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### Presumed Imminence

#### Contention 1 is Presumed Imminence

#### post-Boumediene lower court decisions that authorize lower evidentiary standards have made habeas useless

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Beginning in 2001, the United States began transporting hundreds of persons captured overseas in the “War on Terror” to the U.S. Naval Base at Guantánamo Bay, Cuba.1 They were kept at Guantánamo specifically to insulate from judicial review the military’s decision to detain them.2 Seven years later, the Supreme Court in Boumediene v. Bush granted Guantánamo detainees the right to petition for the writ of habeas corpus in the Court of Appeals for the D.C. Circuit. 3 The Court held that detainees must have “a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law.”4 The Court’s central concern was with the habeas court’s power to admit and consider relevant exculpatory evidence, a power necessary “[f]or the writ of habeas corpus, or its substitute, to function.”5 But while the Court’s central preoccupation was with a habeas court’s power to independently review the evidence, the Court did not enumerate any specific procedural requirements. The Court—hesitant to place burdens on the military and cognizant of the need to protect classified information—sketched only the broad outlines of what the Constitution requires.6 In so doing, it left “[t]he extent of the showing required of the Government in these cases . . . a matter to be determined”7 and charged the district courts with the task of balancing the government’s legitimate interests against each detainee’s right to have a court assess the lawfulness of his detention.8 Since Boumediene, the courts within the D.C. Circuit have heard over sixty habeas petitions from detainees at Guantánamo Bay.9 At first, many writs were granted. The lower courts applied a functional framework for determining the admissibility, credibility, and probity of evidence, holding the government to the ordinary burden of preponderance of the evidence.10 However, as the government and detainees began to appeal habeas decisions on the basis of adverse evidentiary rulings, the Court of Appeals announced binding evidentiary rules limiting the district courts’ discretion to admit, exclude, weigh, and consider evidence as the district courts saw fit.11 This Note argues that these evidentiary rules deny detainees a “meaningful opportunity” to contest the factual basis of their detention.12 The D.C. Circuit maintains that it holds the government to a preponderance standard13 and has cast its reversals of the District Court’s grants of habeas corpus as mere corrections in judging evidentiary probity.14 However, in substance, the Court of Appeals’ evidentiary rules have quietly but significantly eroded the evidentiary burden. The way in which the evidentiary standard and the evidentiary rules interact to weaken Boumediene has, for the most part, escaped scrutiny.15 Many have praised the D.C. Circuit for striking an appropriate balance between the needs of national security and the rights of those wrongfully detained.16 But this underestimates the combined significance of the D.C. Circuit’s evidentiary rulings. Boumediene’s central purpose was to withhold from the executive branch the unchecked power to detain whomever it deems a threat.17 Yet the D.C. Circuit’s evidentiary rules have empowered the government to detain upon so little evidence **that** the habeas hearing no longer serves the checking role the Boumediene Court intended.18 The D.C. Circuit has tacitly reduced the amount and quality of evidence necessary to establish the lawfulness of detention through three powerful mechanisms: (1) all but eliminating corroboration requirements and restrictions on the admissibility of hearsay evidence, no matter how unreliable;19 (2) establishing that courts consider the evidence in the “whole record” when determining whether a petitioner meets the requirements for detention—a determination that often reduces to the Court of Appeals’ deciding that the District Court wrongly refused to credit sufficient government evidence;20 and (3) developing irrefutable presumptions of detainability in which a single fact once established— such as a stay at an al-Qaeda affiliated guesthouse—is dispositive on the question of detention, even when other facts in the record point strongly in the opposite direction.21 That these rules operate to significantly reduce the government’s burden, and thereby deprive detainees of a meaningful opportunity to contest the factual basis of their detention, is not readily apparent from the D.C. Circuit’s decisions. Rather, the D.C. Circuit has framed its successive evidentiary decisions as meeting Boumediene’s goal of striking a careful and necessary balance between the significant burdens that a higher evidentiary requirement would impose on the military during wartime, and the minimal impact that these decisions would have on the substantive rights of detainees in habeas proceedings.22 This Note explains how, contrary to the Court of Appeals’ rhetoric, these evidentiary rules have played a dispositive role in the outcome of these cases. Part I analyzes how the credibility rules established by the Court of Appeals reduce the government’s evidentiary burden. Part II explains how the mosaic theory that the Court of Appeals has imposed on the district courts often privileges unreliable evidence. Finally, Part III demonstrates how the Court of Appeals’ development of irrefutable presumptions for establishing the lawfulness of detention decreases the quality and amount of evidence that the government must put forth to prove membership in al-Qaeda, the Taliban, or associated groups. This Note concludes that the Court of Appeals’ construction of evidentiary rules and the interaction among them has taken the bite out of Boumediene, granting executive detention at Guantánamo Bay judicial sanction without judicial scrutiny.

#### Statistics show this has effectively negated any review process for detention—the government can now prove any person, guilty or not, is an enemy combatant

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It is an open secret that Boumediene v. Bush’s promise of robust review of the legality of the Guantanamo detainees’ detention has been effectively negated by decisions of the United States Court of Appeals for the District of Columbia Circuit, beginning with Al-Adahi v. Obama. This Report examines the outcomes of habeas review for Guantanamo detainees, the right to both habeas and “a meaningful review” of the evidence having been established in 2008 by the Supreme Court in Boumediene. There is a marked difference between the first 34 habeas decisions and the last 12 in both the number of times that detainees win habeas and the frequency in which the trial court has deferred to the government’s factual allegations rather than reject them.1 The difference between these two groups of cases is that the first 34 were before and the remaining 12 were after the July 2010 grant reversal by the D.C. Circuit in Al-Adahi. Detainees won 59% of the first 34 habeas petitions. Detainees lost 92% of the last 12. The sole grant post-Al-Adahi in Latif v. Obama has since been vacated and remanded by the D.C. Circuit. The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government’s factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations. The effect of Al-Adahi on the habeas corpus litigation promised in Boumediene is clear. After Al-Adahi, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition. Given the fact-intensive nature of district court fact-finding, the shifting pattern of lower court decisions could only be due to an appellate court’s radical revision of the legal standards thought to govern habeas petitions, raising questions about whether the D.C. Circuit has in fact correctly applied Boumediene. This Report analyzes allegations that repeatedly appear in habeas cases to reveal the actual pattern of district court fact-finding.

#### The denial of habeas to innocent people represents a unique form of cruel and unusual punishment

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Eisenberg 9

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Representing Guantánamo detainee Mohammed Abd Al Al Qadir (Guantánamo Internee Security Number 284)1 has been an experience unlike any other of my legal career. While serving as counsel for Mr. Al Qadir (also known as Tarari Mohammed), Jerry Cohen2 and I encountered numerous obstacles unique to Guantánamo cases. Convoluted administrative procedures, allegedly implemented to protect national security, made representation difficult for lawyer and client alike. In 2004, the U.S. Department of Defense issued procedures to assess the need to continue detaining enemy combatant detainees.3 Three years later, Tarari Mohammed was cleared for release or transfer.4 Nevertheless, he was still detained in Guantánamo Bay’s Camp 6 as of our March 20, 2008 visit.5 When Jerry and I arrived at the base, guards escorted us to an interview cell. When the cell door was unlocked, we saw our client shackled to the floor,6 as always, and immediately noticed he was wearing a white respirator on his face. The respirator was of the sort a contractor wears when working with toxic materials. Alarmed, I asked if he was all right. As the interpreter began to translate my question, our client interrupted, saying something in Arabic. The interpreter shot us a look and said, “We will talk about it.” After the guards left the room and locked the door behind them, Tarari uncharacteristically spoke in a serious and determined tone. On all other occasions, he had been extremely polite, deferential, and allowed us to lead the conversation. Tarari Mohammed proceeded to tell his story, one he had clearly been waiting to tell. Approximately three weeks prior, he had an appointment with a representative of the International Committee of the Red Cross (ICRC).7 He met with the representative, who brought a letter from our client’s sister. The letter was the first and only communication our client received from any member of his family in over six years of detention. In the letter, Tarari’s sister informed him of their mother’s death, but did not provide details as to the date or cause. The letter also stated that, prior to her death, his mother had been distraught over her son’s detainment; it also detailed his father’s sadness. Tarari expressed that his heart was breaking and that he wanted to return to his cell. At the conclusion of their meeting, the ICRC representative told Tarari that his family had not received any letters from him. Tarari explained he had written and sent many letters during his detainment. The military never forwarded the letters. Communication is a constant struggle for both detainees and counsel. Lawyers must comply with a protective order (PO)8 entered by the court, regulating the dissemination of information.9 The protective order renders all communication with the detainee, whether to or from him, subject to review by a designated authority.10 More specifically, all communications must be handled, transported, and stored in a secure manner as described in the PO.11 The order places an additional burden on an already strained attorney-client relationship, rendering the detainee’s lawyer powerless, unable to have mail delivered between them, or between the client and his family. Petitioner’s counsel (“habeas counsel”) must treat all written and oral communication with a detainee as classified, unless otherwise determined by the reviewing authority.12 Even the notes we take during our client meetings are subject to review.13 Mail is also a source of constant strife for habeas counsel. There are two types of mail, “legal mail” and “non-legal mail,” which are processed in different manners.14 Legal mail is reviewed in a secure facility in or around Washington, D.C.,15 while non-legal mail is reviewed by the military.16 In theory, POs are intended to surmount the many logistical obstacles generated by these cases, and to reconcile the divergent priorities of the government and habeas counsel.17 Secrecy and national security are of paramount interest to the government,18 while habeas counsel advocates for open communication with clients, their families and home countries, as well as the public at large.19 The government contends that without the prescribed screening process, messages could be transmitted to terrorist organizations, possibly endangering the United States or its allies.20 In reality, the process operates to compound the psychological and emotional damage these men suffer, further isolating them from the outside world.21 Not only are detainees isolated from the outside world, but some, like Tarari, have been punished without cause. Tarari’s few freedoms were drastically reduced after his ICRC meeting. Guards came to his cell to measure him for clothing, explaining he was no longer allowed to wear his white jumpsuit, which indicated compliance, and instead must wear orange.22 When asked why they were punishing him, the guards replied that he was in trouble for spitting.23 Tarari denied ever spitting on anyone, yet the guards said he would not only have to wear the orange jumpsuit, but also a respirator.24 During our visit, Tarari asked how anyone could have such hate in their hearts that they punish someone for the death of his mother. He told us that at 2:00 a.m., on the morning after the guards’ visit, they returned to search his cell, harassing him further.25 Tarari then informed us that following the status change, and before our visit, he sought out a particular Non-Commissioned Officer (NCO) who had always treated him fairly. He asked the NCO why he had been disciplined, maintaining he had never spit and that the accusations were false. Tarari trusted the NCO, who told him he would not be punished further. Yet, despite the NCO’s assurances, the punishment did not cease. The NCO later told him that his superior had ordered the reprimand, offering no further justification. Absent another explanation, my co-counsel and I concluded Tarari was punished for having learned his mother had passed away. We speculated that this was a preemptive effort to ensure his compliance, for should Tarari get upset over his mother’s passing, the sanctions would make him easier to control—lending new meaning to the term “prior restraint.”26 We may never know whether our client actually committed a punishable offense, or whether the guards were simply acting out of spite. While anything is possible, it is unlikely our client would lie to us, given our long-established attorney-client relationship and the many hours we have spent together. Tarari celebrated the beginning of his seventh year in captivity, with no charges ever having been brought against him, by learning that he had lost his mother. Even if this otherwise compliant man had acted out after learning of his mother’s death, is that so hard to understand? Tarari is just one of the many Guantánamo detainees who must suffer punishment without recourse. Together, their stories reveal the government’s actions at Guantánamo, redefining cruel and unusual.

#### These decisions reflect a post 9-11 heuristic of deference to the executive and acceptance of its claims of imminent threat based on irrational fears

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It is difficult to determine the risk of a terrorist attack. The government always runs the chance of underestimating or overestimating the probability of an attack, both of which have costs. The 9/11 attacks themselves were attributed to a failure to appreciate the risk. In its report on the September 11 attacks, the 9/11 Commission criticized the government for its failure to imagine the likelihood of an attack by al Qaeda. Yet based upon this failure of imagination, the pendulum has swung in the other direction. The threat of terrorism summons a post-9/11 impression that although terrible harm is uncertain we must act as though it is imminent. Such thinking is a variant of the Precautionary Principle, which Cass Sunstein describes as positing that “action should be taken to correct a problem as soon as there is evidence that harm may occur, not after the harm has already occurred.” This mindset explains the capacious definition of imminence that the government purportedly relies on as part of it legal justification of targeted killings of American citizens. No one wants to be wrong again. This post-9/11 heuristic now pervades our society, our government, and our courts. Part of this transformation entails an emphasis on, and preference for, an intelligence-based preventative strategy. The preventative approach, which necessarily incorporates fear and uncertainty, is a hallmark of what legal scholars Jack Balkin and Sanford Levinson have called the National Surveillance State. This governing regime “is increasingly statistically oriented, ex ante and preventative, rather than focused on deterrence and ex post prosecution of individual wrongdoing.” In this system advances in technology and globalization may erode distinctions between international and domestic spheres. The blurring of military, intelligence, and criminal lines also wreaks havoc with previously understood standards of proof, suspicion and evidence. The preventative emphasis sets the foundation for “a parallel track of preventative law enforcement” Guantanamo, extraordinary renditions, torture that evades constitutional rights protections. Moreover, the parallel track can creep into established criminal law enforcement and distort the traditional protections afforded in that realm. The Supreme Court has directly addressed a number of the government’s post-9/11 counterterrorism measures. While a number of the Court’s post-9/11 decisions the enemy combatant decisions, in particular were often characterized by the media and some scholars as significant defeats for the government, there is reason to question that narrative. A few years removed, the decisions appear fairly modest in their limitations on the government. These opinions were invariably quite deferential to the political branches. Though the opinions assuredly marked a territorial role for the courts in the post-9/11 world, they offered more heat than light. The opinions derived from Separation of Powers structural principles rather than from the Bill of Rights. Thus the decisions were more procedural than substantive, offering little insight on the nature of detainees’ rights. The decisions also provided minimal guidance even as to process, relegating many of the decisions on the details to lower courts and to the political branches. Finally, consider what the Court has not thus far addressed or done. Richard Fallon points out that the Court has not limited the movement of military and intelligence officers in their counterterrorism operations; it has not opined on the state secrets doctrine; nor has it permitted lawsuits seeking relief for abuses suffered as a consequence of counterterrorism abuses to go forward. More specifically, it has not ordered a release in a habeas case and it does not appear poised to do so anytime soon. Fallon attributes such restraint to the notion that judicial review is “politically constructed,” that is, Justices may decide cases based in part on how their opinions may be popularly received, and the Court’s authority respected. This Article offers another explanation of the Court’s deference: the Justices are afraid. They are afraid of terrorism. They are afraid of what could happen to our security if they rein in government. This Article examines the ways in which fear has affected and influenced judges in addressing terrorism. Importantly, the discussion is not limited to enemy combatant cases or to the Supreme Court, but examines the ways in which the post-9/11 heuristic has affected a range of judicial opinions, from limits on political protests to airport security measures to criminal prohibitions of material support of terrorism. Such rulings invariably entail the courts making their own risk assessments. Yet forecasts of uncertain catastrophic events are notoriously unreliable. This is due to cognitive errors and biases that Cass Sunstein and others have documented. What then is a court to do? Many suggest courts should defer to the political branches. Deference is untenable for a number of reasons. First, it is unclear whether political actors are any more adept at making predictions. Second, the arguments for deference in the terrorism threat context are less compelling than in war because, the Court has intimated, the geographic and temporal limitations to fighting terrorism are not evident. Deference would not be a short-term or limited posture, as it might be for a military armed conflict, but one that would endure as long as the seemingly permanent crisis of terrorism. Third, deferring to the government in all events terrorism-related threatens to upset domestic criminal law jurisprudence because counterterrorism measures involve a mélange of military, intelligence, and criminal approaches that employ differing standards of proof. Finally, even when invoking judicial deference and lack of national security expertise, what can be seen at work in many judges’ post-9/11 opinions are their own risk assessments, which evidence their own cognitive biases impacted by the fears engendered by terrorism. Ironically, their frequent fact finding of risks or lack of threat is wholly at odds with the purported deferential stance that judges insist they are taking in addressing the terrorism cases. This tendency can be seen in various Justices and lower court judges’ opinions, regardless of whether they uphold or strike down government actions. This Article takes Holder v. Humanitarian Law Project as its case study. Part I of the Article reviews the Supreme Court’s 2010 decision upholding application of the criminal prohibition on material support of a foreign terrorist organization to human rights advocates’ training of such groups in international humanitarian law and human rights law. The case reveals much about how the Court undertakes terrorism risk assessments and how the judiciary is likely to handle most terrorism cases going forward. The opinion also illustrates the Court’s tendency to fall prey to cognitive errors and biases in undertaking risk assessments even when stating it is deferring to other branches’ factual determinations. The decision also presages a reduced standard of evidence and suspicion in the name of preventing terrorism in the criminal context. Given the government’s increased emphasis on terrorism, there is reason to worry the standard will infect the criminal justice system. Finally, these findings of fact undermine the Court’s credibility because they will be perceived by the public as bad faith efforts to masquerade personal policy preferences as empirical facts. Part II of the Article explores the literature on decision making and risk assessment and how certain dread risks can influence people’s decisions, particularly those of judges. Part II does not limit the discussion to Sunstein’s focus on cognitive errors but builds on Dan Kahan, Paul Slovic, and others’ critique of that account by also reviewing social and cultural influences that affect a person or a judge’s perception of risk. Part III then examines various court opinions, in particular Humanitarian Law Project, to explore how these errors and influences manifest. Next Part IV addresses and ultimately rejects judicial deference as a means to adapting to the concomitant errors of judicial review of terrorism-related matters. Finally, Part V proposes solutions that will enable courts to overcome cognitive biases and other social and cultural influences. The Article concludes that evidentiary standards favoring those whose civil liberties are targeted is a necessary step toward overcoming particular biases that ignore probability. In addition, courts should resist writing in terms of certainty, including findings of fact, but should instead candidly disclose their uncertainty and anxiety over terrorism threats.

#### This causes ineffective risk analysis that produces bad judicial decisionmaking and mass racial discrimination—aff solves

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This section examines how courts often neglect probability in undertaking risk assessments. This cognitive error is not, however, unique to post-9/11 jurisprudence. Indeed, it appears that at times of crisis and through the special needs doctrine, the Supreme Court has long sanctioned probability neglect as an analytical tool. In Humanitarian Law Project Roberts accepted as a foregone conclusion that acts of terrorism were very likely: “The Government,” Roberts explained, “when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.” The reference to “imminent harms” is jarring; nowhere in the opinion was there any discussion of the likelihood of a terrorist attack. There was no basis for believing an attack was imminent. This was simply Roberts’ default position in the face of uncertain harm. The presumption of imminence ups the stakes. In so doing Roberts presented the Court with a form of the ticking time bomb hypothetical, or the “one percent doctrine.” That is, whatever the odds really may be, and we cannot know what they are, we should assume and act as though an attack is about to occur. The standard permits just about any imagined outcome to justify the prohibition of speech to a designated foreign terrorist group. It is also then an invitation to always err on the side of the government and feed cognitive errors and emotions rather than facilitate more deliberative reflection. Though the post-9/11 risk of terrorism may be different from prior threats, the Supreme Court has historically adopted the worst-case scenario, presuming imminence in times of perceived existential dangers. 1. Historical Examples of Presumed Imminence In Korematsu v. United States, the Court upheld the exclusion and internment of over 112,000 Japanese Americans on the grounds of the elastic idea of military necessity. Writing for the six-justice majority, Justice Black justified the decision based upon deference to the military’s determination “that all citizens of Japanese ancestry be segregated from the West Coast” because the “disloyal members of that population . . . could not be precisely and quickly ascertained.” Writing in dissent, Justice Murphy would have required the government to show that a constitutional deprivation based on “military necessity” “is reasonably related to a public danger that is so ‘immediate, imminent, and impending’ as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger,” before simply accepting the military’s judgment. The near total deference and lack of any evidentiary requirement aided the Court in its approval of “obvious racial discrimination.” Looking back at his vote upholding the exclusion, Justice Douglass acknowledged that psychological and social fears and biases inevitably played a role in the decision. The Court’s “‘members are very much a part of the community and know the fears, anxieties, cravings and wishes of their neighbors . . . The state of public opinion will often make the Court cautious when it should be bold.’” Dennis v. United States, in which the Court upheld convictions of American Communist party leaders for conspiring to “advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence,” also prescribed an approach to national security matters that permitted worst-case scenarios to trump lack of evidence of probability or imminence. Unsatisfied with earlier iterations of the “clear and present danger” test, which the Dennis Court determined were not apposite because they did not deal with a “substantial threat to the safety of the community,” such as the existential crisis posed by Communism, the Court adopted Judge Learned Hand’s rule, crafted in the Court of Appeals. The rule provided that for cases involving free speech, courts “‘must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.’” Under this analysis, however, what the rule permitted was that the graver the danger or perceived harm, the lesser the probability of such harm required in order to uphold the government action. Thus the Dennis Court articulated an iteration of the clear and present danger test that operationalized cognitive errors such as probability neglect. Brandenburg, invoked by Breyer in dissent, seemingly overruled the Dennis test, holding unconstitutional the proscription of advocacy of the use of force unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Probability becomes a more significant concern at least under First Amendment analysis. Yet as Humanitarian Law Project suggests, a variant of the Dennis rule, or its psychological antecedents, is alive and well. The threat of catastrophic attack weighs heavily on justices, justifying, it would seem, government restrictions on civil liberties, notwithstanding a low or unidentified probability. 2. Special Needs Cases The Supreme Court’s special needs line of cases also evidences a general willingness on the part of courts to ignore calculations of probability or require specific evidence where the potential harm is great. For example, in Nat’l Treasury Employees Union v. Von Raab, the Supreme Court upheld 5-4 the United States Customs Service’s required urinalysis testing for all those seeking certain promotions or transfer to certain position in the service. Justice Kennedy explained that where “the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.” Justice Scalia dissented, objecting to the lack of evidence that there was a high level of drug use or that such drug use presented a serious harm. Attributing the policy to only a “generalization” that drug use pervades all workplaces, Scalia indicated he would, however, accept simplification where “catastrophic social harm” is involved, and “no risk whatever is tolerable.” Thus we see in high risk contexts a judicial propensity to weight the harm heavily in disregard of evidence supporting the probability or imminence of that harm. Special needs cases seem to reify the “gravity of the evil” analysis of Dennis. How could the prevention of terrorism be anything but a special need that would render government efforts, however intrusive, reasonable? 3. Terrorism Hypotheticals The Supreme Court has also hypothesized in several cases that the threat of terrorism could demand deference to the political branches and diminish civil liberties protections. In City of Indianapolis v. Edmond, the Court struck down a suspicionless checkpoint intended to catch drug offenders as a violation of the Fourth Amendment because its primary purpose was crime control. Justice O’Connor, noted with approval, however, the Seventh Circuit’s assumption in its opinion below that an otherwise criminal objective would not preclude setting up a suspicionless checkpoint in an emergency situation such as “an imminent terrorist attack.” The Seventh Circuit’s full scenario involved “a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis,” leading the Indianapolis police to “block[ ] all the roads to the downtown area even though this would amount to stopping thousands of drivers without suspecting any one of them of criminal activity.” Judge Posner explained that suspicionless checks would not offend the Fourth Amendment because “[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. The Constitution is not a suicide pact.” Posner’s hypothetical involved an imminent attack; the probability was therefore high. This is the proverbial ticking time bomb. The problem with the hypothetical is it writes in to the equation a level of high probability. What level of urgency is there if it is unclear where or when the terrorist attack may be perpetrated? Justice Souter answered this question five years later with his own revealing hypothetical. The Court held in Illinois v. Caballes that the use of a narcotics detecting dog outside of a car in connection with a lawful traffic stop did not violate the Fourth Amendment. Justice Souter dissented, contending the dog sniffing constituted an unauthorized search that was not justified. While insisting that dog sniffs should be treated as searches and subjected to traditional Fourth Amendment scrutiny, Souter offered a footnoted disquisition on the terrorism exception. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk. Souter’s discussion of reasonableness appears rooted in a definition of risk that focuses on the potential harm, but is not concerned with the probability of that harm. Although he references a “demonstrated risk,” that evidence of risk appears focused solely on the “destructive or deadly” outcome, not the likelihood. This calculus, which we as a society have seemed to accept as a commonplace, is deeply rooted in probability neglect. Imminence is presumed. The bomb is always ticking. 4. Post-9/11 Worst-Case Scenarios Since the 9/11 attacks some lower courts have employed risk analyses that implicitly and explicitly consider worst-case scenarios. A worst-case scenario is, by definition, an imagining of the gravest evil. These decisions, not unlike the Court’s hypotheticals or the Dennis test, are particularly susceptible to cognitive errors of probability neglect and the affect heuristic. In its first ever written decision, the Foreign Intelligence Surveillance Court of Review addressed a FISA court’s surveillance order which restricted law enforcement officials’ communications with intelligence officials regarding the surveillance and use of it for criminal prosecution. The court observed that while the threat may not be “dispositive,” it is “a crucial factor” in determining whether a search is reasonable. One can only imagine how crucial it was for this court. In the next sentence, the court speculated, “[o]ur case may well involve the most serious threat our country faces.” Again, the court’s apprehension of the potential harm “the gravity of the evil” appeared to overwhelm any other analysis of what was a reasonable search, including probability or imminence of an attack. In similar fashion, the Second Circuit upheld New York City’s random, suspicionless searches of peoples’ bags on the subway, explaining that where the danger of a terrorist attack was so great, “immediacy” and “a specific, extant threat” were not relevant under the special needs analysis. In another case, the Second Circuit upheld restrictions on political protesters at the Republican National Convention notwithstanding objections that the security risks were “unspecified” and “generic.” Instead of requiring a specific or immediate threat, the court stated that government limitations of speech could be justified on the basis of “managing potential risks,” “consideration of the worst-case scenario” and “possible security threats.” A variant of the worst-case scenario also figured prominently in at one D.C. Circuit judge’s evaluation of the standard of proof for determining a detainee at Guantanamo is a member of al Qaeda or associated forces. Addressing the possible release of a terrorism suspect, Judge Laurence Silberman explained that “unusual incentives and disincentives” affected judges in their decisions concerning habeas for Guantanamo detainees. In contrast to the usual criminal case, in which a “good judge” might overturn a conviction where evidence is lacking even if she were certain of the defendant’s guilt, the detainee case presented a different risk analysis. Silberman expanded: “When we are dealing with detainees, candor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. One does not have to be a “Posnerian”—a believer that virtually all law and regulation should be judged in accordance with a cost/benefit analysis—to recognize this uncomfortable fact.” Therefore, Silberman reasoned, a “preponderance of the evidence” standard would be too burdensome. He speculated that none of his colleagues would “vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.” Judge Silberman may have been only speculating, but it offers a glimpse into how at least one judge, and surely some of his colleagues, undertakes risk analysis. Strikingly, Silberman not only focused on the worst-case scenario, but maintained that a lower burden of proof, lower than what the government advocated, was necessary, making it less likely the “gravity of the evil” could be “discounted by its improbability.” As we can see, in a post-9/11 world, a System 1 fear of terrorism and concomitant probability neglect might not be offset by System 2’s more deliberative faculties. As Kahneman has noted, where attitudes and beliefs are involved, which they assuredly are in the assessment of risk and related government responses, System 2 may instead function as an “apologist” or “endorser” of System 1 responses to terrorism. Thus in contemplating worst-case scenarios, judges may employ System 2 to reduce evidentiary requirements for government action intended to prevent terrorism.

#### Specifically, deference to the national security executive is co-constitutive with legal sanctioning of racism

* These trials permit these beliefs

Joo 2, Professor of Law

[Fall, 2002; Thomas W. Joo, Professor, University of California, Davis, School of Law (King Hall), “PRESUMED DISLOYAL: EXECUTIVE POWER, JUDICIAL DEFERENCE, AND THE CONSTRUCTION OF RACE BEFORE AND AFTER SEPTEMBER 11”, 34 Colum. Human Rights L. Rev. 1]

Because of its peculiar position as the official voice of society, law plays an important role in the construction of social institutions and beliefs, even those that are not typically considered "legal." The study of law and social norms and the study of expressive law focus on this aspect of law. n1 Of course, law does not make up social institutions from whole cloth, but neither is it a passive mirror of existing social beliefs. By demanding precise articulation and justification, law can transform vague and contested ideas into [\*2] legitimate and even enforceable concepts. In so doing, the law not only reflects social institutions but actively constructs them. Critical race theory teaches that race is one of the social institutions shaped by law. Law helps define the boundaries of racial groups. n2 Moreover, the legal treatment of racial groups disseminates and legitimates ideas about the supposed characteristics of members of those groups. n3 For example, American law and society have a long tradition of treating non-White immigrants and their descendants (including U.S. citizens) as permanently foreign and un-assimilable. n4 In times of conflict or perceived conflict with foreign powers, the presumption of foreignness gives rise to a further presumption that these "permanent foreigners" are loyal to those nations and disloyal to America. Our government and law often give official approval of the presumption of disloyalty and thus help to inscribe disloyalty as a racial characteristic. This is an important step in the ongoing process of constructing the meaning of racial categories. In the wake of the terrorist attacks of September 11, 2001, Arab, South Asian, and Muslim Americans have borne the brunt of the presumptions of foreignness and disloyalty. Previously, the foreignness and disloyalty presumptions have been central to the construction of the "Asian"/"Oriental" racial category in America. Thus, although current American usage does not usually apply the racial labels "Asian" and "Oriental" to Arab, South Asian, or Muslim Americans, n5 Asian American legal history holds many lessons about their racial construction since September 11. In the years just prior to September 11, Chinese Americans were the main targets of the "Oriental" disloyalty presumption. The investigation of the American nuclear scientist Wen Ho Lee was the most prominent example of [\*3] this focus. During World War II, the Japanese American internment provided the most vivid and notorious example of the outrages the disloyalty presumption can create. Part I of this Article sets the stage with a description of the Wen Ho Lee investigation. Part II places the Lee case in a larger context. The Lee case implicates racialized presumptions of "Oriental" foreignness and disloyalty that have consistently influenced Asian American legal history, most notoriously in the internment of Japanese Americans during World War II. Part III critiques the courts' deference to the executive branch in the Supreme Court's internment cases and the Lee case. This type of deference does twofold damage. First, and most obviously, it cedes excessive power to the executive branch. Second, by relying on the racial presumption of disloyalty, it constructs the meaning of the "Oriental" racial category to include disloyalty and legitimates the analytical relevance of such racial myths. Finally, Part IV will look at the "war on terrorism" as a new example of similar presumptions in action in another ongoing episode of racial construction. In the modern post-segregation era, the law rarely makes explicit reference to race. But the law often gives government agents discretion to act within broad race-neutral parameters. If discretion is broad enough, racial assumptions can work their way into the application of discretion. The most commonly recognized example of this phenomenon is the police practice of racially profiling suspects. In many areas, police officers have stopped African American drivers or pedestrians at disproportionate rates without significant reasons, or treated African American suspects more harshly than non-Black suspects. n6 The disproportionality is at least partly due to the racial stereotype, held by individual officers or the law enforcement culture, that an African American person (especially a young man) is likely to be a criminal. n7 Similarly, even though laws may not explicitly discriminate against Asian Americans today, Asian Americans may be the subject of racial profiling based on the stereotype of Oriental disloyalty. Wen [\*4] Ho Lee may have been a victim of this kind of thinking. Many of the individuals caught up in the September 11 investigation may be as well. It is critical to recognize the threads that connect the internment, the Lee investigation, the "war on terrorism," and police use of racial profiling. The concept of "racism" should not be limited to specific or isolated acts or policies explicitly based on discriminatory hatred. That view focuses on the moral blameworthiness of the "racist." Race and racism should be viewed as overarching processes and structures that result in subordination of certain people based on their supposed membership in a "non-White" group. n8 This approach emphasizes the effect on the persons who are "raced" - that is, the persons who are the objects of racial thinking. It also acknowledges that law and policy can construct and communicate racial thinking even when they are not explicitly based on race. As we know from the debate over racial profiling in conventional criminal law enforcement prior to September 11, it is difficult to determine whether racial stereotyping is involved when government policy is not based explicitly on race. But the absence of explicit stereotyping does not necessarily mean that government actions are not influenced by racial stereotypes. n9 Negative racial stereotypes are deeply ingrained in our culture and history, and thus reflected in the law and in government conduct. When government acts are consistent with historical discriminatory assumptions and are difficult to explain on race-neutral grounds, racialized assumptions should be considered a plausible explanation. Our society relies heavily on judicial and public scrutiny to control abuses of power by executive agencies such as law enforcement and the military. This requires judges, the press, and the public to take into account the unconscious and pervasive nature of racism. The Japanese American internment, and more recently the Wen Ho Lee [\*5] case, show how excessive judicial and public deference to executive discretion in the name of national security can permit racial scapegoating. Simultaneously, accepting racial scapegoating as a policy justification can permit the expansion of unchecked executive discretion. The current "war against terrorism" shows the same forces at work once again.

#### Applying standardized burdens of proof solves deference and cognitive errors in judicial decisionmaking

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[02/25/2013, Avidan Cover is an Assistant Professor; Associate Director, Institute for Global Security Law and Policy, “PRESUMED IMMINENCE: JUDICIAL RISK ASSESSMENT IN THE POST-9/11 WORLD” works.bepress.com/avidan\_cover/3/‎]

This section proposes a way forward in which judicial review is less deferential to the political branches and less subject to the various cognitive errors that generally pervade risk assessments. Building on Cass Sunstein’s framework for judicial analysis, which attempts to counteract the Precautionary Principle’s adverse effects, this section proposes refinements to that framework. In particular, I propose that courts should apply burdens of proof and presumptions regarding evidence that favor the persons or groups whose civil liberties are curtailed. Second, courts should insist on specific evidence that supports deprivations of liberty, particularly those aimed at minority groups. In light of courts’ tendencies to defer to government interpretations of evidence and dilute evidentiary requirements, imposing set standards may counter these propensities. Finally, drawing from literature on the regulation of judicial emotions I propose that courts adopt candid disclosures, in the mien of Judges Lipez and Silberman, concerning the post-9/11 heuristic’s impact on their thinking. These admissions are more likely to earn the court trust in the public discourse of terrorism in a post-9/11 world. A. Adjusting Sunstein’s Framework Cass Sunstein accepts both that courts lack information and expertise to gauge whether curtailing civil liberties may be justified and that the probability of an attack may defy estimation. Notwithstanding these institutional limitations, Sunstein proposes a framework for judges to review government counterterrorism measures. Specifically, courts should (1) require restrictions on civil liberties to be authorized by the legislature; (2) exact special scrutiny to measures that restrict the liberty of members of identifiable minority groups, because the ordinary political safeguards are unreliable when the burdens imposed by law are not widely shared; and (3) apply second-order balancing because case-by-case ad hoc balancing is more likely to permit excessive intrusions. How might Humanitarian Law Project have fared in Sunstein’s framework? Congress’s passage of the material support law suggests that a court should defer under the first prong. However, the ambiguity as to whether the teaching of peaceful advocacy constitutes “training,” or “expert advice or assistance,” under the material support ban would warrant careful judicial review. Under the second prong, because the ban targets political speech it would also deserve special scrutiny. Roberts may have come fairly close to applying the level scrutiny envisioned by Sunstein as he analyzed the law’s application somewhere between strict scrutiny and that reserved for conduct. Finally, what second order balancing applies? Sunstein identifies the considerations of imminence and likelihood from Brandenburg as factors a court might consider. It was precisely these elements that Breyer asked to be considered in his dissent. But would the second order balancing have made a difference to Roberts? The answer is almost certainly no. And it is this fact that illustrates the limitations of Sunstein’s proposal. Just as the gravity of the harm may be exaggerated, the probability and imminence of that harm also may be overstated. Much of this may be attributed to cultural cognition, Roberts’ understanding that we now live in a “different world.” As a result, Roberts, like many other judges, appeared to presume the probability and imminence of an attack. Sunstein’s second example of torture similarly illustrates the inevitably subjective calculations, or fact finding, that also pervade second-order balancing. Theorizing that torture might be justified in a specific instance under ad hoc balancing, Sunstein contends that utilitarian arguments of the potential for widespread and unjustified torture would lead courts not to approve its isolated use. But it’s not clear that these utilitarian considerations would make a judge any more likely to strike down the use of torture. Based on various biases and cultural affinities, courts could come to different conclusions, even if this second order balancing is adopted, that the potential number of lives saved by torture could offset significant numbers of lives wrongly tortured. Judge Silberman adverted to this in his acceptance of the idea of letting a potentially guilty man go free in the criminal context based on second-order considerations, and in his refusal to authorize the release of a possible al Qaeda detainee because of the “infinitely greater downside risk to our country.” As a result, specific standards of evidence that the government must satisfy in order to justify infringements of civil liberties should be grafted onto the Sunstein framework. These standards should favor the individual or groups whose liberties may be infringed because the government is likely to pursue measures that not only disregard probability but are also calculated to curry popular favor. Researchers found in a series of studies that judgments of blameworthiness for failing to prevent an attack are far more likely to affect anti-terror budget priorities than probability judgments. These studies’ authors concluded that because people blame policy makers more for high consequence events than for more probable ones, policy makers will be tempted to “prevent attacks that are more severe and upsetting without sufficiently balancing the attack’s likelihood against its outcome.” To counteract this emotional tendency, the studies’ authors suggested that policy makers explicitly consider likelihood data in formulating counterterrorism policy. Similarly, without prescribed evidentiary standards, courts are likely to craft opinions that defer to the government’s interpretation of evidence and ignore probability and imminence, often by diluting the evidentiary requirements to the point where they favor the government. Indeed, Roberts decried the dissent’s call in Humanitarian Law Project for “detail,” “specific facts,” “specific evidence,” and “hard proof” “that [the advocates’] activities will support terrorist attacks.” Rather, it was sufficient to rely on the Blood and Belief-sourced notion that “[a] foreign organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.” And Roberts was content to rely simply on the idea that “[t]his possibility is real, not remote.” But failing to require any demonstrable risk when the First Amendment and national security conflict, invites imaginings of the possible and plausible, without sufficient regard for the probable. Applying such a rule, Breyer argued, will grant the government a victory in every instance. Breyer’s and Roberts’ dispute over the quantum of evidence required to establish a connection between the human rights advocates’ speech and terrorist attacks reverberates in the lower courts. This has played out most fully in the post-Boumediene litigation in the D.C. Circuit and district courts. In most instances, the D.C. Circuit has crafted evidentiary standards that benefit the government. For example, the D.C. Circuit has held that the government need only show by a preponderance of the evidence that a detainee is a member of al Qaeda or associated forces. Yet many of the judges have chafed at even the preponderance standard, advocating a lesser burden of proof. Not content with the reduced burden of proof, the D.C. Circuit also held that government intelligence reports enjoy a presumption of regularity. The D.C. Circuit has also insisted that courts undertake “conditional probability analysis,” or a “mosaic approach,” which entails reviewing evidence collectively as opposed to in isolation. The practical effect of these decision has been to, in the words of D.C. Circuit Judge David Tatel, “mov[e] the goal posts,” and “call[ ] the game in the government’s favor.” Humanitarian Law Project and the post-Boumediene litigation demonstrate that in the absence of clearly prescribed evidentiary standards, courts will craft a set of standards that support the government’s contentions, fearful of both the potential for harm and the public’s ire. Thus my proposal requires that burdens of proof be placed squarely on the government and that presumptions about evidence should not tilt against the person or group whose liberty interest has been implicated. This proposal does not ignore valid security interests or call the game in civil liberties’ favor. What it does recognize, however, is that the government, and judges, often overstate the harm, the probability, and imminence of terrorist threats. In order to justify a limitation on a liberty interest, the government must provide specific evidence supporting its assessments of the danger, probability, and imminence of a terrorist attack. Evidence must rise above generality and speculation. Courts should also adopt Cristina Wells’ proposed refined balancing, which entails clarifying the interests implicated and examining the government’s evidence supporting curtailment of the protected activity. A prescribed set of questions or checklist might have the salutary effect of moving judges from an intuitive process to a more deliberative one. Moreover, requiring such specificity is consistent with Philip Tetlock’s admonition that “we as a society would be better off if participants in policy debates stated their beliefs in testable forms.” This approach can only obtain greater accuracy and accountability of all participants, including the government, experts, and judges. Finally, requiring the government to meet a substantial burden of proof should not be alarming. It is hard to understand, for example, how a “clear and convincing” burden of proof in the detention context would prize civil liberty too dearly. This is not an unbearable burden for the government. As Baher Azmy argues, courts have applied this standard in a variety of sensitive and complex contexts including the pretrial detention of people for dangerousness, the civil commitment of “sexually violent predators,” and the commitment of those found not guilty by reason of insanity. A lesser standard is more likely to feed biases, neglecting probability and presuming imminence.

### Plan

#### The United States federal government should apply burdens of proof and presumptions regarding evidence in habeas corpus hearings that favor individuals in military detention.

### Risk Analysis

#### Contention 2 is Risk Analysis

#### The dominance of “any risk logic” that pervades judicial decision-making is a direct parallel to the debate community—instead of “possibilistic thinking,” we believe “probabilistic thinking” should be the frame for the debate

#### Possibilistic Thinking impedes skills development—the critical thinking skills that debate teaches become useless outside of the activity because we can only use them to think in terms of extremes that don’t reflect reality—as a result, decision-making becomes useless

#### don’t assume every part of their DA is true – instead you should have inherent skepticism

Schneier 10, Fellow at Harvard Law School

[05/12/10, Bruce Schneier is a fellow at the Berkman Center for Internet & Society at Harvard Law School and a program fellow at the New America Foundation's Open Technology Institute, He is an an internationally renowned security technologist, called a "security guru" by The Economist. He is the author of 12 books -- including Liars and Outliers: Enabling the Trust Society Needs to Thrive -- as well as hundreds of articles, essays, and academic papers. His influential newsletter "Crypto-Gram" and his blog "Schneier on Security" are read by over 250,000 people. He has testified before Congress, is a frequent guest on television and radio, has served on several government committees, and is regularly quoted in the press. Schneier is a fellow at the Berkman Center for Internet and Society at Harvard Law School, a program fellow at the New America Foundation's Open Technology Institute, a board member of the Electronic Frontier Foundation, an Advisory Board Member of the Electronic Privacy Information Center, and the Chief Technology Officer at Co3 Systems, Inc. He has a Ph. D. from the University of Westminster by the Department of Electronics and Computer Science, “Worst-case thinking makes us nuts, not safe”, <http://www.cnn.com/2010/OPINION/05/12/schneier.worst.case.thinking/>] we do not endorse this author’s intent of ableist language and apologize for it, we have left it intact to preserve the article’s completeness

(CNN) -- At a security conference recently, the moderator asked the panel of distinguished cybersecurity leaders what their nightmare scenario was. The answers were the predictable array of large-scale attacks: against our communications infrastructure, against the power grid, against the financial system, in combination with a physical attack. I didn't get to give my answer until the afternoon, which was: "My nightmare scenario is that people keep talking about their nightmare scenarios." There's a certain ~~blindness~~ that comes from worst-case thinking. An extension of the precautionary principle, it involves imagining the worst possible outcome and then acting as if it were a certainty. It substitutes imagination for thinking, speculation for risk analysis and fear for reason. It fosters powerlessness and vulnerability and magnifies social ~~paralysis~~. And it makes us more vulnerable to the effects of terrorism. Worst-case thinking means generally bad decision making for several reasons. First, it's only half of the cost-benefit equation. Every decision has costs and benefits, risks and rewards. By speculating about what can possibly go wrong, and then acting as if that is likely to happen, worst-case thinking focuses only on the extreme but improbable risks and does a poor job at assessing outcomes. Second, it's based on flawed logic. It begs the question by assuming that a proponent of an action must prove that the nightmare scenario is impossible. Third, it can be used to support any position or its opposite. If we build a nuclear power plant, it could melt down. If we don't build it, we will run short of power and society will collapse into anarchy. If we allow flights near Iceland's volcanic ash, planes will crash and people will die. If we don't, organs won't arrive in time for transplant operations and people will die. If we don't invade Iraq, Saddam Hussein might use the nuclear weapons he might have. If we do, we might destabilize the Middle East, leading to widespread violence and death. Of course, not all fears are equal. Those that we tend to exaggerate are more easily justified by worst-case thinking. So terrorism fears trump privacy fears, and almost everything else; technology is hard to understand and therefore scary; nuclear weapons are worse than conventional weapons; our children need to be protected at all costs; and annihilating the planet is bad. Basically, any fear that would make a good movie plot is amenable to worst-case thinking. Fourth and finally, worst-case thinking validates ignorance. Instead of focusing on what we know, it focuses on what we don't know -- and what we can imagine. Remember Defense Secretary Donald Rumsfeld's quote? "Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don't know we don't know." And this: "the absence of evidence is not evidence of absence." Ignorance isn't a cause for doubt; when you can fill that ignorance with imagination, it can be a call to action. Even worse, it can lead to hasty and dangerous acts. You can't wait for a smoking gun, so you act as if the gun is about to go off. Rather than making us safer, worst-case thinking has the potential to cause dangerous escalation. The new undercurrent in this is that our society no longer has the ability to calculate probabilities. Risk assessment is devalued. Probabilistic thinking is repudiated in favor of "possibilistic thinking": Since we can't know what's likely to go wrong, let's speculate about what can possibly go wrong. Worst-case thinking leads to bad decisions, bad systems design, and bad security. And we all have direct experience with its effects: airline security and the TSA, which we make fun of when we're not appalled that they're harassing 93-year-old women or keeping first-graders off airplanes. You can't be too careful! Actually, you can. You can refuse to fly because of the possibility of plane crashes. You can lock your children in the house because of the possibility of child predators. You can eschew all contact with people because of the possibility of hurt. Steven Hawking wants to avoid trying to communicate with aliens because they might be hostile; does he want to turn off all the planet's television broadcasts because they're radiating into space? It isn't hard to parody worst-case thinking, and at its extreme it's a psychological condition. Frank Furedi, a sociology professor at the University of Kent, writes: "Worst-case thinking encourages society to adopt fear as one of the dominant principles around which the public, the government and institutions should organize their life. It institutionalizes insecurity and fosters a mood of confusion and powerlessness. Through popularizing the belief that worst cases are normal, it incites people to feel defenseless and vulnerable to a wide range of future threats." Even worse, it plays directly into the hands of terrorists, creating a population that is easily terrorized -- even by failed terrorist attacks like the Christmas Day underwear bomber and the Times Square SUV bomber. When someone is proposing a change, the onus should be on them to justify it over the status quo. But worst case thinking is a way of looking at the world that exaggerates the rare and unusual and gives the rare much more credence than it deserves. It isn't really a principle; it's a cheap trick to justify what you already believe. It lets lazy or biased people make what seem to be cogent arguments without understanding the whole issue. And when people don't need to refute counterarguments, there's no point in listening to them.

#### Independently, this means you should prioritize probable systemic impacts over possibilistic spectacular impacts—the 9/11 focus on big unlikely impacts means we ignore violence that ends up causing the most deaths

Nixon ‘11

(Rob, Rachel Carson Professor of English, University of Wisconsin-Madison, Slow Violence and the Environmentalism of the Poor, pgs. 12-14)

Over the past two decades, this high-speed planetary modification has been accompanied (at least for those increasing billions who have access to the Internet) by rapid modifications to the human cortex. It is difficult, but necessary, to consider simultaneously a geologically-paced plasticity, however relatively rapid, and the plasticity of brain circuits reprogrammed by a digital world that threatens to "info-whelm" us into a state of perpetual distraction. If an awareness of the Great Acceleration is (to put it mildly) unevenly distributed, the experience of accelerated connectivity (and the paradoxical disconnects that can accompany it) is increasingly widespread. In an age of degraded attention spans it becomes doubly difficult yet increasingly urgent that we focus on the toll exacted, over time, by the slow violence of ecological degradation. We live, writes Cory Doctorow, in an era when the electronic screen has become an "ecosystem of interruption technologies.''" Or as former Microsoft executive Linda Stone puts it, we now live in an age of "continuous partial attention.?" Fast is faster than it used to be, and story units have become concomitantly shorter. In this cultural milieu of digitally speeded up time, and foreshortened narrative, the intergenerational aftermath becomes a harder sell. So to render slow violence visible entails, among other things, redefining speed: we see such efforts in talk of accelerated species loss, rapid climate change, and in attempts to recast "glacial"-once a dead metaphor for "slow-as a rousing, iconic image of unacceptably fast loss. Efforts to make forms of slow violence more urgently visible suffered a setback in the United States in the aftermath of 9/11, which reinforced a spectacular, immediately sensational, and instantly hyper-visible image of what constitutes a violent threat. The fiery spectacle of the collapsing towers was burned into the national psyche as the definitive image of violence, setting back by years attempts to rally public sentiment against climate change, a threat that is incremental, exponential, and far less sensationally visible. Condoleezza Rice's strategic fantasy of a mushroom cloud looming over America if the United States failed to invade Iraq gave further visual definition to cataclysmic violence as something explosive and instantaneous, a recognizably cinematic, immediately sensational, pyrotechnic event. The representational bias against slow violence has, furthermore, a critically dangerous impact on what counts as a casualty in the first place. Casualties of slow violence-human and environmental-are the casualties most likely not to be seen, not to be counted. Casualties of slow violence become light-weight, disposable casualties, with dire consequences for the ways wars are remembered, which in turn has dire consequences for the projected casualties from future wars. We can observe this bias at work in the way wars, whose lethal repercussions spread across space and time, are tidily bookended in the historical record. Thus, for instance, a 2003 New York Times editorial on Vietnam declared that" during our dozen years there, the U.S. killed and helped kill at least 1.5 million people.'?' But that simple phrase "during our dozen years there" shrinks the toll, foreshortening the ongoing slow-motion slaughter: hundreds of thousands survived the official war years, only to slowly lose their lives later to Agent Orange. In a 2002 study, the environmental scientist Arnold Schecter recorded dioxin levels in the bloodstreams of Bien Hoa residents at '35 times the levels of Hanoi's inhabitants, who lived far north of the spraying." The afflicted include thousands of children born decades after the war's end. More than thirty years after the last spray run, Agent Orange continues to wreak havoc as, through biomagnification, dioxins build up in the fatty tissues of pivotal foods such as duck and fish and pass from the natural world into the cooking pot and from there to ensuing human generations. An Institute of Medicine committee has by now linked seventeen medical conditions to Agent Orange; indeed, as recently as 2009 it uncovered fresh evidence that exposure to the chemical increases the likelihood of developing Parkinson's disease and ischemic heart disease." Under such circumstances, wherein long-term risks continue to emerge, to bookend a war's casualties with the phrase "during our dozen years there" is misleading: that small, seemingly innocent phrase is a powerful reminder of how our rhetorical conventions for bracketing violence routinely ignore ongoing, belated casualties.

#### There are two specific practices you should be skeptical of

#### First—the reliance on secondary and unqualified sources masquerading as experts that use anecdotes and isolated incidents to speak about trends give unrealistic impacts the appearance of legitimacy

Glassner 99, President of Lewis and Clark and Former Professor of Sociology

[1999, Barry Glassner is the president of Lewis & Clark College and was formerly professor of sociology and executive vice provost at the University of Southern California, which honored him in 2002 with its highest research award, “THE CULTURE OF FEAR Why Americans Are Afraid of the Wrong Things”, available on enbookfi]

The pressing question is the same now as it was in 1938: Why do People embrace improbable pronouncements? How did listeners to the [war of the] Worlds" manage to disregard four announcements during °adcast that identified the program as a radio play? Why do peoay believe in the existence of mysterious new illnesses even medical scientists say they do not exist? Why do we entertain preposterous claims about husband abuse, granny dumping, or the middle-class romance with heroin? Soon after the broadcast of "War of the Worlds," Hadley Cantril, a social psychologist at Princeton, set out to determine why more than a million Americans had been frightened and thousands found themselves "praying, crying, fleeing frantically to escape death from the Martians." In a book that resulted from his research— The Invasion from Mars, first published in 1940-Cantril refuted social scientists of his day who presumed, as one put it, that "as good an explanation as any for the panic is that all the intelligent people were listening to Charlie McCarthy" on the rival network. Based on his analysis of the broadcast itself and interviews with people who heard it, Cantril showed that the explanation lay not in a lack of intelligence on the part of listeners but in the acumen of the program's producers and in social conditions at the time. The program had a credible feel, Cantril suggested, largely because it featured credible-sounding people professing to report scientific or firsthand information. The character played by Orson Welles, Professor Richard Pierson of the Princeton Observatory, was only one of several with distinguished titles and affiliations. Other professors and scientists spoke as well, and at various points in the drama people identified as secretary of the interior, vice-president of the Red Cross, and commander of a state militia chimed in. In nearly every episode of fear mongering I discussed in the previous chapters as well, people with fancy titles appeared. Hardly ever were they among the leading figures in their field. Often they were more akin to the authorities in "War of the Worlds": gifted orators with elevated titles. Arnold Nerenberg and Marty Rimm come immediately to mind. Nerenberg (a.k.a. "America's road-rage therapist") is a psychologist quoted uncritically in scores of stories even though his alarming statistics and clinical descriptions have little scientific evidence behind them. Rimm, the college student whom Time glorified in its notorious "cyberporn" issue as the "Principal Investigator" of "a research team," is almost totally devoid of legitimate credentials. I have found that for some species of scares—Internet paranoia among them—secondary scholars are standard fixtures. Bona fide ex-perts easily refute these characters' contentions, yet they continue to appear nonetheless. Take scares about so-called Internet addiction, a malady ludicrously alleged to afflict millions of people and sometimes cause death. Far and away the most frequently quoted "expert" has been psychologist Kimberly Young, whom journalists dubbed "the world's first global shrink" (Los Angeles Times}. Her "major study" (Psychology Today] turns out to have been based on unverifiable reports from a nonscientific sample of people who responded to her postings online. Young's research was rebutted on basic methodological grounds by scholars within and outside her field. Yet she managed to give Internet addiction a clinical air and tie it to serious afflictions by talking of "a newfound link between Net addiction and depression" (USA Today) and offering ill-suited similes. "It's like when a smoker thinks they can quit anytime they want, but when they try they can't," Young told a reporter.3 Fear mongers make their scares all the more credible by backing up would-be experts' assertions with testimonials from people the audience will find sympathetic. In "War of the Worlds" those people were actors playing ordinary citizens who said they had seen the Martians, experienced the destruction they wrought, or had a plan for how to survive the attack. In the stories I studied comparable characters appear: victims of Gulf War Syndrome, multiple chemical sensitivity, and breast implant disorders who testify before congressional panels, juries, and talk show audiences; "seasoned travelers" who express their concerns to reporters at airports after plane crashes; former friends and neighbors of women who have murdered their children. Professional narrators play an important role too in transforming something implausible into something believable. Cantril observed of 'War of the Worlds" that "as the less credible bits of the story begin to enter, the clever dramatist also indicates that he, too, has difficulty in believing what he sees." When we are informed that a mysterious object is not a meteorite but a spaceship, the reporter declares, "this is the most terrifying thing I have ever witnessed." Anchors on TV newsmagazines utter similar statements at the beginning or end of scare stories. "It's frightening," NBC's Katie Couric says as she introduces a report suggesting that "shots designed to protect your children might actually hurt or cripple them." ABC's Barbara Walters opines at the conclusion of a report about a woman who falsely accused her father of sexual abuse, "What a terrifying story."4 Statements of alarm by newscasters and glorification of wannabe experts are two telltale tricks of the fear mongers' trade. In the preceding chapters I pointed out others as well: the use of poignant anecdotes in place of scientific evidence, the christening of isolated incidents as trends, depictions of entire categories of people as innately dangerous. If journalists would curtail such practices, there would be fewer anxious and misinformed Americans. Ultimately, though, neither the ploys that narrators use nor what Cantril termed "the sheer dramatic excellence" of their presentations fully accounts for why people in 1938 swallowed a tall tale about martians taking over New Jersey or why people today buy into tales about perverts taking over cyberspace, Uzi-toting employees taking over workplaces, heroin dealers taking over middle-class suburbs, and so forth.5 The success of a scare depends not only on how well it is expressed but also, as I have tried to suggest, on how well it expresses deeper cultural anxieties. In excerpts Cantril presents from his interviews it is clear what the primary anxiety was in his day. Another year would pass before Britain went to war with Germany, and more than three years before the United States finally joined the Allies in World War II. But by late 1939 Hitler and Mussolini were already well on their way to conquering Europe, and less than two weeks after the "War of the Worlds" broadcast Nazi mobs would destroy Jewish synagogues, homes, and shops in what came to be known as Kristallnacht. Many Americans were having trouble suppressing their fears of war and at the same time their sense of culpability as their nation declined to intervene while millions of innocent people fell prey to the barbarous Nazi and fascist regimes. For a substantial number of listeners "War of the Worlds" gave expression to those bridled feelings. Some actually rewrote the script in their minds as they listened to the broadcast. In place of martians they substituted human enemies. "I knew it some Germans trying to gas us all. When the announcer kept calling them people from Mars I just thought he was ignorant and didn't know that Hitler had sent them all," one person recalled in an interview in Cantril's study. Said another, "I felt it might be the Japanese— they are so crafty."6 Such responses were not the norm, of course. Most listeners envisioned the invaders pretty much as Welles and company described them. Yet this didn't stop some of them from making revealing connections to real dangers, "I worry terribly about the future of the Jews. Nothing else bothers me as much. I thought this might be another attempt to harm them," one person said. Reported another: "I was looking forward with some pleasure to the destruction of the entire human race and the end of the world. If we have fascist domination of the world, there is no purpose in living anyway."7 Flash forward to the 1980s and 1990s and it is not foreign fascists we have to put out of our minds in order to fall asleep at night, even if we do fantasize about hostile forces doing us great harm. (Witness the immediate presumption after the Oklahoma City bombing and the crash of TWA Flight 800 that Middle Eastern terrorists were to blame.) Mostly our fears are domestic, and so are the eerie invaders who populate them—killer kids, men of color, monster moms. The stories told about them are, like "War of the Worlds," oblique expressions of concern about problems that Americans know to be pernicious but have not taken decisive action to quash—problems such as hunger, dilapidated schools, gun proliferation, and deficient health care for much of the U.S. population. Will it take an event comparable to the Japanese attack on Pearl Harbor to convince us that we must join together as a nation and tackle these problems? At the start of the new century it ought to be considerably easier for us to muster our collective will and take decisive action than it was for our own parents and grandparents six decades earlier. This time we do not have to put our own lives or those of our children at risk on battlefields halfway around the globe. We do have to finance and organize a collective effort, which is never a simple matter, but compared with the wholesale reorientation of the U.S. economy and government during World War II, the challenge is not overwhelming. Fear mongers have knocked the optimism out of us by stuffing us full of negative presumptions about our fellow citizens and social institutions. But the United States is a wealthy nation. We have the resources to feed, house, educate, insure, and disarm our communities if we resolve to do so. There should be no mystery about where much of the money and labor can be found—in the culture of fear itself. We waste tens of billions of dollars and person-hours every year on largely mythical hazards like road rage, on prison cells occupied by people who pose little or no danger to others, on programs designed to protect young people from dangers that few of them ever face, on compensation for victims of metaphorical illnesses, and on technology to make airline travel-which is already safer than other means of transportation—safer still. We can choose to redirect some of those funds to combat serious dangers that threaten large numbers of people. At election time we can choose candidates that proffer programs rather than scares.8 Or we can go on believing in martian invaders.’

#### Second—the use of multi-chain internal link and scenarios eclipse reality by obscuring the actual likelihood of the impact—the conjunctive fallacy dictates that they’re less likely

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[2008, Eliezer Yudkowsky is a Research Fellow at the Machine Intelligence Research Institute “Cognitive Biases Potentially Aﬀecting Judgment of Global Risks.”, In Global Catastrophic Risks, edited by Nick Bostrom and Milan M. Ćirković, 91–119]

The conjunction fallacy similarly applies to futurological forecasts. Two independent sets of professional analysts at the Second International Congress on Forecasting were asked to rate, respectively, the probability of “A complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983” or “A Russian invasion of Poland, and a complete suspension of diplomatic relations between the USA and the Soviet Union, sometime in 1983.” The second set of analysts responded with significantly higher probabilities (Tversky and Kahneman 1983). In Johnson et al. (1993), MBA students at Wharton were scheduled to travel to Bangkok as part of their degree program. Several groups of students were asked how much they were willing to pay for terrorism insurance. One group of subjects was asked how much they were willing to pay for terrorism insurance covering the flight from Thailand to the US. A second group of subjects was asked how much they were willing to pay for terrorism insurance covering the round-trip flight. A third group was asked how much they were willing to pay for terrorism insurance that covered the complete trip to Thailand. These three groups responded with average willingness to pay of $17.19, $13.90, and $7.44 respectively. According to probability theory, adding additional detail onto a story must render the story less probable. It is less probable that Linda is a feminist bank teller than that she is a bank teller, since all feminist bank tellers are necessarily bank tellers. Yet human psychology seems to follow the rule that adding an additional detail can make the story more plausible. People might pay more for international diplomacy intended to prevent nanotechnological warfare by China, than for an engineering project to defend against nanotechnological attack from any source. The second threat scenario is less vivid and alarming, but the defense is more useful because it is more vague. More valuable still would be strategies which make humanity harder to extinguish without being specific to nanotechnologic threats—such as colonizing space, or see Yudkowsky (2008) on AI. Security expert Bruce Schneier observed (both before and after the 2005 hurricane in New Orleans) that the U.S. government was guarding specific domestic targets against “movie-plot scenarios” of terrorism, at the cost of taking away resources from emergency-response capabilities that could respond to any disaster (Schneier 2005). Overly detailed reassurances can also create false perceptions of safety: “X is not an existential risk and you don’t need to worry about it, because A, B, C, D, and E”; where the failure of any one of propositions A, B, C, D, or E potentially extinguishes the human species. “We don’t need to worry about nanotechnologic war, because a UN commission will initially develop the technology and prevent its proliferation until such time as an active shield is developed, capable of defending against all accidental and malicious outbreaks that contemporary nanotechnology is capable of producing, and this condition will persist indefinitely.” Vivid, specific scenarios can inflate our probability estimates

of security, as well as misdirecting defensive investments into needlessly narrow or implausibly detailed risk scenarios. More generally, people tend to overestimate conjunctive probabilities and underestimate disjunctive probabilities (Tversky and Kahneman 1974). That is, people tend to overestimate the probability that, e.g., seven events of 90% probability will all occur. Conversely, people tend to underestimate the probability that at least one of seven events of 10% probability will occur. Someone judging whether to, e.g., incorporate a new startup, must evaluate the probability that many individual events will all go right (there will be sufficient funding, competent employees, customers will want the product) while also considering the likelihood that at least one critical failure will occur (the bank refuses a loan, the biggest project fails, the lead scientist dies). This may help explain why only 44% of entrepreneurial ventures2 survive after 4 years (Knaup 2005). Dawes (1988, 133) observes: “In their summations lawyers avoid arguing from disjunctions (‘either this or that or the other could have occurred, all of which would lead to the same conclusion’) in favor of conjunctions. Rationally, of course, disjunctions are much more probable than are conjunctions.” The scenario of humanity going extinct in the next century is a disjunctive event. It could happen as a result of any of the existential risks we already know about—or some other cause which none of us foresaw. Yet for a futurist, disjunctions make for an awkward and unpoetic-sounding prophecy.

#### If we win indicts to the meta-structure of their arguments, it precedes individual risk assessments—effective decisionmaking is impossible in the mindset of possibilistic thinking

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[2009, Frank Furedi is a professor of Sociology, School of Social Policy, Sociology, Social Research, The University of Kent, Canterbury, “PRECAUTIONARY CULTURE AND THE RISE OF POSSIBILISTIC RISK ASSESSMENT”, Erasmus Law Review Volume 2 Issue 2]

The emergence of a speculative approach towards risk is paralleled by the growing influence of possibilistic thinking, which invites speculation about what can possibly go wrong. In our culture of fear, frequently what can possibly go wrong is equated with what is likely to happen. The shift towards possibilistic thinking is driven by a powerful sense of cultural pessimism about knowing and an intense feeling of apprehension about the unknown. The cumulative outcome of this sensibility is the routinisation of the expectation of worst possible outcomes. The principal question posed by possibilistic thinking, ‘what can possibly go wrong’, continually invites the answer ‘everything’. The connection between possibilistic and worse-case thinking is self-consciously promoted by the advocates of this approach. The American sociologist Lee Clarke acknowledges that ‘worst case thinking is possibilistic thinking’ and that it is ‘very different’ from the ‘modern approach to risk’ which is ‘based on probabilistic thinking’.18 However he believes that the kinds of dangers confronting humanity today require us to expect the worst and demand a different attitude towards risk. He claims that: Modern social organization and technologies bring other new opportunities to harm faraway people. Nuclear explosions, nuclear accidents, and global warming are examples. We are increasingly ‘at risk’ of global disasters, most if not all of which qualify as worst cases.19 Warning us about ‘how vulnerable we are to worst case events’, Clarke concludes that ‘we ought to prepare for possible untoward events that are out of control and overwhelming’.20 Politicians and their officials have also integrated worse-case thinking into their response to terrorism and to other types of catastrophic threats. Appeals to the authority of risk assessment still play an important role in policy-making. However, the prevailing culture of fear dictates that probabilistic-led risk management constantly competes with and often gives way to possibilistic-driven worst-case policies. As an important study of Blair’s policy on terrorism notes, he combines an appeal to risk assessment with worse-case thinking. David Runciman, the author of this study, observed that in his response to the threat of terrorism, ‘Blair relied on expert risk assessment and on his own intuitions’. Runciman added that Blair ‘highlighted the importance of knowing the risk posed by global terrorism, all the while insisting that when it comes to global terrorism the risks are never fully knowable’.21 In practice, the co-existence of these two forms of threat assessment tends to be resolved in favour of the possibilistic approach. The occasional demand for a restrained and low-key response to the risk of terrorism is overwhelmed by the alarmist narrative of a worse-case scenario.

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### AT Metcalf and Marguilles

#### The law is indeterminate and is no means perfect, but the alternative is worse—we should recognize the constraints of the law and use that to construct better legal strategies—their author votes for the perm

Margulies and Metcalf 11, Clinical Professor of Law

(“Terrorizing Academia” http://www.swlaw.edu/pdfs/jle/jle603jmarguilies.pdf, Joseph Margulies is a Clinical Professor, Northwestern University School of Law. He was counsel of record for the petitioners in Rasul v. Bush and Munaf v. Geren. He now is counsel of record for Abu Zubaydah, for whose torture (termed harsh interrogation by some) Bush Administration officials John Yoo and Jay Bybee wrote authorizing legal opinions. Earlier versions of this paper were presented at workshops at the American Bar Foundation and the 2010 Law and Society Association Conference in Chicago. Margulies expresses his thanks in particular to Sid Tarrow, AzizHuq, BaherAzmy, Hadi Nicholas Deeb, Beth Mertz, Bonnie Honig, and Vicki Jackson.Hope Metcalf is a Lecturer, Yale Law School. Metcalf is co-counsel for the plaintiffs/petitioners in Padilla v. Rumsfeld, Padilla v. Yoo, Jeppesen v. Mohammed, and Maqaleh v. Obama. She has written numerous amicus briefs in support of petitioners in suits against the government arising out of counterterrorism policies, including in Munaf v. Geren and Boumediene v. Bush. Metcalf expresses her thanks to Muneer Ahmad, Stella Burch Elias, Margot Mendelson, Jean Koh Peters, and Judith Resnik for their feedback, as well as to co-teachers Jonathan Freiman, RamziKassem, Harold HongjuKoh and Michael Wishnie, whose dedication to clients, students and justice continues to inspire., Journal of Legal Education, Volume 60, Number 3 (February 2011))

V. Conclusions and Implications

From the vantage of 2010, it appears the interventionist position—our position—has failed. As we see it, it failed because it was premised upon a legalistic view of rights that simply cannot be squared with the reality of the American political experience. Yet the interventionist stance holds an undeniable attraction. Of all the positions advanced since 9/11, it holds out the best promise of preserving the pluralist ideals of a liberal democracy. The challenge going forward, therefore, is to re-imagine the interventionist intellectual endeavor. To retain relevance, we must translate the lessons of the social sciences into the language of the law, which likely requires that we knock law from its lofty perch. As a beginning, scholarship should be more attuned to the limitations of the judiciary, and mindful of the complicated tendency of narratives to generate backlash and counter-narratives. But there is another tendency we must resist, and that is the impulse to nihilism—to throw up our hands in despair, with the lament that nothing works and repression is inevitable. Just how to integrate the political and the ideal is, of course, a problem that is at least as old as legal realism itself and one we do not purport to solve in this essay.154 Still, we are heartened by the creative work undertaken in other arenas, ranging from poverty law to gay rights, that explores how, done properly, lawyering (and even litigation) can make real differences in the lives of marginalized people.155 We hope that the next decade of reflections on the policies undertaken in the name of national security will follow their lead in probing not just what the law should be, but how it functions and whom it serves. We close this essay on a personal note. Margulies was counsel of record in Rasul v. Bush. He and his colleagues at the Center for Constitutional Rights began work on that litigation in November, 2001, not long after Alan Dershowitz first started to press his proposal for “torture warrants.” By the time this essay appears, Margulies’ uninterrupted involvement in these issues will have lasted more than nine years, with no sign of ending anytime soon. He vividly recalls the state of play when Rasul was filed in February, 2002, and when one of his co-counsel received a death threat at his home in New Orleans. With considerable regret, Margulies now looks back on Rasul as a failure. But in 2002, there was no other choice. The Bush Administration had created a prison beyond the law, Congress was a stony monolith, and the parents and family of lost prisoners pleaded that their loved ones not be abandoned. At that moment, there was no choice but to litigate. He would do it again tomorrow, were the circumstances the same. His mistake, for which he takes sole responsibility, was to believe that law, in an intensely legalistic society, was enough.

#### Legal and rights based detention strategies are a critical form of resistance—even if it fails, the act of demanding habeas rights affirms the life of detainees and provides a check on state violence

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[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

This Article is about the work that rights do, and the work of the lawyers who assert them on their clients‘ behalf, particularly in the face of inordinate state violence, as is the case with Guantánamo. I write this story of Guantánamo based on my experiences of nearly three years of representing a prisoner there.14 While commentators can point to an unbroken record of legal victories in Guantánamo cases at the Supreme Court,15 the view from the prisoners‘ perspective is quite different, and throws into question the claim of transformative legal practice that the Court cases might otherwise suggest. This is not to say that the lawyering has itself been a failure. Rather, I argue that instead of expecting rights-based legal contest at and around Guantánamo to produce transformative results, we might better understand it as a form of resistance to dehumanization. Such a reframing of the Guantánamo litigation invites comparison with other forms of resistance, and helps explain both the power and the limitations of legal practice in extreme instances of state violence. When placed in a human rights frame, Guantánamo is often described in terms of the government‘s denial of rights to the prisoners, but equally important has been the denial of their humanity. Guantánamo has been a project of dehumanization, in the literal sense; it has sought to expel the prisoners—consistently referred to as ―terrorists‖— from our shared understanding of what it means to be human, so as to permit, if not necessitate, physical and mental treatment (albeit in the context of interrogation) abhorrent to human beings. This has been accomplished through three forms of erasure of the human: cultural erasure through the creation of a terrorist narrative; legal erasure through formalistic legerdemain; and physical erasure through torture. While these three dimensions of dehumanization are distinct, they are also interrelated. All are pervaded by law, and more specifically, by rights. This is to say that law has been deployed to create the preconditions for the exercise of a state power so brutal as to deprive the Guantánamo prisoners of the ability to be human. In this way, Guantánamo recalls Hannah Arendt‘s formulation of citizenship as the right to have rights.16 By this she meant that without membership in the polity, the individual stood exposed to the violence of the state, unmediated and unprotected by rights. The result of such exposure, she argued, was to reduce the person to a state of bare life, or life without humanity. What we see at Guantánamo is the inverse of citizenship: no right to have rights, a rights vacuum that enables extreme violence, so as to place Guantánamo at the center of a struggle not merely for rights, but for humanity—that state of being that distinguishes human life from mere biological existence.17 In order to better understand the work that rights do, this Article explores why prisoners‘ advocates, including myself, adopted a rights-based advocacy strategy in an environment defined explicitly by the absence of rights. Since the first prisoners arrived at Guantánamo, the Bush Administration‘s position had been that they lack any rights whatsoever, under any source of law.18 Thus did the Bush Administration attempt to define a rights-free zone, through a manipulation of rights which seemed demonstrably political. And yet, despite the overwhelming evidence of politics animating law at Guantánamo, as advocates we made a conscious decision to engage in rights-based argument, and ―rights talk‖ 19 more generally. This approach finds some support in the work of rights scholars (and critical race theorists in particular) regarding the continuing vitality of rights-based approaches and the promise of ―critical legalism‖ 20 or ―radical constitutionalism‖ 21—the very kinds of progressive constitutional optimism that the Rasul and Boumediene decisions inspire. But the subsequent litigation history demands further inquiry into the political, cultural, jurisprudential, and strategic value of arguing rights in the historical moment and place of Guantá- namo. I argue that while we might hope for rights to obtain transformative effect—to close Guantánamo, for example, or to free those who are wrongfully imprisoned—at Guantánamo and in other places of extreme state violence, rights may do the more modest work of resistance. Rather than fundamentally reconfiguring power arrangements, as rights moments aspire to do, resistance slows, narrows, and increases the costs for the state‘s exercise of violence. Resistance is a form of power contestation that works from within the structures of domination.22 While it may aspire to overturn prevailing power relations, its value derives from its means as much as from its ends. Through resistance, new political spaces may open, but even if they do not, the mere fact of resistance, the assertion of the self against the violence of the state, is self- and life-affirming. Resistance is, in short, a way of staying human. This, then, is the work that rights do: when pushed to the brink of annihilation, they provide us with a rudimentary and perhaps inadequate tool to maintain our humanity. In Part I of this Article, I discuss the cultural erasure of the Guantánamo prisoners through the creation of a post-September 11 terrorist narrative, or what I term an iconography of terror, their legal erasure through the crea-tion of the now abandoned ―enemy combatant‖ 23 category and their physical erasure through torture. I contextualize these discussions with narrative descriptions of the place and space of Guantánamo, which I argue are necessary to understand the contextual nature of rights and rights claims, and the integral connection between law and narrative. In Part II, I deepen the discussion of legal erasure through critique and analysis of my representation of a teenage Canadian Guantánamo prisoner, Omar Khadr, in military commission proceedings, and through a doctrinal analysis of the shifting meanings of core legal terms in the Guantánamo legal regime. In so doing, I suggest how the experience of lawyering in and around Guantánamo helped to prove up its lawless nature. Part III considers the tactical, strategic, and theoretical values of adopting rights-based legal approaches in the rights-free zone of Guantánamo, paying particular attention to the value of rights as recognition, and ultimately arguing the importance of rights as a mode of resistance to state violence. In Part IV, I build upon this discussion of resistance by considering direct forms of resistance in which prisoners themselves have participated. In particular, I suggest the hunger strike as a paradigmatic form of prisoner resistance, and argue the lawyers‘ rights-based litigation and the prisoners‘ hunger strikes share a conceptual understanding of the relationship between rights, violence, and humanity. I conclude by reflecting on the value and limitations of reframing the work of the Guantánamo prisoners‘ lawyers as nothing more, but also nothing less, than resistance. I suggest that neither the resistance of the lawyers nor that of the prisoners may be enough to gain the prisoners‘ freedom, but that they are nonetheless essential when, as at Guantánamo, state violence is so extreme as to attempt to extinguish the human.

**Legal restraints work – the theory of the exception is self-serving and wrong**

William E. **Scheuerman 6**, Professor of Political Science at Indiana University, Carl Schmitt and the Road to Abu Ghraib, Constellations, Volume 13, Issue 1

Yet this argument relies on Schmitt’s controversial model of politics, as outlined eloquently but unconvincingly in his famous Concept of the Political. To be sure, there are intense conflicts in which it is naïve to expect an easy resolution by legal or juridical means. But the argument suffers from a troubling circularity: **Schmitt** occasionally **wants to define “political” conflicts as those irresolvable by legal** or juridical **devices in order** then **to argue against** **legal** or juridical **solutions** to them. **The claim** also **suffers from** a certain **vagueness** and lack of conceptual precision. At times, it seems to be directed against trying to resolve conflicts in the courts or juridical system narrowly understood; at other times it is directed against any legal regulation of intense conflict. The former argument is surely stronger than the latter. After all, **legal devices have undoubtedly played a positive role** **in taming** or at least minimizing the potential dangers of harsh **political antagonisms**. In the Cold War, for example, international law contributed to the peaceful resolution of conflicts which otherwise might have exploded into horrific violence, even if attempts to bring such conflicts before an international court or tribunal probably would have failed.22 Second, Schmitt dwells on the legal inconsistencies that result from modifying the traditional state-centered system of international law by expanding protections to non-state fighters. His view is that irregular combatants logically enjoyed no protections in the state-centered Westphalian model. By broadening protections to include them, international law helps undermine the traditional state system and its accompanying legal framework. Why is this troubling? The most obvious answer is that Schmitt believes that the traditional state system is normatively superior to recent attempts to modify it by, for example, extending international human rights protections to individuals against states. 23 But what if we refuse to endorse his nostalgic preference for the traditional state system? Then a sympathetic reading of the argument would take the form of suggesting that the project of regulating irregular combatants by ordinary law must fail for another reason: it rests on a misguided quest to integrate incongruent models of interstate relations and international law. We cannot, in short, maintain core features of the (state-centered) Westphalian system while extending ambitious new protections to non-state actors. This is a powerful argument, but it remains flawed. Every modern legal order rests on diverse and even conflicting normative elements and ideals, in part because human existence itself is always “in transition.” When one examines the so-called classical liberal legal systems of nineteenth-century England or the United States, for example, one quickly identifies liberal elements coexisting uneasily alongside paternalistic and authoritarian (e.g., the law of slavery in the United States), monarchist, as well as republican and communitarian moments. The same may be said of the legal moorings of the modern welfare state, which arguably rest on a hodgepodge of socialist, liberal, and Christian and even Catholic (for example, in some European maternity policies) programmatic sources. In short, **it is by no means self-evident that trying to give coherent legal form to a transitional** political and social **moment is always doomed to fail**. Moreover, there may be sound reasons for claiming that the contemporary transitional juncture in the rules of war is by no means as incongruent as Schmitt asserts. In some recent accounts, **the general trend** towards extending basic protections to non-state actors **is** plausibly interpreted in a more **positive** – **and by no means incoherent** – light.24 Third, Schmitt identifies a deep tension between the classical quest for codified and stable law and the empirical reality of a social world subject to permanent change: “The tendency to modify or even dissolve classical [legal] concepts…is general, and in view of the rapid change of the world it is entirely understandable” (12). Schmitt’s postwar writings include many provocative comments about what contemporary legal scholars describe as the dilemma of legal obsolescence. 25 In The Partisan, he suggests that the “great transformations and modifications” in the technological apparatus of modern warfare place strains on the aspiration for cogent legal norms capable of regulating human affairs (17; see also 48–50). Given the ever-changing character of warfare and the fast pace of change in military technology, it inevitably proves difficult to codify a set of cogent and stable rules of war. The Geneva Convention proviso that legal combatants must bear their weapons openly, for example, seems poorly attuned to a world where military might ultimately depends on nuclear silos buried deep beneath the surface of the earth, and not the success of traditional standing armies massed in battle on the open field. “Or what does the requirement mean of an insignia visible from afar in night battle, or in battle with the long-range weapons of modern technology of war?” (17). As I have tried to show elsewhere, these are powerful considerations deserving of close scrutiny; Schmitt is probably right to argue that the enigma of legal obsolescence takes on special significance in the context of rapid-fire social change.26 Unfortunately, he seems uninterested in the slightest possibility that we might successfully adapt the process of lawmaking to our dynamic social universe. To be sure, he discusses the “motorization of lawmaking” in a fascinating 1950 publication, but only in order to underscore its pathological core.27 Yet **one** possible **resolution** of the dilemma he describes **would be** to figure how **to reform the process** whereby rules of war are adapted to novel changes in military affairs in order **to minimize the danger of** anachronistic or **out-of-date law. Instead, Schmitt** simply **employs the dilemma of legal obsolescence as a battering ram** against the rule of law and the quest to develop a legal apparatus suited to the special problem of irregular combatants.

**Legal norms don’t cause wars and the alt can’t effect liberalism**

David **Luban 10**, law prof at Georgetown, Beyond Traditional Concepts of Lawfare: Carl Schmitt and the Critique of Lawfare, 43 Case W. Res. J. Int'l L. 457

Among these associations is the positive, constructive side of politics, the very foundation of Aristotle's conception of politics, which Schmitt completely ignores. Politics, we often say, is the art of the possible. It is the medium for organizing all human cooperation. Peaceable civilization, civil institutions, and elemental tasks such as collecting the garbage and delivering food to hungry mouths all depend on politics. Of course, peering into the sausage factory of even such mundane municipal institutions as the town mayor's office will reveal plenty of nasty politicking, jockeying for position and patronage, and downright corruption. Schmitt sneers at these as "banal forms of politics, . . . all sorts of tactics and practices, competitions and intrigues" and dismisses them contemptuously as "parasite- and caricature-like formations." n55 The fact is that **Schmitt has nothing** whatever **to say about the constructive side of politics**, and his entire theory focuses on enemies, not friends. In my small community, political meetings debate issues as trivial as whether to close a street and divert the traffic to another street. It is hard to see mortal combat as even a remote possibility in such disputes, and so, in Schmitt's view, they would not count as politics, but merely administration. Yet issues like these are the stuff of peaceable human politics. Schmitt, I have said, uses the word "political" polemically--in his sense, politically. I have suggested that his very choice of the word "political" to describe mortal enmity is tendentious, attaching to mortal enmity Aristotelian and republican associations quite foreign to it. But the more basic point is that Schmitt's critique of humanitarianism as political and polemical is itself political and polemical. In a word, the critique of lawfare is itself lawfare. It is self-undermining because to the extent that it succeeds in showing that lawfare is illegitimate, it de-legitimizes itself. What about the merits of Schmitt's critique of humanitarianism? His argument is straightforward: either humanitarianism is toothless and [\*471] apolitical, in which case ruthless political actors will destroy the humanitarians; or else humanitarianism is a fighting faith, in which case it has succumbed to the political but made matters worse, because wars on behalf of humanity are the most inhuman wars of all. Liberal humanitarianism is either too weak or too savage. The argument has obvious merit. When Schmitt wrote in 1932 that wars against "outlaws of humanity" would be the most horrible of all, it is hard not to salute him as a prophet of Hiroshima. The same is true when Schmitt writes about the League of Nations' resolution to use "economic sanctions and severance of the food supply," n56 which he calls "imperialism based on pure economic power." n57 Schmitt is no warmonger--he calls the killing of human beings for any reason other than warding off an existential threat "sinister and crazy" n58 --nor is he indifferent to human suffering. But **international** humanitarian law **and criminal law are not the same thing as wars to end all war or humanitarian military interventions, so Schmitt's** important moral **warning** against ultimate military self-righteousness **does not** really **apply**. n59 Nor does "bracketing" war by humanitarian constraints on war-fighting presuppose a vanished order of European public law. The fact is that in nine years of conventional war, the United States has significantly bracketed war-fighting, even against enemies who do not recognize duties of reciprocity. n60 This may frustrate current lawfare critics who complain that American soldiers in Afghanistan are being forced to put down their guns. Bracketing warfare is a decision--Schmitt might call it an existential decision--that rests in part on values that transcend the friend-enemy distinction. **Liberal values are not alien extrusions into politics** or evasions of politics; **they are part of politics, and**, as Stephen Holmes argued against Schmitt, **liberalism has proven remarkably strong, not weak**. n61 We could choose to abandon liberal humanitarianism, and that would be a political decision. It would simply be a bad one.

### AT Civil Society Arg

#### Civil society can be a site of liberation

Brenkman 2

John, Professor of English and Comparative Literature, CUNY Graduate School, “Politics, Mortal and Natal: An Arendtian Rejoinder,” Narrative 10:2, <http://muse.jhu.edu/journals/narrative/v010/10.2brenkman02.html>, p. 187-8,

\*THIS ARTICLE ANSWERS THEIR EDELMAN CARDS ABOUT BRENKMAN

In my view, Edelman effaces this difference between democracy and totalitarianism. He attributes to democracy the workings of totalitarianism: he makes no distinction between civil society and the state, equates "the social order" with politics as such, and equates both with the symbolic order. This misconception of democratic politics is what anchors his call for "a true oppositional politics" whose meaning-dissolving, identity-dissolving ironies would come from "the space outside the frame within which 'politics' appears" ("Post-Partum" 181). The democratic state, as opposed to the totalitarian, does not rule civil society but secures its possibility and flourishing; conversely, civil society is the nonpolitical realm from which emerge those initiatives that transform, moderately or radically, the political realm of laws and rights. For that very reason, the political frame of laws and rights, and of debate and decision, is intrinsically inadequate to the plurality of projects and the social divisions within society—there is always a gap in its political representation of the "real" of the social—and for that very reason the political realm itself is open to change and innovation. Innovation is a crucial concept for understanding the gay and lesbian movement, which emerged from within civil society as citizens who were stigmatized and often criminalized for their sexual lives created new forms of association, transformed their own lifeworld, and organized a political offensive on behalf of political and social reforms. There was an innovation of rights and freedoms, and what I have called innovations in sociality. Contrary to the liberal interpretation of liberal rights and freedoms, I do not think that gays and lesbians have merely sought their place at the table. Their struggle has radically altered the scope and meaning of the liberal rights and freedoms they sought, first and foremost by making them include sexuality, sexual practices, and the shape of household and family. Where the movement has succeeded in changing the laws of the state, it has also opened up new possibilities within civil society. To take an obvious example, wherever it becomes unlawful to deny housing to individuals because they are gay, there is set in motion a transformation of the everyday life of neighborhoods, including the lives of heterosexuals and their children. Within civil society, this is a work of enlightenment, however uneven and fraught and frequently dangerous. It is not a reaffirmation of the symbolic and structural underpinnings of homophobia; on the contrary, it is a challenge to homophobia and a volatilizing of social relations within the nonpolitical realm.

### AT Circumvention

#### No circumvention and the courts are effective—the executive will consent

Prakash and Ramsay 12, Professors of Law

[2012, Saikrishna B. Prakash is a David Lurton Massee, Jr. Professor of Law and Sullivan and Cromwell Professor of Law, University of Virginia School of Law., and Michael D. Ramsey is a Professor of Law, University of San Diego School of Law; “The Goldilocks Executive”, Review of THE EXECUTIVE UNBOUND:AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner & Adrian Vermeule, 90 Texas L. Rev. 973, <http://www.texaslrev.com/wp-content/uploads/Prakash-Ramsey-90-TLR-973.pdf>]

The Courts.—The courts constrain the Executive, both because courts are necessary to the Executive imposing punishments and because courts can enforce the Constitution and laws against the Executive. It is true, as Posner and Vermeule say, that courts often operate ex post and that they may defer to executive determinations, especially in sensitive areas such as national security. But these qualifications do not render the courts meaningless as a Madisonian constraint. First, to impose punishment, the Executive must bring a criminal case before a court. If the court, either via jury or by judge, finds for the defendant, the Executive does not suppose that it can nonetheless impose punishment (or even, except in the most extraordinary cases, continue detention). This is so even if the Executive is certain that the court is mistaken and that failure to punish will lead to bad results. As a result, the Executive’s ability to impose its policies upon unwilling actors is sharply limited by the need to secure the cooperation of a constitutionally independent branch, one that many suppose has a built-in dedication to the rule of law.84 And one can hardly say, in the ordinary course, that trials and convictions in court are a mere rubber stamp of Executive Branch conclusions. Second, courts issue injunctions that bar executive action. Although it is not clear whether the President can be enjoined,85 the rest of his branch surely can and thus can be forced to cease actions that judges conclude violate federal law or the Constitution.86 As a practical matter, while courts issue such injunctions infrequently, injunctions would be issued more often if an administration repeatedly ignored the law. Third, courts’ judgments sometimes force the Executive to take action, such as adhering to a court’s reading of a statute in areas related to benefits, administrative process, and even commission delivery. Though the claim in Marbury v. Madison87 that courts could issue writs of mandamus to executive officers was dicta,88 it was subsequently confirmed in Kendall v. United States ex rel. Stokes, 89 a case where a court ordered one executive officer to pay another.90 Finally, there is the extraordinary practice of the Executive enforcing essentially all judgments. The occasions in which the Executive has refused to enforce judgments are so few and far between that they are the stuff of legend. To this day, we do not know whether Andrew Jackson said, “John Marshall has made his decision, now let him enforce it.”91 Lincoln’s disobedience of Chief Justice Taney’s writ of habeas corpus is so familiar because it was so singular. Yet to focus on actual court cases and judgments is to miss the broader influence of the courts. Judicial review of executive action matters because the knowledge of such review affects what the Executive will do. Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation. The ever-present threat that someone will take a case to court and defeat the Executive acts as a powerful check on executive decision making. The Executive must take account of law, including law defined as what a court will likely order.

### 2AC Queer Theory K

#### The neg must connect their alternative to policy concerns and institutional practices—absent these questions shifts in knowledge production are useless – governments’ obey institutional logics that exist independently of individuals and constrain decisionmaking

Wight – Professor of IR @ University of Sydney – 6

(Colin, Agents, Structures and International Relations: Politics as Ontology, pgs. 48-50

One important aspect of this relational ontology is that these relations constitute our identity as social actors. According to this relational model of societies, one is what one is, by virtue of the relations within which one is embedded. A worker is only a worker by virtue of his/her relationship to his/her employer and vice versa. ‘Our social being is constituted by relations and our social acts presuppose them.’ At any particular moment in time an individual may be implicated in all manner of relations, each exerting its own peculiar causal effects. This ‘lattice-work’ of relations constitutes the structure of particular societies and endures despite changes in the individuals occupying them. Thus, the relations, the structures, are ontologically distinct from the individuals who enter into them. At a minimum, the social sciences are concerned with two distinct, although mutually interdependent, strata. There is an ontological difference between people and structures: ‘people are not relations, societies are not conscious agents’. Any attempt to explain one in terms of the other should be rejected. If there is an ontological difference between society and people, however, we need to elaborate on the relationship between them. Bhaskar argues that we need a system of mediating concepts, encompassing both aspects of the duality of praxis into which active subjects must fit in order to reproduce it: that is, a system of concepts designating the ‘point of contact’ between human agency and social structures. This is known as a ‘positioned practice’ system. In many respects, the idea of ‘positioned practice’ is very similar to Pierre Bourdieu’s notion of habitus. Bourdieu is primarily concerned with what individuals do in their daily lives. He is keen to refute the idea that social activity can be understood solely in terms of individual decision-making, or as determined by surpa-individual objective structures. Bourdieu’s notion of the habitus can be viewed as a bridge-building exercise across the explanatory gap between two extremes. Importantly, the notion of a habitus can only be understood in relation to the concept of a ‘social field’. According to Bourdieu, a social field is ‘a network, or a configuration, of objective relations between positions objectively defined’. A social field, then, refers to a structured system of social positions occupied by individuals and/or institutions – the nature of which defines the situation for their occupants. This is a social field whose form is constituted in terms of the relations which define it as a field of a certain type. A habitus (positioned practices) is a mediating link between individuals’ subjective worlds and the socio-cultural world into which they are born and which they share with others. The power of the habitus derives from the thoughtlessness of habit and habituation, rather than consciously learned rules. The habitus is imprinted and encoded in a socializing process that commences during early childhood. It is inculcated more by experience than by explicit teaching. Socially competent performances are produced as a matter of routine, without explicit reference to a body of codified knowledge, and without the actors necessarily knowing what they are doing (in the sense of being able adequately to explain what they are doing). As such, the habitus can be seen as the site of ‘internalization of reality and the externalization of internality.’ Thus social practices are produced in, and by, the encounter between: (1) the habitus and its dispositions; (2) the constraints and demands of the socio-cultural field to which the habitus is appropriate or within; and (3) the dispositions of the individual agents located within both the socio-cultural field and the habitus. When placed within Bhaskar’s stratified complex social ontology the model we have is as depicted in Figure 1. The explanation of practices will require all three levels. Society, as field of relations, exists prior to, and is independent of, individual and collective understandings at any particular moment in time; that is, social action requires the conditions for action. Likewise, given that behavior is seemingly recurrent, patterned, ordered, institutionalised, and displays a degree of stability over time, there must be sets of relations and rules that govern it. Contrary to individualist theory, these relations, rules and roles are not dependent upon either knowledge of them by particular individuals, or the existence of actions by particular individuals; that is, their explanation cannot be reduced to consciousness or to the attributes of individuals. These emergent social forms must possess emergent powers. This leads on to arguments for the reality of society based on a causal criterion. Society, as opposed to the individuals that constitute it, is, as Foucault has put it, ‘a complex and independent reality that has its own laws and mechanisms of reaction, its regulations as well as its possibility of disturbance. This new reality is society…It becomes necessary to reflect upon it, upon its specific characteristics, its constants and its variables’.

#### The aff is good—Second generation Guantanamo issues require a more detailed focus on the legal system—student advocacy enables us to make change

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[February 9, 2011, Peter Margulies is Professor of Law, Roger Williams University., “The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education’s Responses to Terrorism”Journal of Legal Education, Vol. 60, p. 373, 2011, Roger Williams Univ. Legal Studies Paper No. 100]

If timidity in the face of government overreaching is the academy’s overarching historical narrative,1 responses to September 11 broke the mold. In what I will call the first generation of Guantánamo issues, members of the legal academy mounted a vigorous campaign against the unilateralism of Bush Administration policies.2 However, the landscape has changed in Guantánamo’s second generation, which started with the Supreme Court’s landmark decision in Boumediene v. Bush,3 affirming detainees’ access to habeas corpus, and continued with the election of Barack Obama. Second generation Guantánamo issues are murkier, without the clarion calls that marked first generation fights. This Article identifies points of substantive and methodological convergence4 in the wake of Boumediene and President Obama’s election. It then addresses the risks in the latter form of convergence. Substantive points of convergence that have emerged include a consensus on the lawfulness of detention of suspected terrorists subject to judicial review5 and a more fragile meeting of the minds on the salutary role of constraints generally and international law in particular. However, the promise of substantive consensus is marred by the peril of a methodological convergence that I call dominant doctrinalism. Too often, law school pedagogy and scholarship squint through the lens of doctrine, inattentive to the way that law works in practice.6 Novel doctrinal developments, such as the president’s power to detain United States citizens or persons apprehended in the United States, get disproportionate attention in casebooks and scholarship. In contrast, developments such as an expansion in criminal and immigration law enforcement that build on settled doctrine get short shrift, even though they have equal or greater real-world consequences. Consumers of pedagogy and scholarship are ill-equipped to make informed assessments or push for necessary changes. If legal academia is to respond adequately to second generation Guantánamo issues, as well as issues raised by any future attacks, it must transcend the fascination with doctrine displayed by both left and right, and bolster its commitment to understanding and changing how law works “on the ground.” To combat dominant doctrinalism and promote positive change, this Article asks for greater attention in three areas. First, law schools should do even more to promote clinical and other courses that give students first-hand experience in advocacy for vulnerable and sometimes unpopular clients, including the need for affirming their clients’ humanity and expanding the venue of advocacy into the court of public opinion.7 Clinical students also often discover with their clients that legal rights matter, although chastened veterans of rights battles like Joe Margulies and Hope Metcalf are correct that victories are provisional and sometimes pyrrhic.8 Second, legal scholarship and education should encourage the study of social phenomena like path dependence—the notion that past choices frame current advocacy strategies, so that lawyers recommending an option must consider the consequences of push-back from that choice. Aggressive Bush Administration lawyers unduly discounted risks flagged by more reflective colleagues on the consequences of push-back from the courts. Similarly, both the new Obama Administration and advocates trying to cope with Guantánamo’s post-Boumediene second generation failed to gauge the probability of push-back from the administration’s early announcement of plans to close the facility within a year. In each case, unexpected but reasonably foreseeable reactions skewed the implementation of legal and policy choices. Students should learn more about these dynamics before they enter the legal arena. Third, teachers need to focus more on ways in which bureaucratic structures affect policy choices. For example, terrorism fears gave conservative politicians like John Ashcroft an opportunity to decimate asylum adjudication, harming many victims of persecution who have been unable to press meritorious claims for refugee status and other forms of relief. Similarly, creation of the Department of Homeland Security turned a vital governmental function like disaster relief into a bureaucratic orphan, thereby paving the way for the inadequate response to Hurricane Katrina. Students need more guidance on what to look for when structure shapes substance.

Psychoanalysis can’t be scaled up to explain society or politics – they can’t explain our impacts and definitely can’t solve

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Matthew and Geoff, Žižek and Politics: An Introduction, p. 182-185

Can we bring some order to this host of criticisms? It is remarkable that, for all the criticisms of Žižek’s political Romanticism, no one has argued that the ultra- extremism of Žižek’s political position might reflect his untenable attempt to shape his model for political action on the curative final moment in clinical psychoanalysis. The differences between these two realms, listed in Figure 5.1, are nearly too many and too great to restate – which has perhaps caused the theoretical oversight. The key thing is this. Lacan’s notion of traversing the fantasy involves the radical transformation of people’s subjective structure: a refounding of their most elementary beliefs about themselves, the world, and sexual difference. This is undertaken in the security of the clinic, on the basis of the analysands’ voluntary desire to overcome their inhibitions, symptoms and anxieties. As a clinical and existential process, it has its own independent importance and authenticity. The analysands, in transforming their subjective world, change the way they regard the objective, shared social reality outside the clinic. But they do not transform the world. The political relevance of the clinic can only be (a) as a supporting moment in ideology critique or (b) as a fully- fl edged model of politics, provided that the political subject and its social object are ultimately identical. Option (*b*), Žižek’s option, rests on the idea, not only of a subject who becomes who he is only through his (mis) recognition of the objective sociopolitical order, but whose ‘traversal of the fantasy’ is immediately identical with his transformation of the socio- political system or Other. Hence, according to Žižek, we can analyse the institutional embodiments of this Other using psychoanalytic categories. In Chapter 4, we saw Žižek’s resulting elision of the distinction between the (subjective) Ego Ideal and the (objective) Symbolic Order. This leads him to analyse our entire culture as a single subject–object, whose perverse (or perhaps even psychotic) structure is expressed in every manifestation of contemporary life. Žižek’s decisive political- theoretic errors, one substantive and the other methodological, are different (see Figure 5.1) The substantive problem is to equate any political change worth the name with the total change of the subject–object that is, today, global capitalism. This is a type of change that can only mean equating politics with violent regime change, and ultimately embracing dictatorial government, as Žižek now frankly avows (*IDLC* 412–19). We have seen that the ultra- political form of Žižek’s criticism of everyone else, the theoretical Left and the wider politics, is that no one is sufficiently radical for him – even, we will discover, Chairman Mao. We now see that this is because Žižek’s model of politics proper is modelled on a pre- critical analogy with the total transformation of a subject’s entire subjective structure, at the end of the talking cure. For what could the concrete consequences of this governing analogy be? We have seen that Žižek equates the individual fantasy with the collective identity of an entire people. The social fantasy, he says, structures the regime’s ‘inherent transgressions’: at once subjects’ habitual ways of living the letter of the law, and the regime’s myths of origin and of identity. If political action is modelled on the Lacanian cure, it must involve the complete ‘traversal’ – in Hegel’s terms, the abstract versus the determinate negation – of all these lived myths, practices and habits. Politics must involve the periodic founding of entire new subject–objects. Providing the model for this set of ideas, the fi rst Žižekian political subject was Schelling’s divided God, who gave birth to the entire Symbolic Order before the beginning of time (*IDLC* 153; *OB* 144–8). But can the political theorist reasonably hope or expect that subjects will simply give up on all their inherited ways, myths and beliefs, all in one world- creating moment? And can they be legitimately asked or expected to, on the basis of a set of ideals whose legitimacy they will only retrospectively see, after they have acceded to the Great Leap Forward? And if they do not – for Žižek laments that today subjects are politically disengaged in unprecedented ways – what means can the theorist and his allies use to move them to do so?

#### Their alt rejects all forms of political engagement and ignores the ability of politics to produce social change. The aff’s rejection of compromise serves to empower the Christian right

Brenkman ‘2

(John, professor of English and Comparative Literature at CUNY, Narrative 10.2, “Queer Post-Politics,” projectmuse)

But Edelman interprets this nonrecognition in very different terms from those I have just used. When he asserts that "there are no queers in that future as there can be no future for queers," he is not making a mere statement of protest; rather, he is announcing the theoretical position that is the explicit stake of his entire argument. I [End Page 175] now want to turn to his theoretical project, which involves an argument in political theory and an argument from psychoanalysis and a link between the two. The Political Theory Argument For Edelman the image of the child-as-future is more than a powerful trope in the political discourse of the moment. It in effect defines the political realm: "For politics, however radical the means by which some of its practitioners seek to effect a more desirable social order, is conservative insofar as it necessarily works to affirm a social order, defining various strategies aimed at actualizing social reality and transmitting it into the future it aims to bequeath to its inner child" (19). The burden of this argument is that a genuinely critical discourse cannot arise via the marking or symbolizing of the gap between the present and the future. Such symbolizing has indeed been the defining feature of modern critical social discourse, whether among the Enlightenment's philosophes, French revolutionaries, Marxists, social democrats, or contemporary socialists and democrats. Jürgen Habermas, in The Philosophical Discourse of Modernity, defines modern time-consciousness itself as a taking of responsibility for the future. Edelman sees in such a time-consciousness an inescapable trap. For him any such political discourse or activity steps into "the logic by which political engagement serves always as the medium for reproducing our social reality" (26). Certainly the political realm—whether viewed from the perspective of the state, the political community and citizenship, or political movements—is a medium of social reproduction, in the sense that it serves the relative continuity of innumerable economic and non-economic institutions. But it is not simply a mechanism of social reproduction; it is also the site and instrument of social change. Nor is it simply the field of existing power relations; it is also the terrain of contestation and compromise. Edelman compounds his reductive concept of the political realm by in turn postulating an ironclad intermeshing of social reproduction and sexual reproduction. Here too he takes a fundamental feature of modern society, or any society, and absolutizes it. Sexual reproduction is a necessary dimension of social reproduction, almost by definition, in the sense that a society's survival depends upon, among many other things, the fact that its members reproduce. Kinship practices, customs, religious authorities, and civil and criminal law variously regulate sexual reproduction. However, that is not to say that the imperatives of social reproduction dictate or determine or fully functionalize the institutions and practices of sexual reproduction. The failure to recognize the relative autonomy of those institutions and practices underestimates how seriously feminism and the gay and lesbian movement have already challenged the norms and institutions of compulsory heterosexuality in our society. They have done so through creative transformations in civil society and everyday life and through cultural initiatives and political and legal reforms. The anti-abortion and anti-gay activism of the Christian Right arose, in response, to alter and reverse the fundamental achievements of these movements. How then to analyze or theorize this struggle? A motif in Edelman's analysis [End Page 176] takes the rhetoric and imagery of the Christian Right and traditional Catholicism to be a more insightful discourse than liberalism when it comes to understanding the underlying politics of sexuality today. I think this is extremely misguided. The Right does not have a truer sense of the social-symbolic order than liberals and radicals; it simply has more reactionary aims and has mobilized with significant effect to impose its phobic and repressive values on civil society and through the state. The Christian Right is itself a "new social movement" that contests the feminist and gay and lesbian social movements. To grant the Right the status of exemplary articulators of "the" social order strikes me as politically self-destructive and theoretically just plain wrong.

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#### Legal strategies are more effective than the alternative—focusing on habeas challenges enables us to mobilize attention and utilize the state to undermine its legitimacy—our evidence assumes the malleability of the law

Ahmad 9, Professor of Law

[2009, Muneer I. Ahmad is a Clinical Professor of Law, Yale Law School, “RESISTING GUANTÁNAMO: RIGHTS AT THE BRINK OF DEHUMANIZATION”, Northwestern University Law Review, Vol. 103, p. 1683, American University, WCL Research Paper No. 08-65]

As I have discussed thus far, we believed the commission to be a purely political apparatus, devoid of legal legitimacy, and yet, rather than boycott the proceedings, we participated in them. Moreover, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission, as opposed to accepting the rights-free system presented to us. Thus, we argued that the Constitution, and in particular, Fifth Amendment due process protections, extended to Omar, as did substantive and procedural protections of the Geneva Conventions;255 we argued that Omar had rights as a child, under in-ternational treaty obligations256 as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.257 In contrast, the Pentagon would have had us accept their system as is, and either persuade our clients to plead guilty (as the first defense lawyers were asked to do) or proceed to a trial governed by substandard rules and an unknown jurisprudence. This rights-based strategy might seem futile given the malleability of law and the contingency of its definitions and structures at Guantánamo, epitomized by the ever-shifting nature of such seemingly bedrock questions as who is an ―enemy combatant‖ and what is a ―war crime‖; so long as the political context in which rights reside can be redefined, so, too, can the rights themselves.258 While all rights questions are subject to change over time, as I have argued, the legal indeterminacy at Guantánamo was especially problematic because of the novelty of its core principles, its disavowal of extant jurisprudence, and the unavailability of meaningful judicial review. Moreover, the danger of a rights-based strategy is not merely futility, but complicity in the commission‘s project of self-legitimation, a concern that haunted us throughout the process. Indeed, one of the most sobering events for me came during the first session of Omar‘s commission, in which I had made a lengthy legal argument. During a break, a presiding officer from another case thanked me for the quality of my presentation and said that I had elevated the process. Although I did not create it, I had helped to hold up the commission‘s curtain of legitimacy. The indeterminacy of rights at Guantánamo did not only render them unstable, but suggested that they were politically determined as well. Like the velvet drapes in the military commission room, it seemed clear that law and its rhetoric, structures, and trappings were serving as a cover for the operation of political power. Still, we doggedly pursued a rights-based strategy on Omar‘s behalf. The question of why one might engage in rights-based litigation in as rights-starved an environment as Guantánamo involves tactical, strategic, and theoretical considerations,259 each of which is discussed below. Rights Tactics and Rights Strategies When confronted with profound, seemingly irremediable injustice in the primary forum of contest, the lawyer‘s instinct, if not the human one, is to appeal to a higher authority. In the military commissions, that higher authority was a federal habeas court, which, unlike the commission, stood independent of the Executive and enjoyed a legitimacy to which the commission could only aspire. As a tactical matter, therefore, we sought in the commission proceedings to dramatize the irregularity of the commission, in contrast to the proceedings a criminal defendant could expect in a regular court—either a military court martial or federal district court. Rights were an effective discourse strategy for this project, for they provided instantly recognizable handles for the comparison: the right to see the evidence against you, the right to confront witnesses, and the right to competent counsel were all so familiar within the American courtroom that their invocation in the commission—not just in principle but in the language of rights—would help to cast the commission as fatally deficient in the eyes of the habeas court when they reviewed the proceedings. This recalls Rick Abel‘s insight regarding the apartheid regime in South Africa: ―Because the regime used legal institutions to construct and administer apartheid, it was vulnerable to legal contestation.‖ 260 Similarly, Abel has observed that even though a reflection of power, law nonetheless can be a source of countervailing power as well, because state power is divided among the branches and therefore potentially heterogeneous.261 Such heterogeneity creates opportunities for even nonstate actors to wield power, strategically and interstitially, working the gaps and crevices within a complex state apparatus. Notably, recourse to the habeas court proved to be the most successful strategy in challenging the legitimacy of the military commissions: the Hamdan case, which invalidated the original military commission system at Guantánamo, was brought via a collateral habeas action.262 As a corollary to Abel‘s theorem, our invocation of rights was designed not only to appeal to the judiciary, but also to Congress, civil society actors, and the press. Rights may be an impoverished discourse, susceptible of manipulation and, even when recognized, unable to execute themselves without political consent, but they are nonetheless a familiar and shared discourse whose resonance carries across branches of government and across different segments of society. When we engaged in rights talk within the military commission, we knew that we were speaking to multiple au-diences simultaneously—―playing to the gallery,‖ as it is often pejoratively described—and we knew that the language of rights, as a metric of both correctness and fairness, was accessible to all. As I have discussed previously, the structure of the commissions and their early conduct convinced us that our assertions of rights would almost always fail. But claiming the language of rights forced the government to disclaim it. Each time we argued that the Geneva Conventions compelled some protection for Omar, the government was forced to argue the inapplicability of the Geneva Conventions. This was also the case when we argued constitutional due process and international human rights claims. Our hope was to dramatize, through the cumulative governmental disclaiming of rights, what Omar understood intuitively: that Guantánamo was a rightsfree zone. The fact of divided government and diffuse power263 does not, of course, compel the exercise of countervailing power. Just as the commissions rejected our rights-based arguments, so, too, could the federal courts, Congress, and the public. But the existence of multiple sources of power also permits different relationships between law and power. The appeal of rights, their narrative and jurisprudential meaning, can be expected to vary with the narrative frame of the audience; rights may vary across space and time. Because the commissions were a creation of the Executive and housed within the cultural and command structures of the military, they were institutionally situated far differently than the Article III habeas courts and subject to different political pressures than Congress. Thus, the repeated failure of rights-based arguments in the commissions was not necessarily itself a failure if competing arbiters of rights, in both the popular and legal imaginations, were to come to different conclusions. In many ways, our rights-based strategy was focused less on U.S. institutions and more on Canada, Omar‘s country of citizenship. This reflects a geopolitical view that Omar‘s continued detention and his trial by military commission are partially the function of Canadian acquiescence to American power. To date, the Canadian government has not publicly criticized either Guantánamo or Omar‘s trial by military commission. In contrast, other countries, most notably Great Britain, have rejected both the detention and trial by military commission of their citizens, stating publicly the unacceptability of these practices, and expending political capital in order to end them.264 As a result of these efforts, all Britons have been released from Guantánamo,265 suggesting that international political arrangements circum-scribe Omar‘s legal predicament at Guantánamo. The political domain, then, includes not only the United States, and not only U.S.–Canada relations, but the domestic politics of Canada as well. The case of former Guantánamo prisoner David Hicks is instructive in this regard. Hicks, an Australian citizen, was one of the first Guantánamo prisoners to be charged before a military commission. Through the extraordinary work of his legal counsel and effective advocacy in Australia by his family, Hicks became a cause célèbre in Australia, and a symbol of American injustice toward an Australian citizen.266 His advocates forged a narrative according to which as an Australian, Hicks was entitled to rights which the military commissions failed to afford. Hicks ultimately pleaded guilty to a single charge and was transferred back to Australia267 under an agreement that was widely understood to be a political compromise between the Australian and American governments rather than the product of independent legal process.268 Thus, even if rights-based arguments fall flat in the United States, Omar‘s circumstances might be improved if rights-based arguments were to alter political discourse in Canada. This strategy could be viewed as reducing rights to politics, and deploying rights as mere political devices. But once more we see how the value of rights can vary. Even as we worried that a post-September 11 politics had made the United States inhospitable to rights claims on behalf of terrorist suspects, we understood that in the same historical moment, rights might have greater purchase in Canada. A rightsbased strategy therefore feeds into what is essentially ongoing interlocutory review of Omar‘s case by the Canadian government (admittedly, governed by its own political process, but a different politics), which is in turn informed by broader Canadian public opinion. And so our rights-based strategy in the military commissions attempted to negotiate the uneasy relationship between law and politics, to view rights as less than self-defining but more than ―nonsense on stilts.‖ 269 We sought to subject the ―law‖ of the commissions to the scrutiny of a range of political actors. Thus, our strategy did not depend on victory in the commission itself. Indeed, the goal of demonstrating the legal emptiness of the commissions was better served by our arguments—for due process, for rules of evidence, for prohibitions on coerced testimony—failing in them. We used the commission, and its rejection of our rights-based strategy, for its political and educational value, echoing Jules Lobel‘s call for deliberate use of courts as forums for protest.270 In so doing, we ―drag[ged] the courtroom into politics.‖ 271 Clearly, not all of our tactics worked, and certainly they did not produce our ultimate goal of returning Omar to Canada. Moreover, even these tactics came at a cost of partially legitimizing the commission as a site of legal contest.272 Nonetheless, I believe the strategic potential of rights-based argument was sufficient to make our approach defensible. I must admit, however, that it was not all clear-eyed strategy that led me to the rightsbased approach, for even before I had thought through the strategic potential, I was inclined toward arguing rights. This rights tropism is the logical and predictable consequence of our professional training as lawyers. Indeed, it is an occupational hazard. I do not mean to disclaim rights wholesale, but at the same time, I am mindful, and wary, of rights as the first recourse for helping our clients achieve their goals.273 Rights become the faith story for many of us, holding out hope for a gradualist, liberal perfection of the injustice in the world.

#### Legalism is good and the 1AC is key—even if the law is imperfect, public discourse about legal checks makes them effective by deterring the executive and the alternative’s faith in politics fails

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D. The Role of Politics The force of ordinary electoral politics also cannot account for the shift in U.S. counterterrorism policy. None of the Bush administration's initial initiatives sparked majoritarian opposition. To the contrary, [\*1244] President Bush, who had very low approval ratings shortly before 9/11, shot up in popularity when he declared the "war on terror," and was reelected in 2004, in large measure on his promise to deliver security. n235 Apart from opposition to the war in Iraq, there was little widespread popular pressure on President Bush to rein in his security initiatives. Despite this evidence, Eric Posner and Adrian Vermeule have argued that in the modern era, political checks are all there are when it comes to restraining executive power. n236 They maintain that Congress, the courts, and the law itself cannot effectively constrain the executive, especially in emergencies, but that this need not concern us because the executive is adequately limited by political forces. At first blush, the past decade might appear to vindicate Posner and Vermeule's views, as political forces, broadly speaking, seem to have been at least as effective at checking the President as were Congress or the judiciary. n237 But there is in fact little evidence that electoral politics or majoritarian sentiment played much, if any, role in persuading President Bush to ratchet back his security initiatives. While formal judicial and legislative checks cannot tell the whole story, the alternative account is not "politics" as Posner and Vermeule define and describe it, but a much more complex interplay of civil society, law, politics, and culture: what I have called "civil society constitutionalism." [\*1245] In my view, Posner and Vermeule simultaneously underestimate the constraining force of law and overestimate the influence of political limits on executive overreaching. Sounding like Critical Legal Studies adherents, they sweepingly claim that law is so indeterminate and manipulable as to constitute only a "façade of lawfulness." n242 But in assessing law's effect, they look almost exclusively to formal indicia--statutes and court decisions. n243 That approach disregards the role that law plays without coming to a head in a judicial decision or legislative act. As the post-9/11 period illustrates, when law is reinforced and defended by civil society institutions, it can have a disciplining function long before cases reach final judgment, and even when no case is ever filed, a reality to which anyone who has worked in the executive branch will attest. n244 Executive officials generally cannot know in advance whether their actions will attract the attention of civil society watchdogs, or lead to court review. They often cannot know whether such oversight--whether by a court, a legislative committee, or a nongovernmental organization--will be strict or deferential. As long as there is some risk of such oversight, the resultant uncertainty itself is likely to have a disciplining effect on the choices they make. There are, in short, plenty of reasons why executive lawyers generally take legal limits seriously. They take an oath and are acculturated to do so. They know that claims of illegality can undermine their objectives. And they cannot predict when a legal claim will be advanced against them. Similarly, in focusing exclusively on statutes and their enforcement by courts, Posner and Vermeule disregard the considerable checking function that Congress's legal oversight role plays through means short of formal statutes, such as by holding hearings, launching investigations, requesting information about doubtful executive practices, or restricting federal expenditures. The effectiveness of these checks, moreover, will often turn on the strength of civil society. If there are significant watchdogs in the nongovernmental sector and/or the media focused on executive actions, ready to bring allegedly illegal conduct to public attention, the law will have substantial deterrent effect, with or without actual court decisions. While they are overly skeptical about law, Posner and Vermeule are unrealistically romantic about the constraining force of majoritarian politics. The political checks they identify consist solely of the fact that Presidents must worry about election returns, and must cultivate [\*1246] credibility and trust among the electorate. n245 There are several reasons to doubt that these political realities are sufficient to guard against executive overreaching. First, and most fundamentally, while the democratic process is well designed to protect the majority's rights and interests, it is poorly designed to protect the rights of minorities, and not designed at all to protect the rights of foreign nationals, who have no say in the political process. n246 In times of crisis, the executive nearly always selectively sacrifices the rights of foreign nationals, often defending its actions by claiming that "they" do not deserve the same rights that "we" do. n247 To say the law is superfluous because we have elections is to relegate foreign nationals, and minorities generally, to largely unchecked abuse. Second, the ability of the political process to police the executive is hampered by secrecy. Much of what the executive does, especially in times of crisis, is secret, and even when some aspects of executive action are public, its justifications often rest on grounds that are assertedly secret. n248 Courts and Congress have at least some ability to pierce that veil and to insist on accountability. Absent legal rights, such as those created by the Freedom of Information Act, the general public has virtually no ability to do so. n249 Third, the electoral process is a blunt-edged sword. Presidential elections occur only once every four years, and congressional elections every two years. Congressional elections will often involve an unpredictable mix of local and national matters, and there is little reason to believe they will concentrate on executive overreaching. Presidential elections also inevitably encompass a broad range of issues, most of which will have nothing to do with security and liberty. Elections are therefore unlikely to be effective at addressing specific abuses of power. Voters' concerns about abstract institutional issues such as executive power may clash with their interests on the substantive merits of particular issues, such as whether to use military force in support of Libyan rebels. There is no guarantee that citizens will separate these issues in their minds, and no reason to believe that if they do so, they will favor abstract institutional concerns over specific policy preferences at the ballot box. [\*1247] Fourth, the political process is notoriously focused on the short term, while constitutional rights and separation of powers generally serve long-term values. n250 It was precisely because ordinary politics tend to be shortsighted that the framers adopted a constitutional democracy. The Constitution identifies those values that society understands as important to preserve for the long term, but knows it will be tempted to sacrifice in the short term. n251 If ordinary politics were sufficient to protect such values, we would not need a constitution in the first place. Thus, there is little evidence in fact that majoritarian politics played a significant checking role in the aftermath of 9/11, or that such politics would generally be a sufficient checking force in times of crisis. And more generally, there is little reason to believe that political checks will be sufficient to restrain presidential abuse. The story is infinitely more complicated. As I have sought to illustrate here, in the aftermath of 9/11, the interplay of law, politics, and culture, framed and prompted by civil society organizations, was critical to rendering effective constitutional and international legal checks.