we have troops in many parts¶ of the world, and it is reasonable to assume that at some time¶ some of them may be captured. If the same treatment is¶ applied to them, we would be hard put to argue otherwise”);¶ Harold Hongju Koh, The Case Against Military Commissions,¶ 96 AM. J. INT’L L. 337, 340 (2002) (it “seriously disserves the¶ long-term interests of the United States—whose nonuniformed¶ intelligence and military personnel will conduct extensive¶ armed activities abroad in the months ahead—to assert that any¶ captive who can be labeled an ‘unlawful combatant’ should be¶ 28¶ 7 The danger that captured Americans might be mistreated is¶ increased for those American forces overseas, some in Afghanistan¶ for example, who do not always wear military uniforms. See Mary¶ McGrory, Bungling on the 9-11 Prisoners, WASH. POST, Feb. 10,¶ 2002, at B7; John Mintz & Mike Allen, Bush Shifts Position on¶ Detainees, WASH. POST, Feb. 8, 2002, at A1; Jess Bravin et al.,¶ Status of Guantanamo Bay Detainees is Focus of Bush Security¶ Team’s Meeting, WALL ST. J., Jan. 28, 2002, at A16.¶ denied prisoner-of-war status under the Geneva¶ Conventions”).7 As one commentator has observed:¶ What if another country were to arrest U. S. citizens,¶ take them to a location over which that country had¶ control, but no technical sovereignty, and then argue¶ that the country’s own law did not apply in that¶ territory—so that our citizens would not have a right to¶ counsel, or even to know what the charges against¶ them might be? We would be distressed.¶ Anupam Chander, Guantanamo and the Rule of Law: Why We¶ Should Not Use Guantanamo Bay to Avoid the Constitution,¶ FindLaw’s Legal Commentary (http://writ.news.findlaw.com/¶ commentary/20020307\_chander.html).¶ In 1950, the Eisentrager Court was concerned that¶ permitting German nationals to seek habeas relief—after¶ having received both a trial and post-conviction review by a¶ military reviewing authority (339 U.S. at 766)—would¶ “purchase no equivalent for benefit of our citizen soldiers.”¶ Id. at 779.

#### The plan’s guarantee of trials is especially key to upholding Geneva.

Adjami et. Al, 2003 ( Mirna is from the Midwest Immigrant and Human Rights Center, “[Brief of Amici Curiae Retired Military Officers, Rasul v. Bush, 321 F.3d 1134 (D.C. Cir. 2003),](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=321%20F.3d%201134&countryCode=USA&_md5=00000000000000000000000000000000) cert. granted, [72 USLW 3171](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/mungo/lexseestat.do?bct=A&risb=21_T17974633184&homeCsi=222576&A=0.6559878798218463&urlEnc=ISO-8859-1&&citeString=72%20U.S.L.W.%203171&countryCode=USA&_md5=00000000000000000000000000000000) (U.S. Nov. 10, 2003) (No. 03-334).

The concern about equivalent benefit is different¶ today. In the last half-century, nearly every country on the¶ planet has adopted the 1949 Geneva Conventions, which,¶ among other things, guarantees access to a “competent¶ tribunal” when there is doubt about whether a detainee is a¶ prisoner of war. It is the United States, which has¶ incorporated the Geneva Conventions’ competent tribunal guarantee into American military regulations, that is presently¶ deviating from international norms. Denying the Guantanamo¶ prisoners access to a competent tribunal increases the danger¶ that captured American forces will receive that “equivalent”¶ treatment.¶ Seventy-five years ago, Justice Brandeis eloquently¶ warned:¶ Our Government is the potent, the omnipresent¶ teacher. For good or for ill, it teaches the whole¶ people by its example. \* \* \* If the Government¶ becomes a lawbreaker, it breeds contempt for law; it¶ invites every man to become a law unto himself; it¶ invites anarchy. To declare that \* \* \* the end justifies¶ the means \* \* \* would bring terrible retribution.¶ Against that pernicious doctrine this Court should¶ resolutely set its face.¶ Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting). The¶ United States still serves as an example to the world. Our¶ concern is that, in this instance, the government is setting an¶ example that is not only fundamentally at odds with the rule of¶ law, but that puts American troops in peril.¶ \* \* \*¶ The questions posed by these cases are momentous. This¶ Court has never held that foreigners captured abroad by the¶ United States may be held indefinitely—perhaps for the rest of¶ their lives—without bringing any charges against them and¶ without ever providing the prisoners with some sort of hearing¶ to determine their status. The importance of this question is¶ magnified because the Guantanamo detentions could last a¶ very long time indeed. The war on terror may go on for¶ decades, and we will not know, at the time, when it is finally¶ over. This war will not end with a surrender ceremony on the¶ deck of the Missouri.¶ 30¶ The issues in these cases are especially significant to the¶ members of American military forces, who may be denied the¶ protections of the Geneva Conventions in the future by foreign¶ captors using American treatment of the Guantanamo¶ detainees as precedent. If there is a “new paradigm” of¶ warfare following September 11, as some contend, these cases¶ will determine the rules, or lack of rules, that apply to¶ captured prisoners in this new type of war—and potentially to¶ Americans taken captive.

#### Lack of Geneva precedent causes state sanctioned torture- destroys the rule of law and causes international anarchy.

Arnold 2006 (Terrel, retired Senior Foreign Service Officer of the US Department of State whose immediate pre-retirement positions were as Deputy Director of the State Office of Counter-Terrorism and Emergency Planning, and as Chairman of the Department of International Studies of the National War College, “America Retires from moral Leadership.” Rense.com Web, Acc at <http://rense.com/general73/roal.htm>

Changing the War Crimes Act as proposed not only means that the United States is weakening and redefining the Geneva Conventions, it is also abandoning its role as world leader in the definition and enforcement of sane rules of war--assuming there are sane rules with the proliferation of new weaponry and with the savagery of warfare now being practiced.¶ ¶ American military leaders have long believed and taught in the military colleges that humane treatment of prisoners and regard for the protection of civil society are rules that also help reduce chances that US prisoners will be abused in captivity. The US changes of law and practice are no less than an open invitation to anyone who captures an American combatant to apply the same torture tools the US reserves unto itself. Moreover, the same lack of clarity US officials assert impedes interpretation of the Geneva Conventions can by used by others to assert that the torture they inflict is permitted by the rules. The technical name for this situation is anarchy.

#### The impact is authoritarianism- historically regimes have used US terror and detention policies to justify atrocities.

Pariseault, 2005 (John is a JD Candidate at the university of California, Hastings College of the Law. “Applying the Rule of Law in the War on Terror: An Examination of Guantanamo Bya Through the Lens of the US Constitution and the Geneva Congentions” Spring 2005. 28 Hastings Int’l & Comp. L. Rev. 481)

Yet even as American officials condemn other nations for¶ detaining people indefinitely without access to a court or¶ tribunal, authoritarian regimes elsewhere are pointing to U.S.¶ treatment of the Guantanamo prisoners as justification for such¶ actions. Eritrea’s Ambassador to the United States defended¶ his own government’s roundup of journalists by claiming that¶ their detention without charge was consistent with the United¶ States’ detention of material witnesses and aliens suspected by¶ the United States of terrorist activities. Fred Hiatt, Truth-¶ Tellers in a Time of Terror, WASH. POST, Nov. 25, 2002, at¶ A15. See also Shehu Sani, U.S. Actions Send a Bad Signal to¶ Africa: Inspiring Intolerance, INT’L HERALD TRIB., Sept. 15,¶ 2003, at 6 (“indefinite detention in Guantanamo Bay helps justify Egypt’s move to detain human rights campaigners¶ as threats to national security, and does the same for similar¶ measures by the governments of Ivory Coast, Cameroon and¶ Burkina Faso”).¶ If American detention of the Guantanamo prisoners¶ —indefinite confinement without any type of review by a court¶ or tribunal—is regarded as precedent for similar actions by¶ countries with which we are at peace, it is obvious that it may¶ be similarly regarded by enemies who capture American¶ soldiers in an existing or future conflict. As a result, the lives¶ of captured American military forces may well be endangered¶ by the United States’ failure to grant foreign prisoners in its¶ custody the same rights that the United States insists be¶ accorded to American prisoners held by foreigners.

#### Countries like Eritrea look to America for free speech precedent- and justify locking up dissenters because of detention policies.

Hiatt, 2002 (Fred, “Truth-Tellers in a Time of Terror” Washington Post. Web, Acc at http://www.ephrem.org/dehai\_news\_archive/2002/nov02/0559.html

A good person to answer that -- why not Eritrea? -- might be Fesshaye Yohannes, 47, a noted Eritrean journalist and playwright. Fesshaye fought for Eritrea's independence from Ethiopia and then, once it was achieved, established what became the nation's largest-circulation newspaper. ¶ Unfortunately, you can't ask him. Eritrea's government has had him locked up for more than a year, and won't say where or, for that matter, why. But the reason is no secret: Eritrea's authoritarian rulers have shuttered the independent press, postponed elections and jailed those who dare criticize them. Now they hope that America's war on terror will give them a free pass. And they may be right. ¶ The tension between America's support of free speech and its preoccupation with fighting terror emerges as something of a theme in the awards for press freedom that will be bestowed in New York City tomorrow night by the Committee to Protect Journalists. Fesshaye is one winner of the annual honors; the others are Irina Petrushova of Kazakhstan, Tipu Sultan of Bangladesh and Ignacio Gomez of Colombia. ¶ Like human rights activists in many countries, journalists struggling to tell the truth are the first to notice when America's attention wavers or its priorities shift. "The anti-terror war," Gomez said, "can lead America to have wrong friends." ¶ And the tension operates on another level too: John Ashcroft, with his tough talk of curtailing liberty in the service of national security, has become every dictator's favorite exemplar. Eritrea's ambassador to Washington, Girma Asmerom, assured me in a telephone conversation last week that locking up the nation's independent journalists without charge was perfectly consistent with democratic practice. As proof, he cited America's roundup of material witnesses and suspected aliens. ¶ And in insinuating that Eritrea's journalists were taking money from enemy Ethiopia, he asked, "How long would an American newspaper last if it was taking money from al Qaeda?" ¶ So Fesshaye was taking money from the enemy? "No, no, no," the ambassador replied; the charges will be made clear in due course. The language that dictators and their lackeys use to justify repression is depressing in its sameness: African or European, Arab or Burmese, it hardly seems to matter. Fesshaye, 47, was arrested in September 2001, along with most of Eritrea's independent press corps; his newspaper, Setit, was closed down. The National Assembly explained that "the private newspapers by their wanton irresponsibility had provoked the anger of the people who demanded that they be closed and sighed with relief when they were temporarily suspended." Elections could not be held "due to obstacles created by external forces and the defeatists." But the Horn of Africa is suddenly strategically valuable to the United States. Hire a lobbyist, and maybe the democracy stuff won't matter. ¶ Central Asia is strategically useful too and -- worse luck for Kazakhstan's democrats -- swimming in oil besides. Its potentate, former Communist boss Nursultan Nazarbayev, has had newspapers shut and reporters threatened, beaten, jailed, tortured, expelled and disappeared. Often their crime is "insulting the honor and dignity of the president." ¶ Petrushova and her newspaper, Respublika, showed the bad taste to report on the $1 billion of oil revenue that Nazarbayev had stashed in a Swiss bank account, CPJ reports, along with numerous other tales of cronyism, nepotism and corruption. As a consequence, she found a decapitated dog hanging by the newspaper window; a screwdriver plunged into the body pinned the message, "There will be no next time." The dog's head was waiting for her at home. ¶ Petrushova fled to Russia, from where she edits the newspaper by Internet. To protect them, she lives apart from her family. Even so, she is thus far luckier than some. Sergei Duvanov, another courageous journalist in Kazakhstan, was badly beaten in August and then, days before he was to leave for a trip to the United States, thrown into prison on rape charges. ¶ U.S. officials dutifully condemn such outrages from time to time. But President Bush also welcomed Nazarbayev to the White House last December to celebrate "the long-term, strategic partnership and cooperation between our nations," as the two leaders said in a joint statement. ¶ Such is the balancing act, carefully calibrated and nuanced, of a superpower at war. From inside a prison in Eritrea or Kazakhstan, the nuances may be difficult to appreciate.

### Contention Four is Solvency

#### The legislative process increases public awareness and debate - which is key to resolving the contentious nature of Obama’s demands- even if stakeholders don’t agree with the proposal, the aff’s process ensures embrace, not backlash.

Sillivana, 2009 (Assistant Professor of Law, Paul M. Herbert Law Center, Louisiana State University.“Lincoln’s Constitutionalism in Time of War: Lessons for the War on Terror?” Article: “INTERNATIONAL LAW AND DOMESTIC LEGITIMACY: REMARKS PREPARED FOR LINCOLN’S CONSTITUTIONALISM IN TIME OF WAR: LESSONS FOR THE CURRENT WAR ON TERROR? Chapman Law Review. Spring 2009. Web, Acc 8/14/2013 at <http://www.chapmanlawreview.com/?p=1514>)

Moreover, the incorporation of international law does not preclude legislative override where necessary. The last-in-time doctrine enables the political branches to supersede international law through the passage of contradictory federal legislation.71 **The** formal incorporation of Congress **through such a process fosters public debate both domestically and internationally, and also provides incentive for the legislature to come off the sideline to place preferred policies on solid legal footing**. Regardless of its success or failure, **the process of forming legislation and engaging in the political machinations that surround prospective legislation encourages a broader public dialogue as well as a focal \*502 point for discussion of policy issues upon which debate can unfold.** The focal points of such debates tend to revolve around legislation that sparks the greatest public concern and reflects positions centered on popular understanding of the “most important” points surrounding the issue. Invitation for public debate in the policy-making process enables dissenting views to voice opinions and air grievances. More broadly, incorporating the public into the debate acts as a functional and productive way to curb the vitriol of dissent–which perceives itself as unduly marginalized and unjustly silenced in affecting the actions and direction of government. Public inclusion in the broader policy judgments of war and armed conflict not only enables public opinion an outlet and opportunity for enhanced focus but also encourages public investment in the policy outcome that is ultimately embraced at the conclusion of the process, even if that outcome reflects a decision against the passage of any legislation.

#### That transforms personal political spaces into a SHARED outrage against unaccountable power.

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To see why that is so, the conventional mechanisms of liberal legal liability need to be supplemented by a specifically political understanding of accountability; and, if that understanding is not to bolster the regime it seeks to contest, it must cut itself loose from key premises of the social contractarianism implicit in Danner's remarks. To hint at the contours of such an account, in this context, I will confine myself to two of the departures it requires. First, such an understanding cannot be predicated on the autonomous agents that classical social contract theory imagines as denizens of the state of nature. Nor can it be predicated on the conception of consent that derives from that hypothetical, which, in turn, sustains an anachronistic understanding of popular sovereignty. To facilitate these presuppositional shifts, borrowing a phrase from Christopher Kutz, I suggest that we adopt the terminology of "complicitous accountability."47 This phrase is not to be confused with the liberal legal doctrine of complicity, which holds that an individual can be held culpable for another's crime if he or she intentionally encourages or aids the second in the commission of that crime, and, in consequence, can be charged with "derivative" or "accomplice" liability. True, the idea of complicitous accountability bears connotations of abetment and even collusion in wrong-doing. But it is not meant to imply that the intent of the complier is identical to either that of the wrong-doers in question (e.g., Charles Graner), or to those officials who arguably authorized its performance (e.g., Rumsfeld). Nor is it intended to imply that the accountability of those who engaged in such deeds, or those who authorized them, is co-extensive with those who have but a modest capacity to re-shape the existing regime. Instead, and appropriating a central notion advanced by much feminist theory, complicitous accountability is predicated on a relational understanding of conduct, one that reminds us that human action is always implicated with as well as conditioned by the actions of others. This understanding invokes the etymology of this term (com = with + plico = to fold), which suggests that actions are invariably enfolded together, spatially and temporally, in ways that are beyond anyone's full comprehension and control. Accountability predicated on an acknowledgment of complicity is not assumed as a result of voluntary choice or deliberate endorsement. Instead, as a consequence of joint enmeshment in complex and historically-specific constellations of power relations, such co-implication is for the most part a fruit of habitual submission to the current order of things. In the security state, as Young reminds us, that submission is often rooted in fear and, more specifically, a desire to be shielded from harm. No matter how understandable, though, such acquiescence reproduces the current order of things, and so it is not entirely without reason that we sometimes feel ashamed by the conduct of those who have acted "in our name." Yet that shame will prove of little moment unless it advances from the personal to the political and, more specifically, unless it gives rise to shared outrage at institutions and exercises of unaccountable power that implicate everyday conduct in profoundly anti-democratic policies and practices. This brings me to the second point of departure from social contractarianism. A key element of the transition from personal to political involves recognizing that just as the notion of complicitous accountability calls into question the sovereign individual presupposed by liberal legalism, so too does it call into question the sovereign state that is its counterpart.

#### Congressional action to affirm international law provides the proper framework for legitimate executive action. Gitmo proves structural limitations are a prerequisite to executive action.

Sillivana, 2009 (Assistant Professor of Law, Paul M. Herbert Law Center, Louisiana State University.“Lincoln’s Constitutionalism in Time of War: Lessons for the War on Terror?” Article: “INTERNATIONAL LAW AND DOMESTIC LEGITIMACY: REMARKS PREPARED FOR LINCOLN’S CONSTITUTIONALISM IN TIME OF WAR: LESSONS FOR THE CURRENT WAR ON TERROR? Chapman Law Review. Spring 2009. Web, Acc 8/14/2013 at <http://www.chapmanlawreview.com/?p=1514>)

B. Extra-Executive Structural Regulations¶ International law provides a substantive framework for many of the types of legal difficulties that occur frequently among nations but are typically under-examined in the domestic legal context. In such circumstances, international law can provide the structural design to move the executive toward consensus building through constraints that guard against the intrinsic temptation of the executive branch to maximize its own power at the potential cost of losing its credibility. Where norm vacuums exist in sorting out the law as a domestic matter, international law often provides a basic substantive framework around which more extensive law can be built domestically.¶ These structural and touchstone characteristics of international law assist the public in assessing, and accepting, final provisions of law carried out in policy. Specifically, incorporating international law in the domestic process (1) promotes international and domestic political dialogue; (2) encourages the executive branch to engage in formal and informal justification of its policies; and (3) incentivizes transparency through public disclosure.¶ The importance of structural limitations surrounding executive action is demonstrable in the discussion surrounding the treatment of prisoners at Guantanamo Bay. Addressing the issue of the standard of treatment of U.S. detainees, President Bush asserted that the U.S. would treat detainees “humanely \*503 and, to the extent appropriate and consistent with military necessity . . . .”72 The power of this statement as a force of legitimation, is compromised by the fact that “it was very vague, it was not effectively operationalized into concrete standards of conduct, and it left all of the hard issues about ‘humane’ and ‘appropriate’ treatment to the discretion of unknown officials.”73

#### Those civil society organizations are a key check on executive power- better than statutory or judicial restrictions.

Cole 11 David, Professor, Georgetown University Law Center. Wayne Law Review, Winter, 57 Wayne L. Rev. 1203

Yet perhaps the most important and surprising lesson of the past decade is that constitutional and human rights, which seemed so vulnerable in the attacks' aftermath, proved far more resilient than many would have predicted. President George W. Bush's administration initially chafed at the constraints of constitutional, statutory, and international law, which it treated as inconvenient obstacles on the path to security. 1 The administration acted as if no one would dare to--or could effectively--check it. But in time, the executive branch of the most powerful nation in the world was compelled to adapt its response to legal demands. Equally surprising is that these restraints for the most part were imposed not by the formal mechanisms of checks and balances, but by more informal influences, often sparked by efforts of civil society organizationsthat advocated, educated, organized, demonstrated, and litigated for constitutional and human rights. The American constitutional system is traditionally understood to rely on the separation of powers and judicial review to protect liberty and impose legal restrictions on government officials. After September 11, however, as in [\*1205] other periods of crisis in American history, all three branches were often compromised in their commitments to liberty, equality, dignity, fair process, and the "rule of law." 2 By contrast,civil society groups dedicated to constitutional and rule-of-law values, such as the American Civil Liberties Union, the Center for Constitutional Rights, the American Bar Association, Human Rights Watch, Human Rights First, the Bill of Rights Defense Committee, the Constitution Project, the Muslim Public Affairs Council, and the Council on American Islamic Relations, consistently defended constitutional and human rights--and in so doing reinforced the checking function of constitutional and international law. They issued reports identifying and condemning lawless ventures; 3 provided material and sources to the media to help spread the word; 4 filed lawsuits in domestic and international fora challenging allegedly illegal initiatives; 5 organized and educated the public about the importance of adhering to constitutional and human rights commitments; 6 testified in Congressional hearings on torture, illegal surveillance, and Guantanamo; 7 and coordinated with foreign governments and international nongovernmental organizations to bring diplomatic pressure to bear on the United States to conform its actions to constitutional and international law. 8 Scholars have long focused on the role constitutions and the formal structures of government that they create play in reinforcing commitments to long-term principles when ordinary political forces are [\*1206] inclined to seek shortcuts. 9 The United States' experience during the decade following September 11 suggests that this focus is incomplete; we should pay at least as much attention to the work civil society groups do to "enforce" constitutional rights. Much like a constitution itself, such groups stand for, and can shore up, commitments to principle when those commitments are most tested. And while we often speak metaphorically about a "living Constitution," civil society groups are actually living embodiments of these commitments, comprised of human beings who have joined together out of a shared, lived dedication to constitutional and human rights principles. As such, they are well positioned to influence the polity's and the government's reactions in real time, and in crisis periods may be the only institutional counterforce to the impulse to sacrifice rights for security. These organizations' interventions often call on the formal structures of government to heed their legal claims, but the post-9/11 experience suggests that their work can have traction beyond the formal confines of judicial opinions and enacted statutes. In the first decade after September 11, civil society appears to have played at least as critical a role in the restoration of constitutional and human rights values as the formal institutions of government. In this period, the constraints on executive power operated through what I will call "civil society constitutionalism," in which nongovernmental organizations advocated in multiple ways for adherence to the rule of law, in court and out, and in so doing, did much of the "work" of constitutionalism. In examining the nexus between civil society and constitutionalism, I am especially interested in those nongovernmental groups that define themselves by their collective commitment to constitutional or rule-of-law values. "Civil society" can mean many things to many people, but I will use it in this essay principally as shorthand for this particular subset of nongovernmental organizations. Ernest Gellner provisionally defined the broader civil society as "a set of diverse non-governmental institutions which is strong enough to counterbalance the stateand, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent it from dominating and atomizing the rest of society." 10

#### Incorporating procedural justice into a Domestic Terror Court is key- treatment of each individual detainee influences perception of the United States.

David Welsh, J.D. from the University of Utah. He is currently a doctoral student in the Eller School of Business at the University of Arizona where his research focuses on organizational fairness and ethics, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, 9 U.N.H. L. Rev. 261, March 2011, Lexis

V. The Importance of Procedural Justice¶ In the context of detentions, "the fairness of the procedures" through which the United States exercises authority is the key element driving both national and international perceptions of U.S. legitimacy, and legitimacy ultimately determines the extent to which individuals comply with U.S. policies. [n73](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n73) Robust empirical evidence has "repeatedly documented a pattern of correlations consistent with a causal chain in which procedural fairness leads to perceived legitimacy, which leads to the acceptance of policies." [n74](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n74) Research also [\*273] suggests that procedural justice creates a "willingness to empower legal authorities to resolve issues of public controversy." [n75](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n75) An analysis of how procedural justice has been applied in legal and institutional settings provides a framework for addressing the specific legitimacy problems associated with Guantanamo Bay and how fair process can be effectively incorporated into a DTC model.¶ Thirty-five years ago, the formal study of procedural justice was born when researchers discovered that individuals "care deeply about the fairness of the process that is used to resolve their encounter or dispute, separate and apart from their interest in achieving a favorable outcome." [n76](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n76) This research indicates that individuals with control over the process (e.g., telling their side of the story, presenting evidence, and controlling the order and timing of presentation) view the process itself as fair. [n77](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n77) This outcome, known as the fair process effect, "is one of the most replicated findings in the procedural justice literature." [n78](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n78) A meta-analysis of 120 empirical justice studies covering a twenty-five year period revealed that procedural justice is highly correlated with outcome satisfaction (.48), institutional commitment (.57), trust (.61), and evaluation of authority (.64). [n79](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n79) These findings indicate the degree of significance that procedural justice has on individuals.¶ In the legal setting, an exploration of procedural justice in felony cases revealed that defendants' evaluations of the judicial system did not depend exclusively on the favorability of sentencing. [n80](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n80) Even when verdicts involved incarceration and serious sanctions, litigant [\*274] evaluations went beyond distributive outcomes to analyze their perceptions of the procedural fairness of the legal system. [n81](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n81) Additionally, while judges handling minor cases believed that litigants would ignore procedural issues when granted favorable outcomes, litigants' concerns over process led to unanticipated hostilities when procedural shortcuts were used by the court to resolve cases. [n82](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n82) Thus, while outcomes cannot be entirely disregarded, the fairness of the process used to reach a given outcome is critical to perceptions of legitimacy.¶ Recent research highlights two reasons why procedural justice may be particularly important in the context of detentions. First, judgments of procedural fairness are particularly important to individuals experiencing uncertainty. [n83](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n83) Detainees lack the procedural certainties guaranteed in a regular criminal proceeding in that they frequently do not know how long they will be held, why they are being held, what evidence exists against them, and what degree of punishment they may face. [n84](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n84) Second, the greater the unfavorableness of the outcome and the larger the potential harm, the more individuals care about fair process. [n85](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n85) These findings are reflected in U.S. criminal law provisions requiring certain elements of procedural due process when serious sanctions are involved. [n86](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n86)¶ It is also critical to extend procedural justice judgments beyond the individual detainee to the perspective of a worldwide audience. While it is easy to overlook how an alleged terrorist feels about the degree of procedural fairness he or she is receiving, the perceptions [\*275] of governments, human rights organizations, political groups (including terrorist organizations), and millions of individuals (particularly those who closely identify with that individual's race, religion, or nationality) cannot be ignored. Individuals become upset when they observe unfairness, and such observations motivate them to help victims of this unfairness. [n87](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n87) Thus, it would be a mistake to think that procedural injustice against a single individual will affect the perceptions of that individual alone. [n88](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n88) Additionally, efforts to hide procedural injustices, such as the abuse of detainees by U.S. soldiers, [n89](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n89) have only backfired by creating sympathy for the types of individuals that the United States seeks to dehumanize. [n90](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n90) In the next section, I identify six rules of procedural justice, evaluate the current detention regime based on these rules, and make recommendations about how these rules could be implemented in a DTC model.

#### A DTC keeps both fairness and efficiency in view, but refuses to sacrifice rights in the name of effectiveness.

David Welsh, J.D. from the University of Utah. He is currently a doctoral student in the Eller School of Business at the University of Arizona where his research focuses on organizational fairness and ethics, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, 9 U.N.H. L. Rev. 261, March 2011, Lexis

VII. Balancing Fairness, Effectiveness, and Efficiency¶ Although enhancing procedural justice is critical to U.S. success in the War on Terror, fairness is not an absolute and must be carefully balanced with other strategic objectives including effectiveness and efficiency. Yet, weighing these elements is not inherently a zero-sum game in which one objective can only be maximized at the expense of the others. While some degree of balance is required, a zero-sum mentality is often the result of short-term thinking as opposed to long-term strategy. In this section, I argue that the DTC [\*292] model collectively maximizes effectiveness, efficiency, and fairness to a greater extent than either the current U.S. detention regime or competing detention models. I also caution against the misuse of procedural justice and legitimacy to present a front of credibility that is used to manipulate and exploit individuals.¶ A. Efficiency¶ The DTC model represents a method of bringing efficiency and fairness to the detention system. Efficiency suggests that with limited resources, procedural protections cannot be an absolute. Yet, some unfair policies with a guise of efficiency, like a shoot-on-sight policy against suspected terrorists, would actually be incredibly costly when long-term effects on U.S. legitimacy are considered. At the other end of the spectrum, the trial of thousands of suspected terrorists under the U.S. criminal model is also tremendously inefficient. [n186](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n186) Implementing traditional evidence and jury requirements would be extremely costly and would create significant delays. Critics of Article III courts and international treaty-based terror courts note the impracticability and inefficiency of this system in the context of terrorism. [n187](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n187)¶ Referring back to the problem of "the process as the punishment," weighing the additional delays and complications required under alternate models such as the traditional criminal justice system eclipses the marginal benefit of any additional rights provided by these models. Under the DTC model, efficiency and fairness work together, as both the detainee and the United States have an interest in expediting the judicial process. Of course, resources could be poured into the criminal system to allow a significantly larger caseload, yet, the proposed DTC model strikes a more suitable balance between efficiency and fairness that does not stretch either of these ideals beyond the point of diminishing returns. Just as judicial statutes allow courts to efficiently provide justice without reinventing the wheel on a case-by-case basis, the DTC framework is an efficient alternative to current ad hoc policies used to try terrorists. [\*293] ¶ B. Effectiveness¶ While short-term effectiveness often appears to be hampered by fair process, procedural justice and legitimacy are the building blocks of long-term effectiveness in the War on Terror. The famous ticking time bomb scenario, in which a terrorist is apprehended after hiding a bomb, is often used as an example justifying torture (procedural injustice) in the name of effectiveness. Choosing not to torture the suspected terrorist appears to compromise effectiveness and potentially sentence thousands of innocent civilians to death. Torture supporters argue that in such a situation the ends justify the means. However, substantial evidence suggests that torture marks the beginning of a slippery slope that ultimately undermines both fairness and effectiveness. [n188](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n188)¶ Next, this approach is problematic because it casts a wide net that potentially allows the torture of anyone that may have some knowledge of the bomb. [n194](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n194) "You end up going down a slippery slope and sanctioning torture in general," states Professor David Cole. [n195](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n195) With the lives of thousands of individuals on the line, how far should this individual be tortured? Are any means off limits in such a scenario? What if torturing the alleged terrorist does not produce results, but it is suspected that this individual will talk if the government tortures his six-year-old daughter in front of him? Inevitably, the ticking time bomb scenario leads full circle back to questions about legitimacy and fairness. If the United States is willing to venture down this slippery slope, it will, as the United States Army Field Manual section on torture indicates, "bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort." [n196](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n196)¶ While this scenario represents the extreme example, all attempts to circumvent fairness in the name of effectiveness inevitably begin to move down this slippery slope. In a regime without clear rules, effectiveness becomes subsumed in necessity, and in a period of crisis, long-term costs are easily overshadowed by perceived short-term gains. It is possible to conceptualize a regime in which bureaucratic procedural red tape ties the hands of the military to a point where effectiveness is undermined. However, this is not the lesson of the last seven years. In contrast, U.S. policymakers are seeking to set rules and limits on a regime that has run largely unregulated and unchecked in the War on Terror. [n197](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n197) The DTC model maintains effectiveness by recognizing inherent differences between suspected terrorists and domestic criminals. Yet, it also enhances fairness by granting specific procedural rights to detainees. Thus, under the [\*295] DTC model, if Osama bin Laden was captured today, he would not receive a full Miranda warning or be immediately brought to trial before a jury, as a domestic criminal defendant would be. Yet, he also would not be indefinitely placed in a "black hole" but would be brought before a judge within seven days. He would be guaranteed certain rights that would allow non-abusive interrogation but not torture. Regardless of whether valuable information is obtained through questioning, to go beyond the rules in this scenario would ultimately undermine both effectiveness and fairness in the long term. The DTC model establishes the correct balance by providing the tools to convict bin Laden without losing sight of his rights as a human being. In the eyes of a global audience, this model of guaranteed rules and rights enhances both legitimacy and long-term effectiveness in the War on Terror.

#### \*\*\*A DTC reforms procedural norms and increases international cooperation.

David Welsh, J.D. from the University of Utah. He is currently a doctoral student in the Eller School of Business at the University of Arizona where his research focuses on organizational fairness and ethics, “Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy”, 9 U.N.H. L. Rev. 261, March 2011, Lexis

¶ Second, a re-articulation of detention policies under the DTC model will limit procedural burdens on detainees to a greater degree. The DTC model requires that detainees be brought before a judge without unnecessary delay. [n182](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n182) This should occur within seven days unless exigent circumstances arise. [n183](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n183) Detentions must be independently reviewed at periodic intervals to ensure that the process is progressing either toward trial or release. [n184](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n184) Fairness and efficiency are maximized by a system adapted specifically to detainees, and holding individuals for years without trial would become the rare exception under this model rather than the norm.¶ Third, the DTC model is but one aspect of a broader strategic objective designed to retake the moral high ground in the War on Terror. While the United States has frequently asserted its sovereignty in opposition to international law, [n185](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?reloadEntirePage=true&rand=1371367095741&returnToKey=20_T17612684264&parent=docview&target=results_DocumentContent&tokenKey=rsh-20.445699.5416944018#n185) it would gain much through international cooperation as opposed to unilateral action. While an extensive discussion of the limits of state sovereignty is beyond the scope of this paper, the United States should consider the legitimacy of international laws and customs even in situations where it has the power to go against global norms. By recognizing these universal principles of procedural fairness, the United States gains legitimacy in the War on Terror.