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## Contention One is the Threat to the Lifeworld

#### Democratic deliberation is facing a legitimation crisis—state and economic forces are threatening to create a monopoly on public discourse.

Mitchell 98, (Gordon R. Mitchell, Associate Professor, University of Pittsburgh, PEDAGOGICAL POSSIBILITIES FOR ARGUMENTATIVE AGENCY IN ACADEMIC DEBATE, Argumentation & Advocacy, 1998, Vol. 35 Issue 2, p41-60)

The undercultivation of student agency in the academic field of argumentation is a particularly pressing problem, since social theorists such as Foucault, Habermas and Touraine have proposed that information and communication have emerged as significant media of domination and exploitation in contemporary society. These scholars argue, in different ways, that new and particularly insidious means of social control have developed in recent times. These methods of control are insidious in the sense that they suffuse apparently open public spheres and structure opportunities for dialogue in subtle and often nefarious ways. Who has authority to speak in public forums? How does socioeconomic status determine access to information and close off spaces for public deliberation? Who determines what issues are placed on the agenda for public discussion? It is impossible to seriously consider these questions and still hew closely to the idea that a single, monolithic, essentialized "public sphere" even exists. Instead, multiple public spheres exist in diverse cultural and political milieux, and communicative practices work to transform and reweave continuously the normative fabric that holds them together. Some public spaces are vibrant and full of emancipatory potential, while others are colonized by restrictive institutional logics. Argumentation skills can be practiced in both contexts, but how can the utilization of such skills transform positively the nature of the public spaces where dialogue takes place?¶ For students and teachers of argumentation, the heightened salience of this question should signal the danger that critical thinking and oral advocacy skills alone may not be sufficient for citizens to assert their voices in public deliberation. Institutional interests bent on shutting down dialogue and discussion may recruit new graduates skilled in argumentation and deploy them in information campaigns designed to neutralize public competence and short-circuit democratic decision-making (one variant of Habermas' "colonization of the lifeworld" thesis; see Habermas 1981, p. 376-373). Habermas sees the emergent capacity of capitalist institutions to sustain themselves by manufacturing legitimacy through strategic communication as a development that profoundly transforms the Marxist political dynamic.¶ By colonizing terms and spaces of public dialogue with instrumental, strategically-motivated reasoning, institutions are said by Habermas to have engineered a "refeudalization" of the public sphere. In this distorted space for public discussion, corporations and the state forge a monopoly on argumentation and subvert critical deliberation by members of an enlightened, debating public. This colonization thesis supplements the traditional Marxist problematic of class exploitation by highlighting a new axis of domination, the way in which capitalist systems rely upon the strategic management of discourse as a mode of legitimation and exploitation. Indeed, the implicit bridge that connects argumentation skills to democratic empowerment in many argumentation textbooks crosses perilous waters, since institutions facing "legitimation crises" (see Habermas 1975) rely increasingly on recruitment and deployment of argumentative talent to manufacture public loyalty.

#### More specifically, the “active theater of war” precedent has been used by the Obama administration to deny trials to detainees at Bagram and Guantanamo bay – it places them in a LEGAL BLACK HOLE.

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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.

#### The attack on habeas is symptomatic of a larger attempt by corporatism and state power to corrupt the public sphere—we must resist the ability of means-ends rationality to pervade our discourse.

Williams 08, (Daniel R. Williams, Associate Professor of Law, Northeastern University School of Law, AFTER THE GOLD RUSH – PART II: HAMDI, THE JURY TRIAL, AND OUR DEGRADED PUBLIC SPHERE, Penn State Law Review, Summer, 113 Penn St. L. Rev. 55)

The classic Frankfurt School diagnosis of American culture is grim and pessimistic. Jurgen Habermas rebels against the pessimism that pervades Dialectic of the Enlightenment, but he does not repudiate the essential diagnosis found there, though he surely seeks to deepen it with a more nuanced investigation into the true roots of Enlightenment rationality.145 For our purposes, we may add to this observation of humanity’s destructive fetish with means-ends rationality—the evidence of it is all around us, should we care to look—Habermas’s emphasis on the public sphere as an optimistic source of rationality.146 In the idealized vision that Habermas presents, the public sphere consists of voluntary associations dedicated to promoting unconstrained rational interchange among free and equal participants of good will.147 It is in the public sphere, if truly healthy (free from the distortions of domination), that the common good can be gleaned.148 It is in the public sphere that government overreaching can be checked and averted.149 On this view, world public opinion, cultivated within vibrant public spheres that somehow escape the distortions of governmental and corporate propaganda, may function, in this post-Cold War era that has bled into the Age of Terror, as the only potential countervailing force to the dominant super-power, the United States.¶ What a vibrant public sphere provides are tools to resist naturalistic illusions undergirding social institutions and practices that preserve and promote spheres of inequality and regimes of domination, but seem to be socially necessary. The idea here is well-rehearsed in the literature of critical theory: that which is socially constructed is made to appear fixed and natural; that which serves narrow interests of power and privilege is made to appear to serve everyone.150 A culture beholden to means-ends thinking is a culture that has lost its capacity for critical theorizing, and such a culture is, as a result, at the mercy of its illusions.¶ A vibrant public sphere that successfully exposes illusions which conceal unhealthy conditions for society is crucial to social change, for the exposing of such illusions is exactly what loosens the screws that keep unworthy social institutions intact.151 A vibrant public sphere is the environment for rendering institutions malleable and open to change, which is why thinkers from Kant to Habermas regard “the public sphere as the definitive institution of democracy.”152 The big problem, however, is that the “public sphere” in consumerist societies such as ours may itself have evolved into an illusion, propping up the justificatory myth that the Sovereign’s activity is in check and in harmony with the consent of the governed.153 Consider the implications if we find, as an empirical matter, that the public sphere is beholden to the powerful and privileged, but still retains the image of functioning largely in its idealized way. That false consciousness, to use a very unfashionable phrase, creates manifold opportunities for a bloated sovereignty—indeed, perhaps one like we are witnessing today—and a bloated sovereignty coexists nicely with a consumerist mentality that cannot seem to imagine any alternative to the present, other than a future that consists only of the present just with more snazzy gadgets.¶ Evidence abounds that this false consciousness pervades America today, with disastrous consequences. Vital issues of war and peace(let alone important issues revolving around health care, education, economic well-being) are presented in stage-managed fashion, with vast sums of money spent on manipulating over-worked, anxiety-riddled consumerists who cling to an anachronistic, jingoistic, pre-Cold War understanding of what this nation stands for in the world.¶ Voting is no longer the culminating act that follows a period of reflection and probing dialogue and debate, but a reaction to “campaigns,” operations not unlike military campaigns and Madison Avenue advertising campaigns, where the human commodity on display (the “candidate”) has been selected largely through big-money donors and inside-power politics.154 If the hollowed-out nature of democracy captures something real in our culture, then is it really surprising that the great institutional embodiment of democracy and the most vitalizing expression of the Enlightenment, the right to trial by jury, has been under siege?155 And if we abide the erosion of it, if we find that trial by jury cannot purchase its way into our culture because it cannot satisfy our quest for means-ends efficiency and because we have lost our vocabulary for non-instrumentalist justificatory ways of thinking and being, then what democratic institutions are next?

#### THE WAR ON TERRORWAS CONSTRUCTED TO HASTEN DETENTION and DENY REASON GIVING – reductionist buzzwords like “active theater of war” or “national security” cause mechanistic thinking that culminates in Nazism – trials are a fundamental site of resistance because they recognize the ability to defend oneself.

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

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

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

#### We live in an age where modern counter terrorism operations fear trials. Why does the active theater of war precedent exist? Why does the government think it is so important to prevent individuals from ever experiencing a trial? We begin by understanding that the Habeas writ is the only way to prevent abusive and arbitrary government-

Endicott, 2009 (Timothy, “Habeas Corpus and Guantanamo bay: A view from Abroad” THE AMERICAN JOURNAL OF JURISPRUDENCE 54 Am. J. Juris. 1 Lexis

But the responsible government theory gives a better rationale for the law of habeas corpus. The core purpose of the writ is to provide a technique (a technique restricted by comity) for preventing arbitrary government. Sovereignty over a territory in international law is a good ground for the availability of the writ, but lack of sovereignty over the place of detention, in itself, gives a court no reason to deny the jurisdiction. The reason for the link between habeas corpus and sovereignty is the special responsibility for [\*31] government according to law that arises from the effective and stable control that a state has (except in cases of rebellion or invasion) over its sovereign territory. A state may have that special responsibility for the rule of law in other territories that it holds; the United States has it in Guantanamo Bay.¶ X. The Theories Applied to the Detentions at Guantanamo Bay¶ The rights theory constricted Justice Jackson's conception of habeas corpus in Eisentrager; he looked on the writ as a protection for the rights of the citizen. In fact, habeas corpus is a bulwark of liberty for the citizen, because it is a just technique for securing responsible government.¶ Here is the rationale for the habeas corpus jurisdiction within the United States, or within England: the state's control over the territory creates an opportunity for arbitrary government, which engages the state's responsibility for the rule of law. If the judges can pass judgment on the arbitrariness of a detention without a breach of the comity that they owe to the executive and the legislature, then there was good reason for the judges to invent habeas corpus, in the exercise of their common law jurisdiction over the administration of justice. And there was good reason for the English Parliament to extend it to decisions authorized by the highest authorities of the state, and good reason for the framers of the United States Constitution to protect it from arbitrary suspension. And the United States' "complete jurisdiction and control" in Guantanamo Bay gives the judges the same reason to use the writ to prevent arbitrary detention, if they can do so with comity. If the hearing of the petition would not endanger the President's ability to discharge his responsibility for national security, the court should issue the writ in order to inquire into a prima facie case of arbitrary detention in Guantanamo Bay (and a statute preventing such an inquiry is incompatible with the suspension clause, unless it is a lawful response to rebellion or invasion).

## Contention Two is Reason Giving

#### Ideen and I demand that 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.

#### THE LAW IS NOT PERFECT, but some legal processes contain sources of value. In the criminal justice system – in certain contexts – the right to defend oneself from an accuser deserves to be defended. Learning to adjudicate conflicts through jury trials can provids a telos for humanity.

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

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.

#### Self-imposed exile and fear of the public sphere is pushing us to the brink of annihilation - the right to demand a reason from a sovereign is fundamental –without it, WE HAVE NOTHING, Not even our CULTURE LEFT

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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.

#### We find ourselves in the COMPLEMENTARY SPACE, participating in an activity that, at its core, relies on discourse. This discourse we use, particularly to describe the war on terror, also determines the allocation of authority between the branches of government in this context – even if the current institutional arrangement is bad, we have ceded our authority to even make that decision. The aff reclaims our ability to control the application of national security discourse.

Shaub 11 (Jonathan David Shaub, J.D., Northwestern University School of Law, 2011; M.A., English, Belmont University, 2010; B.A., Philosophy and Religious Studies, Vanderbilt University, 2003, now a Bristow Fellow at the Office of the Solicitor General, “A Foucauldian Call for the Archaeological Excavation of Discourse in the Post-Boumediene Habeas Litigation,” Spring, 2011 Northwestern University Law Review, 105 Nw. U.L. Rev. 869

3. Post-9/11 Énoncés and Complementary Space.—Finally, the “complementary space” refers to the nondiscursive institutions and practic- es that also form part of the text of a discursive formation. One of the chief contributions of Foucault’s methodology, and one of the reasons it is so ap- plicable to the post-9/11 judicial role, is Foucault’s realization that the words themselves define the power relations, which, in turn, construct the meaning of a term. The enunciative field includes certain institutional pow- er relationships and the authority to speak, which are influenced, in turn, by the collateral and correlative spaces. The complementary space determines who has the power to control the application of an énoncé like “national se- curity” or “unlawful enemy combatant” in practice. Thus this aspect of the enunciative field sets the rules for who can define the term, contains the possibilities inherent in the label, and consequently excludes other potential authorities or possibilities.¶ For example, the term “unlawful enemy combatant,” based on Quirin and other precedent, has thus far operated as an unexamined énoncé, an atom of discourse that has constructed the power relations between the branches of government. The énoncé imports a historical set of institutional relationships into the discursive formation as part of its complementary space in the same way it imports discursive relationships as part of its colla- teral and correlative spaces. The term constructs the institutional relation- ships between detainees and the government, excludes potential existing relationships (such as criminal to prosecutor), and ultimately determines both who has the authority to speak and the limits of such speech.¶ One such limit inherent in the post-9/11 discursive formation is the ex- clusion of the criminal discourse. Each discursive formation necessarily en- tails exclusions of other discourses and other referential fields by its allocation of power. Although some officials within the Clinton Adminis- trations in the 1990s began to advocate military action against al Qaeda, ter- rorism was almost universally considered a crime before 9/11.212 Furthermore, the detention and trial of individual terrorists for individual terrorist acts in the United States and other countries was almost exclusively handled in the civilian criminal context until 9/11.213 Crime focuses on conduct, on specific actions, not membership in a military or other group,214 but the detainees in Guantánamo (who cannot be “prisoners” because that label is excluded by the complementary space of the discursive formation) are part of or associated with an organization that is the target of U.S. mili- tary action. To understand the exclusion one only has to imagine a soldier who kills an enemy soldier on a battlefield; such a soldier cannot be guilty of murder because he is only fulfilling the duty of war. There can be no crime when such an action occurs within the discourse of war.¶ At least one judge attempted to excavate this exclusion and draw atten- tion to the impact of discourse. After the Court in Rasul v. Bush gave the lower courts jurisdiction to hear habeas petitions from Guantánamo detainees,215 detainees began challenging the constitutional adequacy and proce- dures of the Combatant Status Review Tribunals (CSRTs) set up by the Bush Administration. In one such case, In re Guantanamo Detainee Cases, Judge Green sharply criticized the CSRTs.216 Judge Green held that detai- nees were entitled to assert due process rights and, therefore, the CSRTs were subject to review concerning their constitutionality under the Hamdi model.217 In her opinion, Judge Green also questioned the aspects of the CSRT enemy combatant definition218 that were associational (an element of the discourse of war but not crime),219 granting that the detainees had a via- ble argument that this definition “violates long standing principles of due process by permitting the detention of individuals based solely on their membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States.”220¶ This same type of exclusion can be seen in the scholarly and political debate over whether this conflict is an international conflict or a noninterna- tional conflict. Even though the United States overthrew the reigning gov- ernment of a sovereign nation (Afghanistan) as part of an attack on a “single enemy, terrorism,” parts of the subsequent conflict have been held not to be an international conflict, but a noninternational conflict, a category originally conceptualized in reference to civil war and insurrection.221 Like the construct of unlawful enemy combatant, noninternational armed conflict has a historical basis and a complex set of relations that belong to a differ- ent discourse than the one surrounding 9/11. By asserting that the conflict was noninternational, the Supreme Court necessarily excluded the volumin- ous discourse concerning international armed conflict and the treatment of civilians, prisoners, and combatants. Whether that entire discourse is rele- vant or not is debatable, but the Court should at least address the fact that the unique GWOT may not fit neatly into historical categories. The Court should excavate the preexisting discursive relationships and exclusions that these imperfect analogies import into the current controversies and deter- mine transparently whether such relationships and exclusions are appropri- ate.¶ B. The Discursive Formation as the Allocation of Power and Authority¶ This Note’s argument is not that harnessing aspects of imperfect anal- ogies is not proper. Instead, it seeks to point out that the discursive forma- tion, which is composed of énoncés and all of the referential space embedded in them, constructs the ways in which these analogies may be in- terpreted and determines who has the authority to make such interpreta- tions. Within the post-9/11 discourse, as exemplified in the post- Boumediene habeas litigation in the D.C. district courts, judges have occu- pied a constrained role, asking whether instead of undertaking the obliga- tion to answer why that Judge Wilkinson perceived. A limited role for the judiciary may be the proper approach in this new kind of war, but courts have not excavated the discourse and made this argument. They have in- stead relied on unexamined énoncés and historical analogies.¶ The exclusions and collateral, correlative, and complementary spaces of the énoncés of the post-9/11 discursive formation have constructed insti- tutional power relationships, instead of the other way around. Judge Leon’s resistance to the temptation of the “judicial craftsmanship” “exhibited” by the Fourth Circuit in al-Marri and his statement that the province of the ju- diciary does not allow it to draft definitions222 is appealing at first because it seems to posit the proper role of the judiciary as the interpreter, but not the drafter, of law. His statement also appears on its face to echo the tradition of deference to the Executive Branch in matters of foreign policy and dur- ing wartime.223 Probably for these reasons, this apparently innocuous, un-controversial statement has been explicitly asserted or implicitly accepted as the basis for almost all decisions in the habeas litigation within the D.C. Circuit following Boumediene.224¶ For example, the Constitution explicitly bestows upon Congress the power to “define and punish . . . Offences against the law of nations,”225 but in a discursive formation that has excluded single offenses or acts from its purview in its focus on association and war, the detention (not punishment) of detainees (not prisoners) does not implicate this doctrine. Although the definition of “unlawful enemy combatants” and thus the legal standard for detention proposed by the Executive Branch borrowed explicitly from a sta- tute making it a crime to materially support terrorism,226 the discursive for- mation does not allow both the criminal and military to coexist; it excludes the idea of “crime” in the unity of “war.” Courts could argue that the AUMF is a proper delegation of power even if they accepted that the defini- tion of an enemy combatant is essentially the definition of someone who commits the crime of terrorism, but they have not conducted such an exca- vation of the unlawful enemy combatant énoncé.¶ Informed by Foucault’s methodology, this Note argues that Judge Leon and many other members of the judiciary are speaking from a role con- structed by the discursive formation itself. The text of the discursive forma- tion determines the meanings of and inherent relationships among terms such as “war” or “enemy combatant” and, consequently, the role of the ju- diciary in analyzing questions involving those terms. As Foucault explains, “Such discourses as economics, medicine, grammar, the science of living beings give rise to certain organizations of concepts, certain regroupings of objects, certain types of enunciation, which form, according to their degree of coherence, rigour, and stability, themes or theories . . . .”227 The themes and theories of the post-9/11 discursive formation, then, define where the power and authority of speech lie and what categories of speech are even possible.¶ Foucault’s insights demonstrate that “[p]ower develops through ‘nor- malization’, through defining what is usual and habitual and to be expected, as opposed to the deviant and exceptional.”228 The discursive formation that has developed after 9/11 postulates the attacks of that day as the origin, as a break with all previous discourses and the cause of all that has followed, but it also includes numerous historical unities that distribute power relation- ships according to their normative content. The GWOT is a new kind of war, calling for new kinds of warfare, but it still includes within it the his- torical unity of “war.” “Unlawful enemy combatants” are a new type of enemy that require new measures, but this label has existed since Quirin and continues to contain its relationships to its historical antecedent and its referential space. In this way, the discursive formation has employed his- torical discourses, each with a complex referential space that “is defined by the rules of formation and transformation of the mobile and multiple objects that those discourses construct and posit as their referents.”229 Therefore, instead of focusing on the radical discontinuity of the emergence of post- 9/11 unlawful enemy combatants, courts have felt bound by the historical rules of the label’s formation and definition. Similarly, since 9/11 is seen as reconstituting all discourses, “terrorism,” which was previously located in the criminal discourse and accompanied by rules excluding it from the dis- course of war,230 has now been reconceptualized and incorporated into an entirely different discursive formation. These discursive interrelationships have gone unexplored and unaccounted for in judicial opinions. Thus, the problem that this Note finds with the approach of many courts considering habeas petitions after Boumediene is the same problem confronted by Fou- cault, and this Note calls for the same solution: archaeology.

#### Deliberative education is key to an informed citizenry—our method is best for challenging state authority and cultivating respect and engagement with those different from ourselves.

Englund 10, (Tomas Englund, Professor of Education, Örebro University, Sweden, Rethinking democracy and education: Towards an education of deliberative citizens, Journal of Curriculum Studies, 32:2, 305-313, November 8, 2010, http://dx.doi.org/10.1080/002202700182772)

#### Different models for deliberative democracy are explicitly based on the need for education in deliberative attitudes on the part of citizens who exercise the communicative power that is one of democracy’s consequences (Gutmann and Thompson 1996). The models of deliberative democracy also see the discursive creation of public opinion as an educative process. The obvious question is what is the part of the schools in these processes. Amy Gutmann, the author of Democratic Education (1987), and a co-author of Democracy and Disagreement (1996), ends Democratic Education with the following words: . . . we can conclude that `political education’—the cultivation of virtues, knowledge, and skills necessary for political participation—has moral primacy over the other purposes of public education in a democratic society. Political education prepares citizens to participate in consciously reproducing their society, and conscious social reproduction is the ideal not only of democratic education but also of democratic politics (Gutmann 1987: 287).¶ She argues that it is reasonable to try to develop everyone’s capacity, and the opportunity, to question traditional authorities (e.g. parents and religious ideas) and to provide every student with the critical intellectual abilities needed to evaluate and judge different life forms, even those that differ from those of their own environment. In short, it is the task of the schools to elevate every individual out of his or her private life to a public world, with the possibilities of making one’s own choice among different ways to the good life (cf. Reese 1988).¶ Gutmann is only one among many others writing in a liberal, virtue- oriented tradition who have pointed to the mission of the public schools to develop the deliberative virtues. The schools have, they say, to develop the capacities of children and youngsters to enter critical discussions where facts and values are simultaneously present, and to develop their moral and political capacity to evaluate and judge in public discussions (Kymlicka and Norman 1995). She can also be seen as a representative of a balance between a participatory and a deliberative democratic view, developing with this latter view further together with Dennis Thompson (Gutmann and Thompson 1996). Like participatory democracy, deliberative democ- racy emphasizes participation in democratic processes, but it accentuates the character of the processes. Thus advocates of deliberative democracy stress the presence of different views or arguments, which are to be negotiated, or put against each other in argumentation. Two or more di􏲭 erent views on a subject are proposed by persons who confront each other, but with an openness in the argumentation: `While acknowledging that we are destined to disagree, deliberative democracy also affirms that we are capable of deciding our common destiny on mutually acceptable terms.’ (Gutmann and T hompson 1996: 361). Compared to participatory democ- racy, deliberative democracy especially emphasizes responsibility and consequences, implying that socialization to citizenship and the exercising of a citizenship must be in focus. As Gutmann and Thompson (1996: 359) write,¶ In any effort to make democracy more deliberative, the single most important institution outside government is the educational system. To prepare their students for citizenship, schools must go beyond teaching literacy and numeracy, though both are of course prerequisites for deliberating about public problems. Schools should aim to develop their students’ capacities to understand different perspectives, communicate their understandings to other people, and engage in the give-and-take of moral argument with a view to making mutually acceptable decisions. These goals, which entail cultivating moral character and intellectual skills at the same time, are likely to require some significant changes in traditional civic education, which has neglected teaching this kind of moral reasoning about politics. Robert Westbrook (1991: 138), the author of the most in ̄ uential recent biography of Dewey, has asserted that the ideal of democracy and education which Dewey pursued would be characterized as a `deliberative democ- racy’:¶ I think [deliberative democracy] captures Dewey’s procedural ideals better than the term I used, `participatory democracy’, since it suggests something of the character of the participation involved in democratic associations . . . rooted in an expansive conception of the community of inquiry.¶ Bohman (1997: 322± 323) adds that ideal proceduralism `is the standard criterion of deliberative legitimacy, since it gives everyone an equal stand- ing to use their practical reason in the give and take of reasons in dialogue’. If, as Bohman (1997: 322) suggests, the proper criterion for deliberative democracy is indeed `equality as e􏲭 ective social freedom, understood as equal capability for public functioning’, how should schools prepare for conditions where this criterion could be met? Deliberative conceptions of democracy `must have demanding requirements of political equality, if they are not to favor the more virtuous, the better educated, or simply the better off ’ (Bohman and Rehg 1997: xxiv).¶ Concluding remarks¶ A neopragmatic interpretation of Dewey’s work creates new visions for the relationship between democracy and education. The idea of deliberative democracy as an educational process offers an image of a kind of commu- nication where different perspectives are brought into ongoing meaning- creating processes of will-formation. To make curricular room for these kind of activities, where deliberative capabilities are developed, would be one way to realize a democratic conception of education implying a communicative rationality (cf. Englund 1996, 1999).

#### Our method offers a way to rethink what debate could be—we believe that we have an obligation as academics to engage in political agency rather than retreat to the privacy of the debate space.

Mitchell 98, (Gordon R. Mitchell, Associate Professor, University of Pittsburgh, PEDAGOGICAL POSSIBILITIES FOR ARGUMENTATIVE AGENCY IN ACADEMIC DEBATE, Argumentation & Advocacy, 1998, Vol. 35 Issue 2, p41-60)

Academics can no longer retreat into their careers, classrooms, or symposiums as if they were the only public spheres available for engaging the power of ideas and the relations of power. Foucault's (1977) notion of the specific intellectual taking up struggles connected to particular issues and contexts must be combined with Gramsci's (1971) notion of the engaged intellectual who connects his or her work to broader social concerns that deeply affect how people live, work, and survive (Giroux 1991, p. 57; see also Giroux 1988, p. 35).¶ Within the limited horizon of zero-sum competition in the contest round framework for academic debate, questions of purpose, strategy, and practice tend to collapse into formulaic axioms for competitive success under the crushing weight of tournament pressure. The purpose of debate becomes unrelenting pursuit of victory at a zero-sum game. Strategies are developed to gain competitive edges that translate into contest round success. Debate practice involves debaters "spewing" a highly technical, specialized discourse at expert judges trained to understand enough of the speeches to render decisions. Even in "kritik rounds," where the political status and meaning of the participants' own discourse is up for grabs, (see Shanahan 1993) the contest round framework tends to freeze the discussion into bipolar, zero-sum terms that highlight competitive payoffs at the expense of opportunities for co-operative "rethinking."¶ When the cultivation of argumentative agency is pursued as a central pedagogical goal in academic debate, questions of purpose, strategy, and practice take on much broader meanings. The purpose of participating in debate gets extended beyond just winning contest rounds (although that purpose does not need to be abandoned completely), as debaters intervene in public affairs directly to affect social change, and in the process, bolster their own senses of political agency. In this approach, debate strategy begins to bear a resemblance to social movement strategizing, with questions of timing, coalition-building, and publicity taking on increasing importance. Finally, debate practice itself becomes dynamic as debaters invent new forms of argumentative expression tailored specifically to support particular projects of political intervention into fields of social action.

# 2AC

#### Detainee treatment spills over into the criminal justice system- must pay attention to our treatment of POW’s to prevent spillover of WOT practice

Hafetz, 2012 (Johathan, Associate Professor of Law at Seton hall University School of Law. “Military Detention in the ‘War on Terorirms”: Normalizing the Exceptional after 9/11. Columbia Law Review Sidebar¶ 112 Colum. L. Rev. Sidebar 31. Lexis Nexis.

Another long-term consequence of the war on terrorism is the threat that it poses to the integrity of the criminal justice system, whose protections for defendants may be circumvented by the government's ability to incarcerate terrorism suspects through an alternative system of military detention or trial by military commission. In prior armed conflicts, military detention operated in a sphere that domestic criminal law generally did not reach--whether because prisoners were detainable solely under the laws of war or because their prosecution in a military commission filled a jurisdictional gap when regular civilian courts were unavailable. By contrast, the military detention and prosecution of terrorism suspects creates significant overlap with the criminal justice system by providing another means of holding prisoners who can be prosecuted in civilian courts. [n73](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n73) In other words, whereas a typical German soldier during World War II could be detained only as a prisoner of war, and was not subject to prosecution under domestic criminal law, a person held today for aiding al Qaeda may be prosecuted in federal court for providing material support for terrorism, held indefinitely in law-of-war detention under the AUMF, or prosecuted for a war crime in a military commission. [n74](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n74)¶ Because this alternative military system provides fewer legal protections to detainees, it creates an incentive for the government to [\*45] divert terrorism suspects there rather than trying them in federal court. Paradoxically, this incentive is greatest where the government's case is weakest and where civilian prosecution appears problematic as a legal, evidentiary, or political matter. For individuals who fall within the AUMF's scope of detention authority based on their relationship to or support for al Qaeda or associated groups, the safeguards provided the federal criminal justice system--above all, the right to be charged and tried under the Constitution--become a matter of discretion, triggered only when the government elects not to proceed with the military option. Conversely, maintaining this alternative military detention system forces the civilian criminal justice system to demonstrate its capacity to prosecute terrorism cases successfully--with success measured in terms of convictions obtained rather than in the fairness and integrity of the procedures . This creates pressure to limit criminal defendants' rights--a trend reflected by recent proposals to expand the "public safety" exception to Miranda v. Arizona [n75](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n75) to deflect criticisms of prosecuting terrorism suspects in federal court. [n76](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n76)¶ Additionally, the war on terror has created a framework for the institutionalization of military detention as well as its expansion into areas traditionally reserved for the criminal justice system. Following 9/11, the Bush Administration applied the enemy combatant label almost exclusively to individuals seized and held abroad. [n77](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n77) The two instances in which it applied this label domestically proved highly controversial, prompting the government to criminally charge and transfer the prisoners to civilian court to avoid Supreme Court review. [n78](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n78) Yet, the continued military confinement of terrorism suspects at Guantánamo and elsewhere outside the country has made this form of detention without trial seem less exceptional. Recent legislative proposals have sought not only to expressly authorize military detention--whereas the AUMF did so only by [\*46] implication--but also to extend that authority to the domestic United States. [n79](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n79) These proposals, moreover, would require the military detention of terrorism suspects who fell within its scope, thus creating a new presumption of military detention that can be overridden only through a waiver process. [n80](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n80) While Congress ultimately enacted a more limited military detention measure in the 2012 National Defense Authorization Act, [n81](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n81) such measures threaten to cement the transformation of post-9/11 military detention powers--created based on the premise of wartime exigency--into a permanent, default detention system for an elastic category of terrorism cases.

#### The invasion of Afghanistan has potential as a TEACHABLE MOMENT - it wakes up the public and causes them to pay attention to the prison industrial complex – backlash of Afghan citizens to US abuses proves it’s possible.

Glenn Greenwald, theguardian.com, September 18, 2012, “Unlike Afghan leaders, Obama fights for power of indefinite military detention” http://www.theguardian.com/commentisfree/2012/sep/18/obama-appeals-ndaa-detention-law

A US official confirmed that the transfer of detainees had paused because of the dispute."

Is that not amazing? On the very same day that the Obama DOJ fights vigorously in US courts for the right to imprison people without charges, the Afghan government fights just as vigorously for basic due process.¶ Remember: the US, we're frequently told, is in Afghanistan to bring democracy to the Afghan people and to teach them about freedom. But the Afghan government is refusing the US demand to imprison people without charges on the ground that such lawless detention violates their conceptions of basic freedom. Maybe Afghanistan should invade the US in order to teach Americans about freedom.¶ This is not the first time this has happened. In 2009, the Obama administration decided that it wanted to target certain Afghan citizens for due process-free assassinations on the ground that the targets to be executed were drug "kingpins". They were to be killed based solely on US accusations, with no trial, just as the Obama administration does with its own citizens. But again, that plan ran into a roadblock: Afghan leaders were horrified by the notion that their citizens would be extrajudicially executed based on unproven suspicions [my emphasis]:¶ "A US military hit list of about 50 suspected drug kingpins is drawing fierce opposition from Afghan officials, who say it could undermine their fragile justice system and trigger a backlash against foreign troops.¶ "The US military and Nato officials have authorized their forces to kill or capture individuals on the list, which was drafted within the past year as part of Nato's new strategy to combat drug operations that finance the Taliban …¶ "General Mohammad Daud Daud, Afghanistan's deputy interior minister for counternarcotics efforts, praised US and British special forces for their help recently in destroying drug labs and stashes of opium. But he said he worried that foreign troops would now act on their own to kill suspected drug lords, based on secret evidence, instead of handing them over for trial.¶ "'They should respect our law, our constitution and our legal codes,' Daud said. 'We have a commitment to arrest these people on our own' …¶ "There is a constitutional problem here. A person is innocent unless proven guilty," [former Afghan interior minister Ali Ahmad Jalali] said. "If you go off to kill or capture them, how do you prove that they are really guilty in terms of legal process?"¶ In other words, the Obama administration has received far more resistance to its due process-free imprisonments and assassinations from Afghans than it has from its own citizens in the US. If only more Americans, including progressives, were willing to point out the most basic truths in response to these Obama power seizures, such as: "If you go off to kill or capture them, how do you prove that they are really guilty in terms of legal process?"¶ Instead, many Americans, particularly in the age of Obama, are content to assume that anyone whom the US government accuses of being a terrorist should, for that reason alone, be assumed to be guilty, and as a result, any punishment the president decides to dole out – indefinite imprisonment, summary execution – is warranted and just; no bothersome, obsolete procedures such as "trials" or "indictments" are necessary.¶ It is that mindset that will ensure that Obama's vigorous fight to preserve the power of indefinite detention will provoke so little objection: among Americans, that is – though obviously not among Afghans, who seem to have an actual understanding of, and appreciation for, the value of due process.

#### Dismissal by race scholars of militarism hides the realities of institutionalized violence against minorities and people of color. A combined approach is key to uncovering hidden realities and adding deeper contexts to today's problems.

Hudson 13 Adam Hudson is a journalist, writer, and photographer based in the San Francisco Bay Area. He is a graduate of Stanford University and a former intern at The Nation magazine “The Continuing US War on the Darker Skinned” Truthout 06 August 2013 <http://truth-out.org/news/item/17988-the-continuing-us-war-on-the-darker-skinned>

Many purportedly anti-racist liberal talking heads and media outlets tend to under-appreciate the connections between racism and militarism. One would expect them as people with knowledge about race relations to highlight this connection when national security stories come up. However, they tend to drop the ball. Melissa Harris-Perry, a political science professor at Tulane University and MSNBC show host, specializes in African-American politics and provides a liberal perspective on American race relations. She spoke out against the Zimmerman verdict and provides insightful coverage on issues like the infringement of voting rights in communities of color. But her views on Obama's militarism range from blasé to apologetic. Last November, when discussing drone strikes on her show, Harris-Perry asked journalist Allison Kilkenny and MSNBC host Chris Hayes, "Make a case to me about why they're problematic because I'm not sure that I agree." Harris-Perry brought up police shootings of black youth in the United States in response to Hayes criticizing the death of Abdulrahman al-Awlaki, a 16-year-old American citizen killed by a US drone strike in Yemen in 2011. Rather than seize the opportunity to make the connection between domestic institutionalized racist violence and American militarism, she used it to buttress her nonchalance on the issue of drone strikes.  Touré, another MSNBC commentator, is also liberal on race issues. But he's hawkish when it comes to drone strikes and assassination. Touré regularly comes to the Obama administration's defense on their belligerent counterterrorism policies. Last February, on Twitter, Touré said "Obama as Commander in Chief is tasked with leading our war against Al Qaeda. He can and [sic] should kill [al-Qaeda] leaders whenever possible." On The Cycle, he expanded his argument, "But we are at war with al-Qaeda right now. And if you join al-Qaeda, you lose the right to be an American; you lose the right to due process; you declare yourself an enemy of this nation. And you are committing treason" - even though the Constitution grants due process for those who commit treason. Then again, this is pretty much normal for a network that functions as the Obama administration's Pravda. The Root and The Grio are two large black media outlets; The Root, is owned by The Washington Post; and The Grio is owned by NBC News. They provide neither substantial coverage of foreign policy issues nor deeper analysis of the intersections between racism and empire. What one does get, however, is a lot of support for Obama. Contrast this with Black Agenda Report - a black leftist news and analysis website - or Pambazuka News - a Pan-Africanist online weekly newsletter - and the coverage is far different. Along with substantive critiques of the Obama administration's transgressions, there's regular critical analysis of domestic politics, foreign affairs, and the connections between institutional racism and Western imperialism. However, sites like Black Agenda Report and Pambazuka News are independent and have less exposure than The Root, The Grio, or MSNBC, due to the latter's corporate ownership. This raises the issue of how corporate media dilute the wider discourse on race relations That is a problem because it reveals a blind spot in understanding about issues of race and national security. It leaves certain realities in the dark, such as the plight of foreign workers on American military bases. Highlighting the connections can add deeper context to problems, such as the killing of Trayvon Martin. His death was the byproduct of a militarized system of racism that allows a neighborhood watchman to carry a gun and shoot anyone (especially black teenagers) he deems threatening, with impunity. Examining the real connections between racism and militarism provides better understanding of the issues at stake. Such analysis is more likely to be found in independent black journalistic outlets than corporate media.

#### —the starting point of military detention allows an interrogation of US notions of punishment

Brown 5

[Michelle Brown, “"Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad”, American Quarterly 57.3 (2005) 973-997, <http://muse.jhu.edu/journals/american_quarterly/v057/57.3brown.html>]

As a site of unseemly conjunctures between various kinds of competing law, Abu Ghraib is an unusually complex instance of American imprisonment. Its gates mark encounters with United States, Islamic, military, criminal, and international human rights law. Its walls mark not simply the contours of sovereignty and the boundaries of the nation/state but, more significantly, their violation as an immense superpower engages in a preemptive strike, invasion, occupation, and torture. Within this configuration of power, transnational exportations of punishment materialize in a variety of manifestations: (1) in the sociopolitical contexts that define the lives of the primary actors caught up in the prison/military-industrial complex and its increasingly global economies; (2) through the international implementation of U.S. penal technologies with unprecedented exclusionary capabilities, epitomized in President Bush's desire to raze Abu Ghraib and build a "state of the art" supermax prison in its place; and (3) in the unregulated use of force outside of the boundaries of law, a violence juxtaposed and conflated with the memory and backdrop of penal horror under the regime of Saddam Hussein. Abu Ghraib, then, is the kind of place always caught in a double gesture. Regimes and governments attempt to deny and erase the prison's existence. Yet we are simultaneously unable to turn away from its grotesqueness, a site that demands investigation and thus constitutes, as ordered by military judicial ruling, "the scene of the crime."6 Prisons have long served as liminal spaces both inside and outside the boundaries of constitutional law, belonging to (in fact, invented by) but not of the United States. The birth of the penitentiary, a form of punishment defined [End Page 974] entirely upon the denial of freedom, is culturally grounded in democratic values. As historian David Rothman points out, incarceration emerged "at the very moment when Americans began to pride themselves on the openness of their society, when the boundless frontier became the symbol of opportunity and equality . . . as principles of freedom became more celebrated in the outside society."7 Sociolegal scholar David Garland depicts the penitentiary as a regime constructed upon notably American value systems, including "the targeting of 'liberty' as the object of punishment" and the "intensive focusing upon the individual in prison cells."8 However, as an institution fundamentally constructed through the inverse of these values, the American penitentiary rests upon a crucial cultural contradiction, the removal of liberty in a nation that would seek to preserve it, the use of violence to counter violence. As Michael Ignatieff writes: "Outside was a scrambling and competitive egalitarianism; inside, an unprecedented carceral totalitarianism."9 The prison is built upon an interior secret, a union of antithetical ideas and values. Its invocation always risks disclosing the weakness not simply of the sovereign state but of American democracy, founded in distinctly penal terms, including genocide and slavery. Prisons, then, are strategic research sites, from which we may always uncover the contradictions of American power. For these reasons, special attention must be given to how recent assertions of sovereignty by the United States, coded in penal terms, set the conditions for what Judith Butler refers to as the "new war prison," where "the current configuration of state power, in relation both to the management of populations (the hallmark of governmentality) and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured," a context rife with possibilities for the violation of human rights.10 This corruptibility is, in part, an intrinsic property of punishment. To borrow Ignatieff's terminology, prisons are inherently "lesser evil" institutions. Even as democratic defense, such institutions always risk, in any invocation, the violation of foundational commitments to democracy. Even when applied in the context of legislative deliberation, judicial review, and adversarial constraint, they remain necessarily tragic and ultimately evil.11 However, events at Abu Ghraib and other contemporary domestic and war prisons prove most disconcerting not simply because of the absence of open, adversarial justification, but because of the larger absence of any perceived need for justification. As evidence emerges that Abu Ghraib was simply one site of detainee abuse among many in the war against terror,12 we realize the fear, as expressed by Amy Kaplan in her 2003 presidential address to the American Studies Association, that Guantánamo would become a story of our future, a world where "this floating [End Page 975] colony will become the norm rather than an anomaly, that homeland security will increasingly depend on proliferating these mobile, ambiguous spaces between the domestic and foreign."13 Abu Ghraib is, consequently, the kind of "unanticipated event," dramatic, poignant, and ugly all at once, in which the "normality of the abnormal is shown for what it is"—terror as usual. For these reasons, it also marks a critical site from which to consider how what it means to do American studies is irrevocably bound up with the practice and conjugation of U.S. punishment, not simply at home but abroad, and especially in those "mobile, ambiguous spaces" lost somewhere in between in a time of empire.

#### We’ll impact turn their link—a unique focus on military detention is critical—military detention establishes an unprecedented and new manifestation of prison systems characterized by no end or bounds—the fixture of military prisons in a space of lawlessness demands an exposition otherwise the stories are forgotten

Brown 5

[Michelle Brown, “"Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad”, American Quarterly 57.3 (2005) 973-997, <http://muse.jhu.edu/journals/american_quarterly/v057/57.3brown.html>]

Abu Ghraib, like Guantánamo and other U.S. military prisons, marks the kind of penal expansion that takes place in the context of wars with no end: wars on drugs, crime, and terror. In the U.S., we imprison more than anyone in the world and more than any other society has ever imprisoned for the purposes of crime control, and we do so in a manner that is defined by race.57 This unprecedented use of imprisonment has largely taken place outside of democratic checks or public interest, in disregard of decades of work by penal scholars and activists who have introduced a vocabulary of warning through terms such as "penological crisis," "incarceration binge," "prison-industrial complex," and the "warehousing" of offenders. Such massive expansion has direct effects upon the private lives of prisoners, prison workers, their families, [End Page 990] and their communities. I have tried, at least, to point to the ways in which these effects may extend far beyond their immediate contexts into a potential reconfiguration of public life. Such unprecedented penal expenditures mark the global emergence of a new discourse of punishment, one whose racial divisions and abusive practices are revised into a technical, legal language of acceptability, one in which Americans are conveniently further distanced from the social realities of punishment through strategies of isolation and exclusion, all conducted in a manner and on a scale that exacerbates the fundamental class, race, and gender contradictions and divisions of democracy. In this respect, the "new war prison" is constituted by both material practices and a discursive language whose expansion and intensification need recognize no limits, no borders, no bounds. I have used punishment and torture interchangeably across this piece, not because I believe they are without distinction or difference, but because I believe, as history and social theory teach us, that they are grounded in the same fundamental practice: the infliction of pain. Because punishment carries pain, rupture, and trauma with it, its implementation will always be fundamentally tragic. Torture, then, is not incidental to punishment. It is at its core. Instead of accepting this reality, the history of the practice and study of punishment is marred by an assumption that intention matters, that explanations and justifications define punishment and its appropriate use, and that the law can control its violence. However, these kinds of assumptions conceal the presence of the law itself. When punishment is invoked, it is always intended to remind the people of the power and presence of the state. However, this is an invocation that is precisely meant to be avoided in democratic contexts, as strong governments have no need to rely upon force. According to both Nietzsche and Durkheim, it is a weak state that will resort to a display of force and violence. Any regime that decides to inflict pain and harm will inevitably find itself caught up in a unique social institution whose essence is violence and whose justifications are inherently problematic. Punishment is, thus, always most usefully understood at its most elemental level: as a bloodlust for revenge, one whose essence is passion, unreason, anger, and emotion, whose invocation is highly individualized, subjective, and personal, an insatiable urge that knows no limits. In such a setting, as sociolegal scholar Austin Sarat argues, a "wildness" is introduced into the "house of law," wherein "private becomes public and public becomes private; passion is introduced into the temple of reason, and yet passion itself is subject to the discipline of reason. Every effort to distinguish revenge and retribution nevertheless reveals that 'vengeance arrives among us in a judicious disguise.'"58 The vengeance that underlies [End Page 991] the implied calm reason of systematic, procedural, proportional retribution cannot be repressed and is evidenced in contemporary patterns of punishment in the United States that often defy a rational logic of any kind. Any solidarity or sociality gained at the price of such punishment, then, speaks not only to the end of democracy but of humanity as well. And so we went from September 11 to a war on terror, from Abu Ghraib to the summer of beheadings in an endless repetition whose limits are defined currently only in the possibility of sheer exhaustion. For American studies, this means that Abu Ghraib operates at a series of intersections and borders that have rendered the fundamental contradictions of imprisonment in a democratic context acutely visible, if only temporarily. As the impossible case for democracy, the "scandal" at Abu Ghraib reveals how an unmarked proliferation of penal discourses, technologies, and institutions not only "set the conditions" for the grossest violations of democratic values but revealed the normalcy and acceptability of these kinds of practices in spaces beyond and between the law. Consequently, Abu Ghraib falls within a distinct category of legal and territorial borders, those spaces that sociolegal scholar Susan Bibler Coutin observes "defy categories and paradigms, that 'don't fit,' and that therefore reveal the criteria that determine fittedness, spaces whose very existence is simultaneously denied and demanded by the socially powerful." Capturing the sense of doubleness that characterizes Abu Ghraib, she describes these "targets of repression and zones of militarization" as contradictory spaces that "are marginalized yet strategic, inviolate yet continually violated, forgotten yet significant."59 Many peoples exist at these borders, and all stories may be told there. But, and this is of crucial significance, there is no guarantee that these stories will be told. So much of the writing and thought surrounding the borderlands has been directed at the development of a new social vision, derived from the pain of history and experience, but grounded in the celebratory justice of the inevitable, vindicating arrival of the hybrid. As Gloria Anzaldúa insists, "En unas pocas centurias, the future will belong to the mestiza."60 Yet Abu Ghraib falls squarely into the kind of border zone that cannot be celebrated, a subaltern site where many stories and voices will never be told or heard, no matter how we reconstruct its history and its events. Judith Butler observes that the subject outside of the law "is neither alive nor dead, neither fully constituted as a subject nor fully deconstituted in death."61 Under Saddam Hussein's rule, numberless thousands were lost in the prison. Under American occupation, "ghost detainees" were a prevalent problem, unidentified, vanished inside the institution's own lost accountability. As Žižek points out, these individuals constitute the "living dead," those missed [End Page 992] by bombs in the battlefield, "their right to life forfeited by their having been the legitimate targets of murderous bombings." This positioning has direct impact upon the legal privilege of their captors: "And just as the Guantánamo prisoners are located, like homo sacer, in the space 'between two deaths,' but biologically are still alive, the U.S. authorities that treat them in this way also have an indeterminate legal status. They set themselves up as a legal power, but their acts are no longer covered and constrained by the law: they operate in an empty space which is, nevertheless, within the domain of the law."62 The spectacle of abuse at Abu Ghraib makes plain the consequences of putting prisoners and custodians in this space "between two deaths," a legal borderland filled with spectral violence, a space packed with people and yet profoundly empty of its humanity. Bibler Coutin writes, "I cannot celebrate the space of nonexistence. Even if this space is in some ways subversive, even if its boundaries are permeable, and even if it is sometimes irrelevant to individuals' everyday lives, nonexistence can be deadly."63 When writing of Abu Ghraib, I find myself in a similar space, peering in at a border whose history, purpose, and foundations prevent it from being redeemed or reclaimed, its terrorized inhabitants the essence of Anzaldúa's "zero, nothing, no one."64 Abu Ghraib reminds us then of the pains we had hoped to transcend, of the "intimate terrorism" we had hoped to end, of the bloody sovereignty we had hoped to eclipse in a postnational context.65 As Anzaldúa observed of "life in the borderlands" nearly two decades ago: The world is not a safe place to live in. We shiver in separate cells in enclosed cities, shoulders hunched, barely keeping the panic below the surface of the skin, daily drinking shock along with our morning coffee, fearing the torches being set to our buildings, the attacks in the street. Shutting down . . . The ability to respond is what is meant by responsibility, yet our cultures take away our ability to act—shackle us in the name of protection. Blocked, immobilized, we can't move forward, we can't move backwards. That writhing serpent movement, the very movement of life, swifter than lightning. Frozen.66 In the working vocabulary and memory of a penal culture, Abu Ghraib remains a border lost to us, accessible only through the fixed and frozen images that remind us of its irrevocableness. We find ourselves, in a sense, at a new border that is very old, caught at the crossroads, left alone with America, asking, and with considerable trepidation, what will our futures be?67

#### THERE IS VALUE IN OUR PROJECT. Exposing ourselves to different modes of understanding is critical to cultivating sympathy for different ways of life

**JENNI**, Pf Philosophy at Redlands, **01** (Kathie, *Social Theory and Practice*, July v27 i3 p437)

The claim on behalf of academics' value to the world at large is that in enhancing the moral reasoning of students, we indirectly contribute to ending injustice and suffering, as well. **We ourselves may not minister to the starving or rescue the tortured, lobby Congress, or protest in the street.** But in sustaining the life of higher education, we are preparing (as it were) moral armies to go and do those things themselves, or at least to live in ways that may eventually make other kinds of activism less necessary. **The intellectual's contribution to global welfare, then, is indirect and yet potentially immense.** Empirical work supports this optimistic assessment of higher education's value, noting the role it can play in moral development. Eamonn Callan, for example, notes the importance of exposing students to *different modes* of moral understanding and thus **cultivating "imaginative sympathy for alien ways of life."**(8) Others observe that liberal arts education provides a natural setting for "the **discomfiture that comes with experiences that do not fit one's earlier conceptions,"** which seems essential for growth in moral judgment.(9)

#### Understanding reason-giving as the basis for communicative action can challenge institutionalized forms of oppression and open up productive spaces for discussions of racism.

Gamez 10, (Francisco N. Gamez, RE-STARTING THE CONVERSATION ABOUT RACE IN ACADEMIA: TRANSCULTURAL NARRATIVES IN THE LIFEWORLD, University of San Francisco, December 2010, http://udini.proquest.com/view/re-starting-the-conversation-about-goid:851315315/)

Jurgen Habermas' (1984,1985) theory of communicative action incorporates actors/participants in society who seek to reach common understanding and coordinate actions through rational argumentation or the force of the better argument, consensus, and cooperation, rather than taking action towards one's personal agenda or goals. This can lead participants towards mutual understanding and shared realities since "acting and speaking subjects can relate to more than only one world, and that when they come to an understanding with one another about something in one world, they base their communication on a commonly supposed system of worlds" (Habermas 1984: 278).¶ Before the dialogue or discourse on any issue can start, Habermas stipulates that communicative competence or rationality must be achieved. He believes that in order for any communication that can lead to mutual understanding can start, there needs to be an orientation towards understanding from all parties involved in the dialogue. Herda (1999:71) illustrates communicative competence when she writes that"... this principle, characterized by the validity claims of comprehensibility, shared knowledge, trust, and shared value, is 'always already' implicitly raised in action orientation to reaching understanding." It is by reaching theses universal validity claims that our dialogue and discourse can help us reach mutual understandings.¶ This dialogue and discourse should lead us toward a point where we can share realities that can lead us to imagine the next actions to take when looking at the roles race and discrimination play in academia. In this exchange of dialogue, Ricoeur (1981: 78) explains Habermas' idea when he writes that "Habermas invokes the regulative ideal of an unrestricted and unconstrained communication which does not precede us but guides us from a future point." Habermas (1984, 1985) believed that the force of the better argument could open up dialogue and discourse towards a shared mutual understanding, so when applied to how colleges and universities address the issue of race in their institutions, it becomes inclusive and democratic so that policies are created with all parties involved, which he called "deliberative democracy."¶ Habermas (1984, 1985) believed that argumentative politics in deliberative democracy is a form of governance in which multiple participants are engaged within the public sphere. So by engaging in dialogue and discourse about race, we can hear multiple voices from multiple participants and potentially engage in mutual learning and understanding on the role race plays in the everyday lives of staff and administrators of color and the various interpretations that can occur in their relationships with others and the institution. Denhardt and Denhardt (2003: 99) illustrate Habermas' ideal of deliberative democracy in the public sphere concisely by stating¶ .. .while our society operates under a narrow definition of rationality, one consistent with a society dominated by technology and bureaucracy, we maintain an innate capacity to reason in a much larger sense. Moreover, it is this capacity to reason that enables us to communicate across various social and ideological boundaries. But for reason to prevail in any given situation, we must (1) engage in dialogue, not a monologue, and (2) the dialogue must be free of domination and distortion.¶ This exchange of dialogue that must be free of domination and distortion should be the norm in any discussions about race or any other issues relevant to post-secondary institutions. Unfortunately, the reality is that most dialogues are dominated and distorted by those with influence and power within any college or university's organizational political system. Regardless of race or ethnicity, as staff and administrators, and as participants in college and university communities, we must be vigilant to change this through incremental steps that include dialogue with multiple parties/actors and being open to learn from each other to create policies and working environments that are mutually beneficial for all. Sharing narratives and creating forums for dialogue and discourse would help shift the power towards the public sphere and become more inclusive, which can lead to new interpretations and understandings that can affect the lifeworld of all involved.

#### A lifeworld can incorporate discussions of race and discussions of policy to create better academic discussions and socially just policies.

Gamez 10, (Francisco N. Gamez, RE-STARTING THE CONVERSATION ABOUT RACE IN ACADEMIA: TRANSCULTURAL NARRATIVES IN THE LIFEWORLD, University of San Francisco, December 2010, http://udini.proquest.com/view/re-starting-the-conversation-about-goid:851315315/)

In order to re-start the conversation on race within academia, many of the participants shared that a safe environment was essential for such a conversation to happen. An environment where participants were oriented towards truly reaching new understanding without malice or pretense; where participants may be honest with their feelings, fears, questions, and answers, to get to the heart of the issues at hand. This ideal environment may lead to new understanding and interpretations to the role race plays in the lives of staff and administrators of color and may lead to new ways in which to address the needs of individuals and the larger organization.¶ Mutual Understanding¶ The participants who were able to have conversations that were oriented towards reaching understanding were able to reinterpret their issues and come up with new solutions. From reinterpreting definitions and one's place within society, the communicative acts that helped reconfigure the issues discussed helped address both individual and larger issues that were communicated. The examples shared by my participants helped show how communicative action and conversations toward understanding could help reinterpret issues of race within academia and bring about potential changes that address the needs of all aspects of organizational life and create socially just institutions.¶ Implications¶ The findings from my research study suggest that conversations about race/ethnicity and its role in the everyday lives of staff and administrators of color need to re-start. A discourse on race may lead to new interpretations of the issue and potentially expand the lifeworld of others who hear and share the narratives brought to life in this study. While a dialogue on race and ethnicity may start on any level, implications exist for leaders within higher education and those who are developing and implementing policy. This may help shift organizational cultures within institutions of higher education and build socially just communities within academia at institutions across the United States.¶ Implications for Institutional Leadership¶ Leaders in post-secondary institutions may use this text to help reinterpret how race and issues of diversity are viewed on the staff and administrative level. The narratives shared may bring into light the need for more transparent hiring practices and promotability from within the organization. Viewing diversity as an asset and valuing contributions from staff and administrators of color may open up the dialogue to have honest conversations about the experiences and issues that many staff and administrators endure and face. As leaders within institutions of higher education, there is a need to bring up issues of diversity and peel back the fa9ade of polite acceptance to delve deep into issues that lie in the underbelly of the organizational life that many people choose to ignore to keep the hegemonic structures within society going.¶ To keep the voices of the marginalized at bay creates an environment of hostility and moral bankruptcy, so as leaders within higher education institutions, there must be an effort to promote diversity not only a few days a year, but celebrate and promote diversity within the on-going daily structures of the university. This may lead to new understandings about race and ethnicity, as well as provide opportunities for those staff and administrators of color who have been traditionally marginalized to have a voice and potentially take on positions of leadership that may shift an organizational culture from one with a polite veil of tepid acceptance of diversity to one that is truly dedicated to acceptance of individuals and all aspects of cultural diversity. Through the use of on- going training programs similar to those used for sexual harassment, the shift in culture¶ may occur and lead institutions towards social justice initiatives within everyday organizational life.¶ Implications for Institutional Policy¶ The findings of this study may help develop and implement socially just policies that are beneficial to all staff and administrators within a university. Through the sharing of narratives from staff and administrators of color, a voice is given to those who have been traditionally marginalized both within society and within organizational policy making structures. Providing a text for others to appropriate within the horizons of the lifeworld may provide differing opinions and view points on the policy development level and provide more inclusive policy development models. By giving a voice to the those who have been traditionally marginalized, it may create socially just policies that take into consideration the underrepresented and may help minimize any unintentional consequences or actions that may occur during the implementation process of policy making.¶ Within the implementation structure of policy design, the inclusion of others such as staff and administrators of color, may help with policy buy-in and lead to future policies of inclusion and social justice. The inclusion of other viewpoints may lead to reinterpretations on how policy is implemented or how issues are viewed. If mutual understanding is reached within the policy design structure, the opportunities for cultural growth and community building may occur, which may lead to a more culturally competent university and community that is inclusive and respectful of difference and cultural and individual identities. The opportunities to reinterpret what is, versus what ought to be, may create a newly interpreted lifeworld that staff and administrators of color may live within, while working in post-secondary institutions.

#### Cross-cultural communication is possible as a mode of deliberative discourse.

Fraser 90, Nancy Fraser, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, Social Text, No. 25/26 (1990), pp. 56-80, Duke University Press, http://www.jstor.org/stable/466240

It follows that public life in egalitarian, multi-cultural societies cannot¶ consist exclusively in a single, comprehensive public sphere. That would be tantamount to filtering diverse rhetorical and stylistic norms through a single, overarching lens. Moreover, since there can be no such lens that is genuinely culturally neutral, it would effectively privilege the expres- sive norms of one cultural group over others, thereby making discursive assimilation a condition for participation in public debate. The result would be the demise of multi-culturalism (and the likely demise of social equality). In general, then, we can conclude that the idea of an egalitarian, multi-cultural society only makes sense if we suppose a plurality of public arenas in which groups with diverse values and rhetorics participate. By definition, such a society must contain a multiplicity of publics.¶ However, this need not preclude the possibility of an additional, more comprehensive arena in which members of different, more limited publics talk across lines of cultural diversity. On the contrary, our hypothetical egalitarian, multi-cultural society would surely have to entertain debates over policies and issues affecting everyone. The question is: would par- ticipants in such debates share enough in the way of values, expressive norms, and, therefore, protocols of persuasion to lend their talk the quality of deliberations aimed at reaching agreement through giving rea- sons?¶ In my view, this is better treated as an empirical question than as a¶ conceptual question. I see no reason to rule out in principle the possibility of a society in which social equality and cultural diversity coexist with¶ participatory democracy. I certainly hope there can be such a society. That hope gains some plausibility if we consider that, however difficult it may be, communication across lines of cultural difference is not in principle¶ impossible-although it will certainly become impossible if one imagines that it requires bracketing of differences. Granted such communication¶ requires multi-cultural literacy, but that, I believe, can be acquired¶ through practice. In fact, the possibilities expand once we acknowledge the complexity of cultural identities. Pace reductive, essentialist concep-¶ tions, cultural identities are woven of many different strands, and some of these strands may be common to people whose identities otherwise di- verge, even when it is the divergences that are most salient.28 Likewise, under conditions of social equality, the porousness, outer-directedness, and open-endedness of publics could promote inter-cultural communica-¶ tion. After all, the concept of a public presupposes a plurality of perspectives among those who participate within it, thereby allowing for internal differences and antagonisms, and likewise discouraging reified blocs.29 In addition, the unbounded character and publicist orientation of publics allows for the fact that people participate in more than one public, and¶ that the memberships of different publics may partially overlap. This in turn makes inter-cultural communication conceivable in principle. All¶ told, then, there do not seem to be any conceptual (as opposed to empiri- cal) barriers to the possibility of a socially egalitarian, multi-cultural society that is also a participatory democracy. But this will necessarily be¶ a society with many different publics, including at least one public in which participants can deliberate as peers across lines of difference about policy that concerns them all.¶ In general, I have been arguing that the ideal of participatory parity is better achieved by a multiplicity of publics than by a single public. This is true both for stratified societies and for egalitarian, multi-cultural societies, albeit for different reasons. In neither case is my argument¶ intended as a simple postmodern celebration of multiplicity. Rather, in the case of stratified societies, I am defending subaltern counterpublics formed under conditions of dominance and subordination. In the other¶ case, by contrast, I am defending the possibility of combining social equality, cultural diversity, and participatory democracy.

#### Today, the juridical justification for detention authority draws on unscrutinzed énoncés of post-9/11 discourse: concepts like “war” and “national security” are being stretched to their breaking point.

Shaub 11 (Jonathan David Shaub, J.D., Northwestern University School of Law, 2011; M.A., English, Belmont University, 2010; B.A., Philosophy and Religious Studies, Vanderbilt University, 2003, now a Bristow Fellow at the Office of the Solicitor General, “A Foucauldian Call for the Archaeological Excavation of Discourse in the Post-Boumediene Habeas Litigation,” Spring, 2011 Northwestern University Law Review, 105 Nw. U.L. Rev. 869

I. The Post-9/11 . . . what Foucault calls a “discursive formation.”¶ THE POST-9/11 DISCURSIVE FORMATION¶ The simple words “September 11th” stand for the proposition, at least in the collective American psyche, that the world has changed.15 Philoso- phers have called 9/11 an unnamable event, known only by the date because its terror and trauma exist beyond the ability of language to provide a name.16 September 11th is the event that everyone identifies as a new be- ginning, the ultimate reference for almost everything that has followed in American foreign policy and the origin of the “Global War on Terror” (GWOT).17 Although history is constantly subject to reexamination and re- vision, public memory has rigidified 9/11 into an iconic form: “an instant memory”18 that is the fundamental reference point for anything relating to national security or foreign policy. A post-9/11 discourse exists because September 11th is an unmoving foundation, a fixed origin that relates to all aspects of the discursive formation that has resulted. This Part first explores the discourse about war and detention follow- ing 9/11. Next, it illustrates the Supreme Court’s reliance in Hamdi on his- torical conceptions of national security as well as its emphasis on “necessity” in its post-9/11 discourse. Finally, utilizing Foucault’s insights into discourse, this Part argues that 9/11 functions as the origin of a “discur- sive formation,” an entity composed of the interrelated text, authorities, and practices within a discourse.19 A. The Beginnings of the Debate over Presidential Power¶ Immediately after the attacks, President Bush and Congress worked to- gether to craft legislative authorization for the use of force against the per- petrators of 9/11. These negotiations resulted in the Authorization for the Use of Military Force (AUMF), which empowered the President to use¶ all necessary and appropriate force against those nations, organizations, or per- sons he determines planned, authorized, committed, or aided the terrorist at- tacks . . . , or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.20¶ Initially, the President wanted the authority to “deter and pre-empt any fu- ture acts of terrorism or aggression against the United States,” but Congress insisted that the legislation only authorize force against those connected to the 9/11 attacks.21¶ Based on this authorization to use “all necessary and appropriate force” and the President’s inherent powers as Commander in Chief,22 the Adminis- tration concluded that it was “necessary” as part of this war on terror “for individuals subject to this order” to be tried by military tribunals.23 The Administration turned to the World War II case Ex parte Quirin24 to create a label for individuals subject to detention: “unlawful enemy combatants.” In Quirin, the Supreme Court determined that a group of German saboteurs, including one who claimed American citizenship, who had surreptitiously entered the United States to detonate explosives, were “unlawful enemy belligerents” according to the laws of war.25 The Court drew a distinction between those members of an enemy nation’s armed forces who follow the laws of war and those who do not, offering numerous examples of espio- nage and sabotage to make the distinction clear.26 In the Quirin opinion, the “lawful” aspect of “unlawful” referred to the laws of war governing dis- putes between two nations, and the terms “combatant” or “belligerent” re- ferred to individuals under the direction of the German army. Using the constructed label “unlawful enemy combatant” after 9/11 to refer to terror- ism suspects, then, provided the advantage of a foundation in earlier U.S. case law,27 an association with the discourse of war, and a broadly applica- ble term without much definition beyond the unique facts of Quirin.¶ A 2002 letter written by President Bush’s General Counsel to the De- partment of Defense offered one of the first definitions of the post-9/11 un- lawful enemy combatant: “an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict.”28 The defi- nition did not define exactly who could be considered an unlawful enemy combatant but only provided that the military had authority to detain indi- viduals who were subject to detention based on the laws and customs of war. According to the letter, the authority for this power derived from two distinct places: (1) the power of a nation in war to detain combatants for the duration of hostilities and (2) the language in Quirin establishing that “[c]itizens who associate themselves with the military arm of the enemy government, and . . . enter this country bent on hostile acts are enemy belli- gerents within the meaning of the Hague Convention and the law of war.”29 Under this framework, once a military officer or administration official determined that an individual should be designated an enemy combatant, this determination would be sufficient to ensure the label’s validity.30 The judi- ciary, then, would have no place in the determination.¶ The Supreme Court rejected this contention in Hamdi v. Rumsfeld and insisted that due process dictates that an enemy combatant, at least a U.S. citizen, must receive “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neu- tral decisionmaker.”31 The Hamdi Court, in a plurality opinion by Justice O’Connor, specifically noted that it was only answering the “narrow ques- tion” of whether the President had the authority under the AUMF to detain an individual who was part of the Taliban forces and had fought against the United States forces on a battlefield.32 Justice O’Connor later reemphasized the narrowness of the plurality’s holding, finding that “[b]ecause detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, . . . Congress [through the AUMF] has clearly and unmis- takably authorized detention in the narrow circumstances considered here.”33 However, the Court did note that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, th[e] understanding [that the AUMF al- lows indefinite detention] may unravel.”34 Despite this clear statement that the analogies to past wars and the historical law of war may “unravel” at some point, most judges after Hamdi have declined to examine the “practic- al circumstances” of the GWOT. Judge Wilkinson of the Fourth Circuit engaged in such an endeavor after the Boumediene decision,35 but the judges of the D.C. federal courts declined to follow his example.36¶ The Hamdi Court expressly declined to outline the contours of the un- lawful enemy combatant category,37 relying on the lower courts to attempt the task first and provide some common law adjudication of the issue. The Court also did not elaborate on whether different purposes for detention, other than “to prevent a combatant’s return to the battlefield,” would also be¶ “fundamental incident[s] of waging war.”38 In the current habeas litigation, however, the lower courts have failed to address the principles that should determine who is an enemy combatant, instead claiming that it is not the province of the judiciary to draft such a definition, and they have never ad- dressed whether other types of detention are also “fundamental” to war. In- stead they have relied on unquestioned analogies and unexplored assumptions that the post-9/11 habeas cases exist within the traditional con- fines of war.¶ B. The Supreme Court’s Post-9/11 Discourse: “Necessity,” “National Security,” and “War” in Hamdi v. Rumsfeld¶ The Supreme Court has only addressed the merits of the detention of unlawful enemy combatants one time: in Hamdi. The various opinions of the Hamdi Court relied on foundational ideas like “national security,” “for- eign relations,” and “war” while also emphasizing the radical break of 9/11 and the “necessity” it has created. The foundational terms, or, as I will ar- gue, self-legitimizing énoncés, constitute the basic atoms of Hamdi’s rea- soning and the surrounding discourse. The long history of these terms within the larger discourse concerning the judicial role allows them to dic- tate institutional power and determine the meaning of the discursive text. At the same time, there is a clear recognition that 9/11 has ushered in a new era disconnected from past realities.¶ Justice O’Connor’s plurality opinion in Hamdi began with the phrase “At this difficult time in our Nation’s history”39 and then opened its recital of the facts with the familiar “On September 11, 2001 . . . ”40 As Professor Daniel Williams notes, opening the opinion by invoking the idea of a “diffi- cult time” “establishes the mood of, the backdrop to, the opinion’s analysis” and “foreshadows that some departure from a legal norm is to take place and will need to be justified through law.”41 As Williams persuasively ar- gues, the underlying meaning of this opening and the backdrop of the Ham- di opinion as a whole is one of necessity and national security.42 One can also view this as evidence that the Court perceived 9/11 as an origin that marks a departure into a new discourse.¶ Continuing, Justice O’Connor acknowledged that the Court “recog- nize[s] that the national security underpinnings of the ‘war on terror,’ al- though crucially important, are broad and malleable.”43 The plurality opinion restricted itself on the detention issue to deciding the “narrow question” of whether the President had the authority to detain “an individual who . . . was part of or supporting forces hostile to the United States or coa- lition partners in Afghanistan and who engaged in an armed conflict against the United States there,”44 clearly limiting the decision to the traditional idea that an individual participating in hostilities, even a civilian, becomes a combatant by virtue of this participation.45¶ When addressing the level of process due to enemy combatants, Justice O’Connor recognized the “weighty and sensitive governmental interests”46 in keeping combatants from returning to battle and claimed that “[w]ithout doubt, our Constitution recognizes that core strategic matters of warmak- ing” should be left to the “politically accountable” branches.47 Although Justice O’Connor ruled against the Government on Hamdi’s due process claim, creating a new framework for challenging detention,48 she made sure to emphasize the traditional deference due to the Executive throughout her opinion and upheld the power of the Executive to detain unlawful enemy combatants under the AUMF.¶ In support of this deference, Justice O’Connor cited Department of the Navy v. Egan,49 which “not[ed] the reluctance of the courts ‘to intrude upon the authority of the Executive in military and national security affairs.’”50¶ She also cited Youngstown Sheet & Tube Co. v. Sawyer51 for the proposition that military commanders have “broad powers” when “engaged in day-to- day fighting in a theater of war.”52 These two historical references at- tempted immediately to establish the role of the judiciary in the case by simple analogy. However, Justice O’Connor did not investigate why courts were reluctant to “intrude upon the authority of the Executive” in Egan and never examined what about the Korean War context of Youngstown neces- sitated broad executive power. In many ways, then, her opinion is a para- dox. If 9/11 has put our country into a “difficult time” and mandated new approaches, then reliance on historical examples with little relation to the issue at hand would seem disingenuous. Instead, a more searching excava- tion of the relationships among these historical examples and of the impor- tance of foundational ideas such as “national security” is necessary.¶ The other opinions in Hamdi also focused on “national security” and “war.” In his dissent, Justice Scalia framed the “difficult time” arising out of 9/11 in his opening paragraph: “This case brings into conflict the com- peting demands of national security and our citizens’ constitutional right to personal liberty.”53 Similarly, Justice Thomas, in his dissent, criticized the plurality for “failing adequately to consider basic principles of the constitu- tional structure as it relates to national security and foreign affairs.”54 Jus- tice Thomas plainly stated that the plurality erred in conducting a balancing test related to the government’s “war powers” and that it “utterly fail[ed]” to take into account the government’s “compelling interests” and the Court’s own “inability” to weigh competing concerns during wartime.55¶ Thus, although the various Justices in Hamdi disagreed vehemently on the proper approach to dealing with the post-9/11 unlawful enemy comba- tants and the proper separation of powers, all of them made use of preexist- ing, self-legitimizing unities—including war, national security, governmental interests—as what Foucault would call the “tranquil locus”56 of their opinions. No Justice questioned whether “national security” had the same intrinsic meaning in this context as it had in past historical con- texts. The Justices did not question exactly what relationships, what power dynamics, or what exclusions énoncés like “national security” or “foreign affairs” entailed but instead relied on an unmoving, general understanding of the terms. Moreover, the Hamdi plurality took the same approach with the concept, or énoncé, of “war.” Despite the fact that the GWOT is not a typical war,57 the Court utilized the analogy to traditional war without prob- ing its definition and inherent relations within this specific discourse. Jus- tice O’Connor cited Youngstown, arguably the most famous constitutional case on the President’s war power, but as this Note argues in Part II, “war” as used in the Korean War context of Youngstown and “war” after 9/11 may not have the same inherent meaning because they are situated in different discourses. The two “wars” are unified only as the same word, or “syn- tagm.”58 Using Foucault’s insight into discourse, this Note argues that the meaning of “war,” like other énoncés, is constructed by the various aspects of the discourse in which it is situated, including the power relationships that control who defines the word and the inherent historical and linguistic relationships the word entails. “War” today exists as part of a cohesive post-9/11 discourse that has formed what Foucault calls a “discursive for- mation.”

#### Detainee treatment spills over into the criminal justice system- must pay attention to our treatment of POW’s to prevent spillover of WOT practice

Hafetz, 2012 (Johathan, Associate Professor of Law at Seton hall University School of Law. “Military Detention in the ‘War on Terorirms”: Normalizing the Exceptional after 9/11. Columbia Law Review Sidebar¶ 112 Colum. L. Rev. Sidebar 31. Lexis Nexis.

Another long-term consequence of the war on terrorism is the threat that it poses to the integrity of the criminal justice system, whose protections for defendants may be circumvented by the government's ability to incarcerate terrorism suspects through an alternative system of military detention or trial by military commission. In prior armed conflicts, military detention operated in a sphere that domestic criminal law generally did not reach--whether because prisoners were detainable solely under the laws of war or because their prosecution in a military commission filled a jurisdictional gap when regular civilian courts were unavailable. By contrast, the military detention and prosecution of terrorism suspects creates significant overlap with the criminal justice system by providing another means of holding prisoners who can be prosecuted in civilian courts. [n73](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n73) In other words, whereas a typical German soldier during World War II could be detained only as a prisoner of war, and was not subject to prosecution under domestic criminal law, a person held today for aiding al Qaeda may be prosecuted in federal court for providing material support for terrorism, held indefinitely in law-of-war detention under the AUMF, or prosecuted for a war crime in a military commission. [n74](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n74)¶ Because this alternative military system provides fewer legal protections to detainees, it creates an incentive for the government to [\*45] divert terrorism suspects there rather than trying them in federal court. Paradoxically, this incentive is greatest where the government's case is weakest and where civilian prosecution appears problematic as a legal, evidentiary, or political matter. For individuals who fall within the AUMF's scope of detention authority based on their relationship to or support for al Qaeda or associated groups, the safeguards provided the federal criminal justice system--above all, the right to be charged and tried under the Constitution--become a matter of discretion, triggered only when the government elects not to proceed with the military option. Conversely, maintaining this alternative military detention system forces the civilian criminal justice system to demonstrate its capacity to prosecute terrorism cases successfully--with success measured in terms of convictions obtained rather than in the fairness and integrity of the procedures . This creates pressure to limit criminal defendants' rights--a trend reflected by recent proposals to expand the "public safety" exception to Miranda v. Arizona [n75](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n75) to deflect criticisms of prosecuting terrorism suspects in federal court. [n76](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n76)¶ Additionally, the war on terror has created a framework for the institutionalization of military detention as well as its expansion into areas traditionally reserved for the criminal justice system. Following 9/11, the Bush Administration applied the enemy combatant label almost exclusively to individuals seized and held abroad. [n77](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n77) The two instances in which it applied this label domestically proved highly controversial, prompting the government to criminally charge and transfer the prisoners to civilian court to avoid Supreme Court review. [n78](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n78) Yet, the continued military confinement of terrorism suspects at Guantánamo and elsewhere outside the country has made this form of detention without trial seem less exceptional. Recent legislative proposals have sought not only to expressly authorize military detention--whereas the AUMF did so only by [\*46] implication--but also to extend that authority to the domestic United States. [n79](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n79) These proposals, moreover, would require the military detention of terrorism suspects who fell within its scope, thus creating a new presumption of military detention that can be overridden only through a waiver process. [n80](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n80) While Congress ultimately enacted a more limited military detention measure in the 2012 National Defense Authorization Act, [n81](https://www-lexisnexis-com.libproxy.usc.edu/lnacui2api/frame.do?tokenKey=rsh-20.42089.784017215745&target=results_DocumentContent&returnToKey=20_T17970796915&parent=docview&rand=1376618781978&reloadEntirePage=true#n81) such measures threaten to cement the transformation of post-9/11 military detention powers--created based on the premise of wartime exigency--into a permanent, default detention system for an elastic category of terrorism cases.

#### The invasion of Afghanistan has potential as a TEACHABLE MOMENT - it wakes up the public and causes them to pay attention to the prison industrial complex – backlash of Afghan citizens to US abuses proves it’s possible.

Glenn Greenwald, theguardian.com, September 18, 2012, “Unlike Afghan leaders, Obama fights for power of indefinite military detention” http://www.theguardian.com/commentisfree/2012/sep/18/obama-appeals-ndaa-detention-law

A US official confirmed that the transfer of detainees had paused because of the dispute."

Is that not amazing? On the very same day that the Obama DOJ fights vigorously in US courts for the right to imprison people without charges, the Afghan government fights just as vigorously for basic due process.¶ Remember: the US, we're frequently told, is in Afghanistan to bring democracy to the Afghan people and to teach them about freedom. But the Afghan government is refusing the US demand to imprison people without charges on the ground that such lawless detention violates their conceptions of basic freedom. Maybe Afghanistan should invade the US in order to teach Americans about freedom.¶ This is not the first time this has happened. In 2009, the Obama administration decided that it wanted to target certain Afghan citizens for due process-free assassinations on the ground that the targets to be executed were drug "kingpins". They were to be killed based solely on US accusations, with no trial, just as the Obama administration does with its own citizens. But again, that plan ran into a roadblock: Afghan leaders were horrified by the notion that their citizens would be extrajudicially executed based on unproven suspicions [my emphasis]:¶ "A US military hit list of about 50 suspected drug kingpins is drawing fierce opposition from Afghan officials, who say it could undermine their fragile justice system and trigger a backlash against foreign troops.¶ "The US military and Nato officials have authorized their forces to kill or capture individuals on the list, which was drafted within the past year as part of Nato's new strategy to combat drug operations that finance the Taliban …¶ "General Mohammad Daud Daud, Afghanistan's deputy interior minister for counternarcotics efforts, praised US and British special forces for their help recently in destroying drug labs and stashes of opium. But he said he worried that foreign troops would now act on their own to kill suspected drug lords, based on secret evidence, instead of handing them over for trial.¶ "'They should respect our law, our constitution and our legal codes,' Daud said. 'We have a commitment to arrest these people on our own' …¶ "There is a constitutional problem here. A person is innocent unless proven guilty," [former Afghan interior minister Ali Ahmad Jalali] said. "If you go off to kill or capture them, how do you prove that they are really guilty in terms of legal process?"¶ In other words, the Obama administration has received far more resistance to its due process-free imprisonments and assassinations from Afghans than it has from its own citizens in the US. If only more Americans, including progressives, were willing to point out the most basic truths in response to these Obama power seizures, such as: "If you go off to kill or capture them, how do you prove that they are really guilty in terms of legal process?"¶ Instead, many Americans, particularly in the age of Obama, are content to assume that anyone whom the US government accuses of being a terrorist should, for that reason alone, be assumed to be guilty, and as a result, any punishment the president decides to dole out – indefinite imprisonment, summary execution – is warranted and just; no bothersome, obsolete procedures such as "trials" or "indictments" are necessary.¶ It is that mindset that will ensure that Obama's vigorous fight to preserve the power of indefinite detention will provoke so little objection: among Americans, that is – though obviously not among Afghans, who seem to have an actual understanding of, and appreciation for, the value of due process.

#### Dismissal by race scholars of militarism hides the realities of institutionalized violence against minorities and people of color. A combined approach is key to uncovering hidden realities and adding deeper contexts to today's problems.

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Many purportedly anti-racist liberal talking heads and media outlets tend to under-appreciate the connections between racism and militarism. One would expect them as people with knowledge about race relations to highlight this connection when national security stories come up. However, they tend to drop the ball. Melissa Harris-Perry, a political science professor at Tulane University and MSNBC show host, specializes in African-American politics and provides a liberal perspective on American race relations. She spoke out against the Zimmerman verdict and provides insightful coverage on issues like the infringement of voting rights in communities of color. But her views on Obama's militarism range from blasé to apologetic. Last November, when discussing drone strikes on her show, Harris-Perry asked journalist Allison Kilkenny and MSNBC host Chris Hayes, "Make a case to me about why they're problematic because I'm not sure that I agree." Harris-Perry brought up police shootings of black youth in the United States in response to Hayes criticizing the death of Abdulrahman al-Awlaki, a 16-year-old American citizen killed by a US drone strike in Yemen in 2011. Rather than seize the opportunity to make the connection between domestic institutionalized racist violence and American militarism, she used it to buttress her nonchalance on the issue of drone strikes.  Touré, another MSNBC commentator, is also liberal on race issues. But he's hawkish when it comes to drone strikes and assassination. Touré regularly comes to the Obama administration's defense on their belligerent counterterrorism policies. Last February, on Twitter, Touré said "Obama as Commander in Chief is tasked with leading our war against Al Qaeda. He can and [sic] should kill [al-Qaeda] leaders whenever possible." On The Cycle, he expanded his argument, "But we are at war with al-Qaeda right now. And if you join al-Qaeda, you lose the right to be an American; you lose the right to due process; you declare yourself an enemy of this nation. And you are committing treason" - even though the Constitution grants due process for those who commit treason. Then again, this is pretty much normal for a network that functions as the Obama administration's Pravda. The Root and The Grio are two large black media outlets; The Root, is owned by The Washington Post; and The Grio is owned by NBC News. They provide neither substantial coverage of foreign policy issues nor deeper analysis of the intersections between racism and empire. What one does get, however, is a lot of support for Obama. Contrast this with Black Agenda Report - a black leftist news and analysis website - or Pambazuka News - a Pan-Africanist online weekly newsletter - and the coverage is far different. Along with substantive critiques of the Obama administration's transgressions, there's regular critical analysis of domestic politics, foreign affairs, and the connections between institutional racism and Western imperialism. However, sites like Black Agenda Report and Pambazuka News are independent and have less exposure than The Root, The Grio, or MSNBC, due to the latter's corporate ownership. This raises the issue of how corporate media dilute the wider discourse on race relations That is a problem because it reveals a blind spot in understanding about issues of race and national security. It leaves certain realities in the dark, such as the plight of foreign workers on American military bases. Highlighting the connections can add deeper context to problems, such as the killing of Trayvon Martin. His death was the byproduct of a militarized system of racism that allows a neighborhood watchman to carry a gun and shoot anyone (especially black teenagers) he deems threatening, with impunity. Examining the real connections between racism and militarism provides better understanding of the issues at stake. Such analysis is more likely to be found in independent black journalistic outlets than corporate media.

#### —the starting point of military detention allows an interrogation of US notions of punishment

Brown 5

[Michelle Brown, “"Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad”, American Quarterly 57.3 (2005) 973-997, <http://muse.jhu.edu/journals/american_quarterly/v057/57.3brown.html>]

As a site of unseemly conjunctures between various kinds of competing law, Abu Ghraib is an unusually complex instance of American imprisonment. Its gates mark encounters with United States, Islamic, military, criminal, and international human rights law. Its walls mark not simply the contours of sovereignty and the boundaries of the nation/state but, more significantly, their violation as an immense superpower engages in a preemptive strike, invasion, occupation, and torture. Within this configuration of power, transnational exportations of punishment materialize in a variety of manifestations: (1) in the sociopolitical contexts that define the lives of the primary actors caught up in the prison/military-industrial complex and its increasingly global economies; (2) through the international implementation of U.S. penal technologies with unprecedented exclusionary capabilities, epitomized in President Bush's desire to raze Abu Ghraib and build a "state of the art" supermax prison in its place; and (3) in the unregulated use of force outside of the boundaries of law, a violence juxtaposed and conflated with the memory and backdrop of penal horror under the regime of Saddam Hussein. Abu Ghraib, then, is the kind of place always caught in a double gesture. Regimes and governments attempt to deny and erase the prison's existence. Yet we are simultaneously unable to turn away from its grotesqueness, a site that demands investigation and thus constitutes, as ordered by military judicial ruling, "the scene of the crime."6 Prisons have long served as liminal spaces both inside and outside the boundaries of constitutional law, belonging to (in fact, invented by) but not of the United States. The birth of the penitentiary, a form of punishment defined [End Page 974] entirely upon the denial of freedom, is culturally grounded in democratic values. As historian David Rothman points out, incarceration emerged "at the very moment when Americans began to pride themselves on the openness of their society, when the boundless frontier became the symbol of opportunity and equality . . . as principles of freedom became more celebrated in the outside society."7 Sociolegal scholar David Garland depicts the penitentiary as a regime constructed upon notably American value systems, including "the targeting of 'liberty' as the object of punishment" and the "intensive focusing upon the individual in prison cells."8 However, as an institution fundamentally constructed through the inverse of these values, the American penitentiary rests upon a crucial cultural contradiction, the removal of liberty in a nation that would seek to preserve it, the use of violence to counter violence. As Michael Ignatieff writes: "Outside was a scrambling and competitive egalitarianism; inside, an unprecedented carceral totalitarianism."9 The prison is built upon an interior secret, a union of antithetical ideas and values. Its invocation always risks disclosing the weakness not simply of the sovereign state but of American democracy, founded in distinctly penal terms, including genocide and slavery. Prisons, then, are strategic research sites, from which we may always uncover the contradictions of American power. For these reasons, special attention must be given to how recent assertions of sovereignty by the United States, coded in penal terms, set the conditions for what Judith Butler refers to as the "new war prison," where "the current configuration of state power, in relation both to the management of populations (the hallmark of governmentality) and the exercise of sovereignty in the acts that suspend and limit the jurisdiction of law itself, are reconfigured," a context rife with possibilities for the violation of human rights.10 This corruptibility is, in part, an intrinsic property of punishment. To borrow Ignatieff's terminology, prisons are inherently "lesser evil" institutions. Even as democratic defense, such institutions always risk, in any invocation, the violation of foundational commitments to democracy. Even when applied in the context of legislative deliberation, judicial review, and adversarial constraint, they remain necessarily tragic and ultimately evil.11 However, events at Abu Ghraib and other contemporary domestic and war prisons prove most disconcerting not simply because of the absence of open, adversarial justification, but because of the larger absence of any perceived need for justification. As evidence emerges that Abu Ghraib was simply one site of detainee abuse among many in the war against terror,12 we realize the fear, as expressed by Amy Kaplan in her 2003 presidential address to the American Studies Association, that Guantánamo would become a story of our future, a world where "this floating [End Page 975] colony will become the norm rather than an anomaly, that homeland security will increasingly depend on proliferating these mobile, ambiguous spaces between the domestic and foreign."13 Abu Ghraib is, consequently, the kind of "unanticipated event," dramatic, poignant, and ugly all at once, in which the "normality of the abnormal is shown for what it is"—terror as usual. For these reasons, it also marks a critical site from which to consider how what it means to do American studies is irrevocably bound up with the practice and conjugation of U.S. punishment, not simply at home but abroad, and especially in those "mobile, ambiguous spaces" lost somewhere in between in a time of empire.

#### We’ll impact turn their link—a unique focus on military detention is critical—military detention establishes an unprecedented and new manifestation of prison systems characterized by no end or bounds—the fixture of military prisons in a space of lawlessness demands an exposition otherwise the stories are forgotten

Brown 5

[Michelle Brown, “"Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad”, American Quarterly 57.3 (2005) 973-997, <http://muse.jhu.edu/journals/american_quarterly/v057/57.3brown.html>]

Abu Ghraib, like Guantánamo and other U.S. military prisons, marks the kind of penal expansion that takes place in the context of wars with no end: wars on drugs, crime, and terror. In the U.S., we imprison more than anyone in the world and more than any other society has ever imprisoned for the purposes of crime control, and we do so in a manner that is defined by race.57 This unprecedented use of imprisonment has largely taken place outside of democratic checks or public interest, in disregard of decades of work by penal scholars and activists who have introduced a vocabulary of warning through terms such as "penological crisis," "incarceration binge," "prison-industrial complex," and the "warehousing" of offenders. Such massive expansion has direct effects upon the private lives of prisoners, prison workers, their families, [End Page 990] and their communities. I have tried, at least, to point to the ways in which these effects may extend far beyond their immediate contexts into a potential reconfiguration of public life. Such unprecedented penal expenditures mark the global emergence of a new discourse of punishment, one whose racial divisions and abusive practices are revised into a technical, legal language of acceptability, one in which Americans are conveniently further distanced from the social realities of punishment through strategies of isolation and exclusion, all conducted in a manner and on a scale that exacerbates the fundamental class, race, and gender contradictions and divisions of democracy. In this respect, the "new war prison" is constituted by both material practices and a discursive language whose expansion and intensification need recognize no limits, no borders, no bounds. I have used punishment and torture interchangeably across this piece, not because I believe they are without distinction or difference, but because I believe, as history and social theory teach us, that they are grounded in the same fundamental practice: the infliction of pain. Because punishment carries pain, rupture, and trauma with it, its implementation will always be fundamentally tragic. Torture, then, is not incidental to punishment. It is at its core. Instead of accepting this reality, the history of the practice and study of punishment is marred by an assumption that intention matters, that explanations and justifications define punishment and its appropriate use, and that the law can control its violence. However, these kinds of assumptions conceal the presence of the law itself. When punishment is invoked, it is always intended to remind the people of the power and presence of the state. However, this is an invocation that is precisely meant to be avoided in democratic contexts, as strong governments have no need to rely upon force. According to both Nietzsche and Durkheim, it is a weak state that will resort to a display of force and violence. Any regime that decides to inflict pain and harm will inevitably find itself caught up in a unique social institution whose essence is violence and whose justifications are inherently problematic. Punishment is, thus, always most usefully understood at its most elemental level: as a bloodlust for revenge, one whose essence is passion, unreason, anger, and emotion, whose invocation is highly individualized, subjective, and personal, an insatiable urge that knows no limits. In such a setting, as sociolegal scholar Austin Sarat argues, a "wildness" is introduced into the "house of law," wherein "private becomes public and public becomes private; passion is introduced into the temple of reason, and yet passion itself is subject to the discipline of reason. Every effort to distinguish revenge and retribution nevertheless reveals that 'vengeance arrives among us in a judicious disguise.'"58 The vengeance that underlies [End Page 991] the implied calm reason of systematic, procedural, proportional retribution cannot be repressed and is evidenced in contemporary patterns of punishment in the United States that often defy a rational logic of any kind. Any solidarity or sociality gained at the price of such punishment, then, speaks not only to the end of democracy but of humanity as well. And so we went from September 11 to a war on terror, from Abu Ghraib to the summer of beheadings in an endless repetition whose limits are defined currently only in the possibility of sheer exhaustion. For American studies, this means that Abu Ghraib operates at a series of intersections and borders that have rendered the fundamental contradictions of imprisonment in a democratic context acutely visible, if only temporarily. As the impossible case for democracy, the "scandal" at Abu Ghraib reveals how an unmarked proliferation of penal discourses, technologies, and institutions not only "set the conditions" for the grossest violations of democratic values but revealed the normalcy and acceptability of these kinds of practices in spaces beyond and between the law. Consequently, Abu Ghraib falls within a distinct category of legal and territorial borders, those spaces that sociolegal scholar Susan Bibler Coutin observes "defy categories and paradigms, that 'don't fit,' and that therefore reveal the criteria that determine fittedness, spaces whose very existence is simultaneously denied and demanded by the socially powerful." Capturing the sense of doubleness that characterizes Abu Ghraib, she describes these "targets of repression and zones of militarization" as contradictory spaces that "are marginalized yet strategic, inviolate yet continually violated, forgotten yet significant."59 Many peoples exist at these borders, and all stories may be told there. But, and this is of crucial significance, there is no guarantee that these stories will be told. So much of the writing and thought surrounding the borderlands has been directed at the development of a new social vision, derived from the pain of history and experience, but grounded in the celebratory justice of the inevitable, vindicating arrival of the hybrid. As Gloria Anzaldúa insists, "En unas pocas centurias, the future will belong to the mestiza."60 Yet Abu Ghraib falls squarely into the kind of border zone that cannot be celebrated, a subaltern site where many stories and voices will never be told or heard, no matter how we reconstruct its history and its events. Judith Butler observes that the subject outside of the law "is neither alive nor dead, neither fully constituted as a subject nor fully deconstituted in death."61 Under Saddam Hussein's rule, numberless thousands were lost in the prison. Under American occupation, "ghost detainees" were a prevalent problem, unidentified, vanished inside the institution's own lost accountability. As Žižek points out, these individuals constitute the "living dead," those missed [End Page 992] by bombs in the battlefield, "their right to life forfeited by their having been the legitimate targets of murderous bombings." This positioning has direct impact upon the legal privilege of their captors: "And just as the Guantánamo prisoners are located, like homo sacer, in the space 'between two deaths,' but biologically are still alive, the U.S. authorities that treat them in this way also have an indeterminate legal status. They set themselves up as a legal power, but their acts are no longer covered and constrained by the law: they operate in an empty space which is, nevertheless, within the domain of the law."62 The spectacle of abuse at Abu Ghraib makes plain the consequences of putting prisoners and custodians in this space "between two deaths," a legal borderland filled with spectral violence, a space packed with people and yet profoundly empty of its humanity. Bibler Coutin writes, "I cannot celebrate the space of nonexistence. Even if this space is in some ways subversive, even if its boundaries are permeable, and even if it is sometimes irrelevant to individuals' everyday lives, nonexistence can be deadly."63 When writing of Abu Ghraib, I find myself in a similar space, peering in at a border whose history, purpose, and foundations prevent it from being redeemed or reclaimed, its terrorized inhabitants the essence of Anzaldúa's "zero, nothing, no one."64 Abu Ghraib reminds us then of the pains we had hoped to transcend, of the "intimate terrorism" we had hoped to end, of the bloody sovereignty we had hoped to eclipse in a postnational context.65 As Anzaldúa observed of "life in the borderlands" nearly two decades ago: The world is not a safe place to live in. We shiver in separate cells in enclosed cities, shoulders hunched, barely keeping the panic below the surface of the skin, daily drinking shock along with our morning coffee, fearing the torches being set to our buildings, the attacks in the street. Shutting down . . . The ability to respond is what is meant by responsibility, yet our cultures take away our ability to act—shackle us in the name of protection. Blocked, immobilized, we can't move forward, we can't move backwards. That writhing serpent movement, the very movement of life, swifter than lightning. Frozen.66 In the working vocabulary and memory of a penal culture, Abu Ghraib remains a border lost to us, accessible only through the fixed and frozen images that remind us of its irrevocableness. We find ourselves, in a sense, at a new border that is very old, caught at the crossroads, left alone with America, asking, and with considerable trepidation, what will our futures be?67

#### THERE IS VALUE IN OUR PROJECT. Exposing ourselves to different modes of understanding is critical to cultivating sympathy for different ways of life

**JENNI**, Pf Philosophy at Redlands, **01** (Kathie, *Social Theory and Practice*, July v27 i3 p437)

The claim on behalf of academics' value to the world at large is that in enhancing the moral reasoning of students, we indirectly contribute to ending injustice and suffering, as well. **We ourselves may not minister to the starving or rescue the tortured, lobby Congress, or protest in the street.** But in sustaining the life of higher education, we are preparing (as it were) moral armies to go and do those things themselves, or at least to live in ways that may eventually make other kinds of activism less necessary. **The intellectual's contribution to global welfare, then, is indirect and yet potentially immense.** Empirical work supports this optimistic assessment of higher education's value, noting the role it can play in moral development. Eamonn Callan, for example, notes the importance of exposing students to *different modes* of moral understanding and thus **cultivating "imaginative sympathy for alien ways of life."**(8) Others observe that liberal arts education provides a natural setting for "the **discomfiture that comes with experiences that do not fit one's earlier conceptions,"** which seems essential for growth in moral judgment.(9)

#### Understanding reason-giving as the basis for communicative action can challenge institutionalized forms of oppression and open up productive spaces for discussions of racism.

Gamez 10, (Francisco N. Gamez, RE-STARTING THE CONVERSATION ABOUT RACE IN ACADEMIA: TRANSCULTURAL NARRATIVES IN THE LIFEWORLD, University of San Francisco, December 2010, http://udini.proquest.com/view/re-starting-the-conversation-about-goid:851315315/)

Jurgen Habermas' (1984,1985) theory of communicative action incorporates actors/participants in society who seek to reach common understanding and coordinate actions through rational argumentation or the force of the better argument, consensus, and cooperation, rather than taking action towards one's personal agenda or goals. This can lead participants towards mutual understanding and shared realities since "acting and speaking subjects can relate to more than only one world, and that when they come to an understanding with one another about something in one world, they base their communication on a commonly supposed system of worlds" (Habermas 1984: 278).¶ Before the dialogue or discourse on any issue can start, Habermas stipulates that communicative competence or rationality must be achieved. He believes that in order for any communication that can lead to mutual understanding can start, there needs to be an orientation towards understanding from all parties involved in the dialogue. Herda (1999:71) illustrates communicative competence when she writes that"... this principle, characterized by the validity claims of comprehensibility, shared knowledge, trust, and shared value, is 'always already' implicitly raised in action orientation to reaching understanding." It is by reaching theses universal validity claims that our dialogue and discourse can help us reach mutual understandings.¶ This dialogue and discourse should lead us toward a point where we can share realities that can lead us to imagine the next actions to take when looking at the roles race and discrimination play in academia. In this exchange of dialogue, Ricoeur (1981: 78) explains Habermas' idea when he writes that "Habermas invokes the regulative ideal of an unrestricted and unconstrained communication which does not precede us but guides us from a future point." Habermas (1984, 1985) believed that the force of the better argument could open up dialogue and discourse towards a shared mutual understanding, so when applied to how colleges and universities address the issue of race in their institutions, it becomes inclusive and democratic so that policies are created with all parties involved, which he called "deliberative democracy."¶ Habermas (1984, 1985) believed that argumentative politics in deliberative democracy is a form of governance in which multiple participants are engaged within the public sphere. So by engaging in dialogue and discourse about race, we can hear multiple voices from multiple participants and potentially engage in mutual learning and understanding on the role race plays in the everyday lives of staff and administrators of color and the various interpretations that can occur in their relationships with others and the institution. Denhardt and Denhardt (2003: 99) illustrate Habermas' ideal of deliberative democracy in the public sphere concisely by stating¶ .. .while our society operates under a narrow definition of rationality, one consistent with a society dominated by technology and bureaucracy, we maintain an innate capacity to reason in a much larger sense. Moreover, it is this capacity to reason that enables us to communicate across various social and ideological boundaries. But for reason to prevail in any given situation, we must (1) engage in dialogue, not a monologue, and (2) the dialogue must be free of domination and distortion.¶ This exchange of dialogue that must be free of domination and distortion should be the norm in any discussions about race or any other issues relevant to post-secondary institutions. Unfortunately, the reality is that most dialogues are dominated and distorted by those with influence and power within any college or university's organizational political system. Regardless of race or ethnicity, as staff and administrators, and as participants in college and university communities, we must be vigilant to change this through incremental steps that include dialogue with multiple parties/actors and being open to learn from each other to create policies and working environments that are mutually beneficial for all. Sharing narratives and creating forums for dialogue and discourse would help shift the power towards the public sphere and become more inclusive, which can lead to new interpretations and understandings that can affect the lifeworld of all involved.

#### A lifeworld can incorporate discussions of race and discussions of policy to create better academic discussions and socially just policies.

Gamez 10, (Francisco N. Gamez, RE-STARTING THE CONVERSATION ABOUT RACE IN ACADEMIA: TRANSCULTURAL NARRATIVES IN THE LIFEWORLD, University of San Francisco, December 2010, http://udini.proquest.com/view/re-starting-the-conversation-about-goid:851315315/)

In order to re-start the conversation on race within academia, many of the participants shared that a safe environment was essential for such a conversation to happen. An environment where participants were oriented towards truly reaching new understanding without malice or pretense; where participants may be honest with their feelings, fears, questions, and answers, to get to the heart of the issues at hand. This ideal environment may lead to new understanding and interpretations to the role race plays in the lives of staff and administrators of color and may lead to new ways in which to address the needs of individuals and the larger organization.¶ Mutual Understanding¶ The participants who were able to have conversations that were oriented towards reaching understanding were able to reinterpret their issues and come up with new solutions. From reinterpreting definitions and one's place within society, the communicative acts that helped reconfigure the issues discussed helped address both individual and larger issues that were communicated. The examples shared by my participants helped show how communicative action and conversations toward understanding could help reinterpret issues of race within academia and bring about potential changes that address the needs of all aspects of organizational life and create socially just institutions.¶ Implications¶ The findings from my research study suggest that conversations about race/ethnicity and its role in the everyday lives of staff and administrators of color need to re-start. A discourse on race may lead to new interpretations of the issue and potentially expand the lifeworld of others who hear and share the narratives brought to life in this study. While a dialogue on race and ethnicity may start on any level, implications exist for leaders within higher education and those who are developing and implementing policy. This may help shift organizational cultures within institutions of higher education and build socially just communities within academia at institutions across the United States.¶ Implications for Institutional Leadership¶ Leaders in post-secondary institutions may use this text to help reinterpret how race and issues of diversity are viewed on the staff and administrative level. The narratives shared may bring into light the need for more transparent hiring practices and promotability from within the organization. Viewing diversity as an asset and valuing contributions from staff and administrators of color may open up the dialogue to have honest conversations about the experiences and issues that many staff and administrators endure and face. As leaders within institutions of higher education, there is a need to bring up issues of diversity and peel back the fa9ade of polite acceptance to delve deep into issues that lie in the underbelly of the organizational life that many people choose to ignore to keep the hegemonic structures within society going.¶ To keep the voices of the marginalized at bay creates an environment of hostility and moral bankruptcy, so as leaders within higher education institutions, there must be an effort to promote diversity not only a few days a year, but celebrate and promote diversity within the on-going daily structures of the university. This may lead to new understandings about race and ethnicity, as well as provide opportunities for those staff and administrators of color who have been traditionally marginalized to have a voice and potentially take on positions of leadership that may shift an organizational culture from one with a polite veil of tepid acceptance of diversity to one that is truly dedicated to acceptance of individuals and all aspects of cultural diversity. Through the use of on- going training programs similar to those used for sexual harassment, the shift in culture¶ may occur and lead institutions towards social justice initiatives within everyday organizational life.¶ Implications for Institutional Policy¶ The findings of this study may help develop and implement socially just policies that are beneficial to all staff and administrators within a university. Through the sharing of narratives from staff and administrators of color, a voice is given to those who have been traditionally marginalized both within society and within organizational policy making structures. Providing a text for others to appropriate within the horizons of the lifeworld may provide differing opinions and view points on the policy development level and provide more inclusive policy development models. By giving a voice to the those who have been traditionally marginalized, it may create socially just policies that take into consideration the underrepresented and may help minimize any unintentional consequences or actions that may occur during the implementation process of policy making.¶ Within the implementation structure of policy design, the inclusion of others such as staff and administrators of color, may help with policy buy-in and lead to future policies of inclusion and social justice. The inclusion of other viewpoints may lead to reinterpretations on how policy is implemented or how issues are viewed. If mutual understanding is reached within the policy design structure, the opportunities for cultural growth and community building may occur, which may lead to a more culturally competent university and community that is inclusive and respectful of difference and cultural and individual identities. The opportunities to reinterpret what is, versus what ought to be, may create a newly interpreted lifeworld that staff and administrators of color may live within, while working in post-secondary institutions.

#### Cross-cultural communication is possible as a mode of deliberative discourse.

Fraser 90, Nancy Fraser, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, Social Text, No. 25/26 (1990), pp. 56-80, Duke University Press, http://www.jstor.org/stable/466240

It follows that public life in egalitarian, multi-cultural societies cannot¶ consist exclusively in a single, comprehensive public sphere. That would be tantamount to filtering diverse rhetorical and stylistic norms through a single, overarching lens. Moreover, since there can be no such lens that is genuinely culturally neutral, it would effectively privilege the expres- sive norms of one cultural group over others, thereby making discursive assimilation a condition for participation in public debate. The result would be the demise of multi-culturalism (and the likely demise of social equality). In general, then, we can conclude that the idea of an egalitarian, multi-cultural society only makes sense if we suppose a plurality of public arenas in which groups with diverse values and rhetorics participate. By definition, such a society must contain a multiplicity of publics.¶ However, this need not preclude the possibility of an additional, more comprehensive arena in which members of different, more limited publics talk across lines of cultural diversity. On the contrary, our hypothetical egalitarian, multi-cultural society would surely have to entertain debates over policies and issues affecting everyone. The question is: would par- ticipants in such debates share enough in the way of values, expressive norms, and, therefore, protocols of persuasion to lend their talk the quality of deliberations aimed at reaching agreement through giving rea- sons?¶ In my view, this is better treated as an empirical question than as a¶ conceptual question. I see no reason to rule out in principle the possibility of a society in which social equality and cultural diversity coexist with¶ participatory democracy. I certainly hope there can be such a society. That hope gains some plausibility if we consider that, however difficult it may be, communication across lines of cultural difference is not in principle¶ impossible-although it will certainly become impossible if one imagines that it requires bracketing of differences. Granted such communication¶ requires multi-cultural literacy, but that, I believe, can be acquired¶ through practice. In fact, the possibilities expand once we acknowledge the complexity of cultural identities. Pace reductive, essentialist concep-¶ tions, cultural identities are woven of many different strands, and some of these strands may be common to people whose identities otherwise di- verge, even when it is the divergences that are most salient.28 Likewise, under conditions of social equality, the porousness, outer-directedness, and open-endedness of publics could promote inter-cultural communica-¶ tion. After all, the concept of a public presupposes a plurality of perspectives among those who participate within it, thereby allowing for internal differences and antagonisms, and likewise discouraging reified blocs.29 In addition, the unbounded character and publicist orientation of publics allows for the fact that people participate in more than one public, and¶ that the memberships of different publics may partially overlap. This in turn makes inter-cultural communication conceivable in principle. All¶ told, then, there do not seem to be any conceptual (as opposed to empiri- cal) barriers to the possibility of a socially egalitarian, multi-cultural society that is also a participatory democracy. But this will necessarily be¶ a society with many different publics, including at least one public in which participants can deliberate as peers across lines of difference about policy that concerns them all.¶ In general, I have been arguing that the ideal of participatory parity is better achieved by a multiplicity of publics than by a single public. This is true both for stratified societies and for egalitarian, multi-cultural societies, albeit for different reasons. In neither case is my argument¶ intended as a simple postmodern celebration of multiplicity. Rather, in the case of stratified societies, I am defending subaltern counterpublics formed under conditions of dominance and subordination. In the other¶ case, by contrast, I am defending the possibility of combining social equality, cultural diversity, and participatory democracy.

#### Today, the juridical justification for detention authority draws on unscrutinzed énoncés of post-9/11 discourse: concepts like “war” and “national security” are being stretched to their breaking point.

Shaub 11 (Jonathan David Shaub, J.D., Northwestern University School of Law, 2011; M.A., English, Belmont University, 2010; B.A., Philosophy and Religious Studies, Vanderbilt University, 2003, now a Bristow Fellow at the Office of the Solicitor General, “A Foucauldian Call for the Archaeological Excavation of Discourse in the Post-Boumediene Habeas Litigation,” Spring, 2011 Northwestern University Law Review, 105 Nw. U.L. Rev. 869

I. The Post-9/11 . . . what Foucault calls a “discursive formation.”¶ THE POST-9/11 DISCURSIVE FORMATION¶ The simple words “September 11th” stand for the proposition, at least in the collective American psyche, that the world has changed.15 Philoso- phers have called 9/11 an unnamable event, known only by the date because its terror and trauma exist beyond the ability of language to provide a name.16 September 11th is the event that everyone identifies as a new be- ginning, the ultimate reference for almost everything that has followed in American foreign policy and the origin of the “Global War on Terror” (GWOT).17 Although history is constantly subject to reexamination and re- vision, public memory has rigidified 9/11 into an iconic form: “an instant memory”18 that is the fundamental reference point for anything relating to national security or foreign policy. A post-9/11 discourse exists because September 11th is an unmoving foundation, a fixed origin that relates to all aspects of the discursive formation that has resulted. This Part first explores the discourse about war and detention follow- ing 9/11. Next, it illustrates the Supreme Court’s reliance in Hamdi on his- torical conceptions of national security as well as its emphasis on “necessity” in its post-9/11 discourse. Finally, utilizing Foucault’s insights into discourse, this Part argues that 9/11 functions as the origin of a “discur- sive formation,” an entity composed of the interrelated text, authorities, and practices within a discourse.19 A. The Beginnings of the Debate over Presidential Power¶ Immediately after the attacks, President Bush and Congress worked to- gether to craft legislative authorization for the use of force against the per- petrators of 9/11. These negotiations resulted in the Authorization for the Use of Military Force (AUMF), which empowered the President to use¶ all necessary and appropriate force against those nations, organizations, or per- sons he determines planned, authorized, committed, or aided the terrorist at- tacks . . . , or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.20¶ Initially, the President wanted the authority to “deter and pre-empt any fu- ture acts of terrorism or aggression against the United States,” but Congress insisted that the legislation only authorize force against those connected to the 9/11 attacks.21¶ Based on this authorization to use “all necessary and appropriate force” and the President’s inherent powers as Commander in Chief,22 the Adminis- tration concluded that it was “necessary” as part of this war on terror “for individuals subject to this order” to be tried by military tribunals.23 The Administration turned to the World War II case Ex parte Quirin24 to create a label for individuals subject to detention: “unlawful enemy combatants.” In Quirin, the Supreme Court determined that a group of German saboteurs, including one who claimed American citizenship, who had surreptitiously entered the United States to detonate explosives, were “unlawful enemy belligerents” according to the laws of war.25 The Court drew a distinction between those members of an enemy nation’s armed forces who follow the laws of war and those who do not, offering numerous examples of espio- nage and sabotage to make the distinction clear.26 In the Quirin opinion, the “lawful” aspect of “unlawful” referred to the laws of war governing dis- putes between two nations, and the terms “combatant” or “belligerent” re- ferred to individuals under the direction of the German army. Using the constructed label “unlawful enemy combatant” after 9/11 to refer to terror- ism suspects, then, provided the advantage of a foundation in earlier U.S. case law,27 an association with the discourse of war, and a broadly applica- ble term without much definition beyond the unique facts of Quirin.¶ A 2002 letter written by President Bush’s General Counsel to the De- partment of Defense offered one of the first definitions of the post-9/11 un- lawful enemy combatant: “an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict.”28 The defi- nition did not define exactly who could be considered an unlawful enemy combatant but only provided that the military had authority to detain indi- viduals who were subject to detention based on the laws and customs of war. According to the letter, the authority for this power derived from two distinct places: (1) the power of a nation in war to detain combatants for the duration of hostilities and (2) the language in Quirin establishing that “[c]itizens who associate themselves with the military arm of the enemy government, and . . . enter this country bent on hostile acts are enemy belli- gerents within the meaning of the Hague Convention and the law of war.”29 Under this framework, once a military officer or administration official determined that an individual should be designated an enemy combatant, this determination would be sufficient to ensure the label’s validity.30 The judi- ciary, then, would have no place in the determination.¶ The Supreme Court rejected this contention in Hamdi v. Rumsfeld and insisted that due process dictates that an enemy combatant, at least a U.S. citizen, must receive “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neu- tral decisionmaker.”31 The Hamdi Court, in a plurality opinion by Justice O’Connor, specifically noted that it was only answering the “narrow ques- tion” of whether the President had the authority under the AUMF to detain an individual who was part of the Taliban forces and had fought against the United States forces on a battlefield.32 Justice O’Connor later reemphasized the narrowness of the plurality’s holding, finding that “[b]ecause detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, . . . Congress [through the AUMF] has clearly and unmis- takably authorized detention in the narrow circumstances considered here.”33 However, the Court did note that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, th[e] understanding [that the AUMF al- lows indefinite detention] may unravel.”34 Despite this clear statement that the analogies to past wars and the historical law of war may “unravel” at some point, most judges after Hamdi have declined to examine the “practic- al circumstances” of the GWOT. Judge Wilkinson of the Fourth Circuit engaged in such an endeavor after the Boumediene decision,35 but the judges of the D.C. federal courts declined to follow his example.36¶ The Hamdi Court expressly declined to outline the contours of the un- lawful enemy combatant category,37 relying on the lower courts to attempt the task first and provide some common law adjudication of the issue. The Court also did not elaborate on whether different purposes for detention, other than “to prevent a combatant’s return to the battlefield,” would also be¶ “fundamental incident[s] of waging war.”38 In the current habeas litigation, however, the lower courts have failed to address the principles that should determine who is an enemy combatant, instead claiming that it is not the province of the judiciary to draft such a definition, and they have never ad- dressed whether other types of detention are also “fundamental” to war. In- stead they have relied on unquestioned analogies and unexplored assumptions that the post-9/11 habeas cases exist within the traditional con- fines of war.¶ B. The Supreme Court’s Post-9/11 Discourse: “Necessity,” “National Security,” and “War” in Hamdi v. Rumsfeld¶ The Supreme Court has only addressed the merits of the detention of unlawful enemy combatants one time: in Hamdi. The various opinions of the Hamdi Court relied on foundational ideas like “national security,” “for- eign relations,” and “war” while also emphasizing the radical break of 9/11 and the “necessity” it has created. The foundational terms, or, as I will ar- gue, self-legitimizing énoncés, constitute the basic atoms of Hamdi’s rea- soning and the surrounding discourse. The long history of these terms within the larger discourse concerning the judicial role allows them to dic- tate institutional power and determine the meaning of the discursive text. At the same time, there is a clear recognition that 9/11 has ushered in a new era disconnected from past realities.¶ Justice O’Connor’s plurality opinion in Hamdi began with the phrase “At this difficult time in our Nation’s history”39 and then opened its recital of the facts with the familiar “On September 11, 2001 . . . ”40 As Professor Daniel Williams notes, opening the opinion by invoking the idea of a “diffi- cult time” “establishes the mood of, the backdrop to, the opinion’s analysis” and “foreshadows that some departure from a legal norm is to take place and will need to be justified through law.”41 As Williams persuasively ar- gues, the underlying meaning of this opening and the backdrop of the Ham- di opinion as a whole is one of necessity and national security.42 One can also view this as evidence that the Court perceived 9/11 as an origin that marks a departure into a new discourse.¶ Continuing, Justice O’Connor acknowledged that the Court “recog- nize[s] that the national security underpinnings of the ‘war on terror,’ al- though crucially important, are broad and malleable.”43 The plurality opinion restricted itself on the detention issue to deciding the “narrow question” of whether the President had the authority to detain “an individual who . . . was part of or supporting forces hostile to the United States or coa- lition partners in Afghanistan and who engaged in an armed conflict against the United States there,”44 clearly limiting the decision to the traditional idea that an individual participating in hostilities, even a civilian, becomes a combatant by virtue of this participation.45¶ When addressing the level of process due to enemy combatants, Justice O’Connor recognized the “weighty and sensitive governmental interests”46 in keeping combatants from returning to battle and claimed that “[w]ithout doubt, our Constitution recognizes that core strategic matters of warmak- ing” should be left to the “politically accountable” branches.47 Although Justice O’Connor ruled against the Government on Hamdi’s due process claim, creating a new framework for challenging detention,48 she made sure to emphasize the traditional deference due to the Executive throughout her opinion and upheld the power of the Executive to detain unlawful enemy combatants under the AUMF.¶ In support of this deference, Justice O’Connor cited Department of the Navy v. Egan,49 which “not[ed] the reluctance of the courts ‘to intrude upon the authority of the Executive in military and national security affairs.’”50¶ She also cited Youngstown Sheet & Tube Co. v. Sawyer51 for the proposition that military commanders have “broad powers” when “engaged in day-to- day fighting in a theater of war.”52 These two historical references at- tempted immediately to establish the role of the judiciary in the case by simple analogy. However, Justice O’Connor did not investigate why courts were reluctant to “intrude upon the authority of the Executive” in Egan and never examined what about the Korean War context of Youngstown neces- sitated broad executive power. In many ways, then, her opinion is a para- dox. If 9/11 has put our country into a “difficult time” and mandated new approaches, then reliance on historical examples with little relation to the issue at hand would seem disingenuous. Instead, a more searching excava- tion of the relationships among these historical examples and of the impor- tance of foundational ideas such as “national security” is necessary.¶ The other opinions in Hamdi also focused on “national security” and “war.” In his dissent, Justice Scalia framed the “difficult time” arising out of 9/11 in his opening paragraph: “This case brings into conflict the com- peting demands of national security and our citizens’ constitutional right to personal liberty.”53 Similarly, Justice Thomas, in his dissent, criticized the plurality for “failing adequately to consider basic principles of the constitu- tional structure as it relates to national security and foreign affairs.”54 Jus- tice Thomas plainly stated that the plurality erred in conducting a balancing test related to the government’s “war powers” and that it “utterly fail[ed]” to take into account the government’s “compelling interests” and the Court’s own “inability” to weigh competing concerns during wartime.55¶ Thus, although the various Justices in Hamdi disagreed vehemently on the proper approach to dealing with the post-9/11 unlawful enemy comba- tants and the proper separation of powers, all of them made use of preexist- ing, self-legitimizing unities—including war, national security, governmental interests—as what Foucault would call the “tranquil locus”56 of their opinions. No Justice questioned whether “national security” had the same intrinsic meaning in this context as it had in past historical con- texts. The Justices did not question exactly what relationships, what power dynamics, or what exclusions énoncés like “national security” or “foreign affairs” entailed but instead relied on an unmoving, general understanding of the terms. Moreover, the Hamdi plurality took the same approach with the concept, or énoncé, of “war.” Despite the fact that the GWOT is not a typical war,57 the Court utilized the analogy to traditional war without prob- ing its definition and inherent relations within this specific discourse. Jus- tice O’Connor cited Youngstown, arguably the most famous constitutional case on the President’s war power, but as this Note argues in Part II, “war” as used in the Korean War context of Youngstown and “war” after 9/11 may not have the same inherent meaning because they are situated in different discourses. The two “wars” are unified only as the same word, or “syn- tagm.”58 Using Foucault’s insight into discourse, this Note argues that the meaning of “war,” like other énoncés, is constructed by the various aspects of the discourse in which it is situated, including the power relationships that control who defines the word and the inherent historical and linguistic relationships the word entails. “War” today exists as part of a cohesive post-9/11 discourse that has formed what Foucault calls a “discursive for- mation.”