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#### 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 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

Cover 13, Assistant Professor and Associate Director of the Institute for Global Security Law

[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.

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

#### 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, debaters become incapable of effectuating change

#### Possibilistic thinking makes effective decision making impossible—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.

#### 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

Furedi 9, Professor of Sociology

[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.

#### 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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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.

### 2AC O/V

#### Dozens of people now and hundreds in the future are being and will be wrongfully detained in conditions devoid of any humanity—our Eisenberg evidence compares the act of detention in military centers itself to cruel and unusual punishment as people are denied access to their families, any semblance of justice, and physically and psychologically destroyed every day of their imprisonment—you should not forget the magnitude of our impact when evaluating the debate

#### Independently, they’ve conceded that wrongful drone strikes, racial profiling, and large scale scapegoating of a population have been reinforced by status quo court policies—only voting affirmative challenges this both in the judiciary and trains us as students to challenge those issues in our decisionmaking—that’s Joo

### 2AC Courts Constrain

#### 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.

#### No circumvention by the executive

Stimson 9

[09/25/09, Cully Stimson is a senior legal fellow at the Heritage Foundation and an instructor at the Naval Justice School former American career appointee at the Pentagon. Stimson was the Deputy Assistant Secretary of Defense for Detainee Affairs, “Punting National Security To The Judiciary”, http://blog.heritage.org/2009/09/25/punting-national-security-to-the-judiciary/]

So what is really going on here? To those of us who have either served in senior policy posts and dealt with these issues on a daily basis, or followed them closely from the outside, it is becoming increasingly clear that this administration is trying to create the appearance of a tough national-security policy regarding the detention of terrorists at Guantanamo, yet allow the courts to make the tough calls on releasing the bad guys. Letting the courts do the dirty work would give the administration plausible cover and distance from the decision-making process. The numbers speak for themselves. Of the 38 detainees whose cases have been adjudicated through the habeas process in federal court in Washington, 30 have been ordered released by civilian judges. That is close to an 80 percent loss rate for the government, which argued for continued detention. Yet, how many of these decisions has this administration appealed, knowing full well that many of those 30 detainees should not in good conscience be let go? The answer: one. Letting the courts do it for him gives the president distance from the unsavory release decisions. It also allows him to state with a straight face, as he did at the Archives speech, “We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people.” No, the president won’t release detainees; he’ll sit back and let the courts to do it for him. And the president won’t seek congressional authorization for prolonged detention of the enemy, as he promised, because it will anger his political base on the Left. The ultra-liberals aren’t about to relinquish their “try them or set them free” mantra, even though such a policy threatens to put terrorists back on the battlefield. Moreover, the president would have to spend political capital to win congressional authorization for a prolonged detention policy. Obviously, he would rather spend that capital on other policy priorities. Politically speaking, it is easier to maintain the status quo and let the detainees seek release from federal judges. The passive approach also helps the administration close Gitmo without taking the heat for actually releasing detainees themselves.

### AT T—Indefinite Detention

#### We meet—there are less conditions under which the executive can detain someone after the plan

#### We meet – Challenges to evidentiary standards reduce the President’s authority to indefinitely detain

LAKHDAR BOUMEDIENE, et al., 2008

v. GEORGE W. BUSH, PRESIDENT of the UNITED STATES, et al. KHALED A. F. AL ODAH, next friend of FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al. v. UNITED STATES et al., (No. 06-1195), (No. 06-1196), SUPREME COURT OF THE UNITED STATES, 553 U.S. 723; 128 S. Ct. 2229; 171 L. Ed. 2d 41; 2008 U.S. LEXIS 4887; 76 U.S.L.W. 4406; 21 Fla. L. Weekly Fed. S 329, December 5, 2007, Argued, June 12, 2008 \*

Although we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is "closed and accusatorial." See Bismullah III, 514 F.3d at 1296 (Ginsburg, C. J., concurring in denial of rehearing en banc). And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore. [\*786] HN24Go to this Headnote in the case. [\*\*\*LEdHR24] LEdHR(24)[24] For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings. This [\*\*\*90] includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting. See Townsend v. Sain, 372 U.S. 293, 313, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). Here that opportunity is constitutionally required. HN25Go to this Headnote in the case. [\*\*\*LEdHR25] LEdHR(25)[25] Consistent with the historic function and province of the writ, habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here. In two habeas cases involving enemy aliens tried for war crimes, In re Yamashita, 327 U.S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946), and Ex parte Quirin, 317 U.S. 1, 63 S. Ct. [\*\*2271] 2, 87 L. Ed. 3 (1942), for example, this Court limited its review to determining whether the Executive had legal authority to try the petitioners by military commission. See Yamashita, supra, at 8, 66 S. Ct. 340, 90 L. Ed. 499 ("[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged"); Quirin, supra, at 25, 63 S. Ct. 2, 87 L. Ed. 3 ("We are not here concerned with any question of the guilt or innocence of petitioners"). Military courts are not courts of record. See Watkins, 3 Pet., at 209; Church 513. And the procedures used to try General Yamashita have been sharply criticized by Members of this Court. See Hamdan, 548 U.S., at 617, 126 S. Ct. 2749, 165 L. Ed. 2d 723; Yamashita, supra, at 41-81, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., dissenting). We need not revisit these cases, however. For on their own terms, the proceedings in Yamashita and Quirin, like those in Eisentrager, had an adversarial structure that is lacking here. See Yamashita, [\*787] supra, at 5, 66 S. Ct. 340, 90 L. Ed. 499 (noting that General Yamashita was represented by six military lawyers and that "[t]hroughout the proceedings . . . defense counsel . . . demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged"); Quirin, supra, at 23-24, 63 S. Ct. 2, 87 L. Ed. 3; Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (appointing counsel to represent the German saboteurs). The extent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage. We do hold that HN26Go to this Headnote in the case. [\*\*\*LEdHR26] LEdHR(26)[26] when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release. C We now consider whether the DTA allows the Court of Appeals to conduct a proceeding meeting these standards. HN27Go to this Headnote in the case. [\*\*\*LEdHR27] LEdHR(27)[27] "[W]e are obligated to construe the statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so. St. Cyr, 533 U.S., at 299-300, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting Crowell v. Benson, 285 U.S. 22, 62, 52 S. Ct. 285, [\*\*\*91] 76 L. Ed. 598 (1932)). There are limits to this principle, however. The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. See Clark v. Martinez, 543 U.S. 371, 385, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them"). We cannot ignore the text and purpose of a statute in order to save it. The DTA does not explicitly empower the Court of Appeals to order the applicant in a DTA review proceeding released should the court find that the standards and procedures used at his CSRT hearing were insufficient to justify [\*788] detention. This is troubling. Yet, for present purposes, we can assume congressional silence permits a constitutionally required remedy. In that case it would be possible to hold that a remedy of release is impliedly provided for. The DTA might be read, furthermore, to allow petitioners to assert most, if not all, of the legal claims they seek to advance, including their most basic claim: that the President has no authority under the AUMF to detain them indefinitely. (Whether the President has such authority turns on whether the AUMF [\*\*2272] authorizes--and the Constitution permits--the indefinite detention of "enemy combatants" as the Department of Defense defines that term. Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant, a "standard" used by the CSRTs in petitioners' cases.) At oral argument, the Solicitor General urged us to adopt both these constructions, if doing so would allow MCA § 7 to remain intact. See Tr. of Oral Arg. 37, 53.

#### CI – Indefinite detention is detention without charge

Cheyette and Allen – Physicians for Human Rights – June 2011

Cara M. Cheyette (lead author), JD, MPH and Scott Allen (drafting and edting), MD and Co-Director of the Center for Prisoner Health and Human Rights at Brown University; Punishment Before Justice: Indefinite Detention in the US, <https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf>

As used in this report, “indefinite detention” refers to the government’s restriction of an individual’s liberty for reasons other than public health or the commission of any chargeable crime by the individual. The term encompasses custody arrangements that explicitly contemplate a detention of an indefinite term, as well as those that may result in detention of an indefinite term, including “preventive detention,”18 “executive custody,”19 “security detention,”20 “military detention,”21 “prolonged detention,”22 “administrative detention,”23 “conditional detention,”24 or, under the March 7 Executive Order, “continued law of war detention.”25

#### War power = military force – distinct from foreign affairs power

David I. Lewittes - Winter 1992, Associate, Rogers & Wells, New York City; J.D., New York University School of Law, ARTICLE: CONSTITUTIONAL SEPARATION OF WAR POWERS: PROTECTING PUBLIC AND PRIVATE LIBERTY., 57 Brooklyn L. Rev. 1083, Brooklyn Law Review, LexisNexis

The next question should be: What is the executive war power?

B. The Commander-in-Chief Power Justice Frankfurter once said: "The war power is the war power." n129 This fine explanation apparently did not help Justice Jackson who, four years later, expressed puzzlement over the meaning of the constitutional provision granting the President [\*1115] the commander-in-chief power: These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy. n130 One can understand where a constitutional power "begins or ends" only, first, by comprehending the object of the grant and, second, by scrutinizing it in the context of related grants of, or limitations on, power found in the Constitution. n131 The object of the grant is to "provide for the common defence." n132 The Constitution, however, is replete with grants of power that, together, serve this object. Therefore, the contours of the commander-in-chief power will be found only by fitting it into the constitutional puzzle that, when complete, forms the full panoply of war powers. To better understand the separation of war powers among the branches of the federal government, one should refer once again to Blackstone for an explanation of the British monarch's war powers at the time the Constitution of the United States was drafted. In his Commentaries, Blackstone wrote the following: The king is considered . . . as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: [\*1116] and the principal use of government is to direct that united strength in the best and most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince. n133 Our Founding Fathers accepted the idea that unity of the states and in the federal executive is essential for vigor, which is necessary for a strong defense. Our nation, though, is founded upon republican principles. To this end, the federal government was arranged so that, in external matters, the United States speak and act as one, while, in relation to internal concerns, they and their inhabitants may be divided. In The Federalist, Hamilton cites Montesquieu approvingly: "It is very probable" (says he) "that mankind would have been obliged at length to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a CONFEDERATE REPUBLIC." n134 The king of Great Britain possessed many more war-related powers than the power to direct military forces. n135 These include powers that our Constitution vests in Congress. Prior to the Constitution, the Confederate Congress, as the sole department of the confederate government, had powers that now are distributed among the three branches of the federal government, including the power to direct the operations of the armed forces of the United States. n136 Even before the Articles of Confederation had been ratified, Congress raised armies, fitted out a navy, and prescribed rules for their government: Congress conducted all military operations both by land and sea: Congress emitted bills of credit, received and sent ambassadors, and made treaties: Congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to [\*1117] capture, and prescribed rules for the distribution of prizes. n137 To wage the Revolutionary War successfully, the Continental Congress "appointed a commander in chief." n138 Under the Articles of Confederation, the Confederate Congress retained the power appoint a commander-in-chief but was forbidden to do so without the assent of nine states. n139 Thus, military command was fragmented. The commander-in-chief was answerable to the Congress, which, in turn, depended upon the states. To remedy the weakness of this division of authority in the conduct of war, the Constitution places this power entirely in the hands of the President. For the public safety, "[t]he two correlative powers, to conduct war and to prevent war, are Executive functions under our Constitution." n140 For the purpose of republican safety, many of the powers of the king and of the Confederate Congress were vested in the federal legislature. n141 Therefore, the President's power in war, while, of necessity, n142 great, does not approach that of the British monarch. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme [\*1118] command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, -- all which, by the Constitution under consideration, would appertain to the legislature. n143 As explained below, the powers of raising, supporting, and regulating armed forces are checks on the President's power to "protect and defend" public liberty, fashioned to protect liberty in the republican sense. n144 These legislative powers, however, do not restrict the Commander-in-Chief's discretion in employing and in directing the armed forces as he deems necessary against foreign aggressors (or against domestic rebels). The authority to declare war, which includes the publicly authorized, private war power, aimed at securing personal liberty, n145 is the power of conferring certain rights and of imposing specific obligations upon the individual citizens of the United States. It does not contract the powers of the Commander-in-Chief. 1. Commander-in-Chief Of Armed Forces Of The United States Article II, Section 2, Clause 1 of the Constitution, invests the President with the commander-in-chief power: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. There is no qualification on the President's command of the armed forces of the United States. The distinction between that power and the President's command over the states' militia is apparent from the language of the Constitution. The President is the Commander-in-Chief of the armed forces of the United States at all times. n146 There need not be a war or public danger. [\*1119] "The Constitution in some of its provisions expressly refers to 'time of peace' and 'time of war.'" n147 This is not among them. Once a branch of the armed services is raised or is provided, the President is its commander-in-chief. It is certain that the Framers intended, by vesting the commander-in-chief power in the President, to give him the authority to conduct war. n148 Conducting war includes the power to direct the movements of the armed forces and to employ them as the President determines to be necessary for the security of the United States. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority. n149 Chief Justice Taney, in Fleming v. Page, n150 reiterated this exposition of the power of the President to conduct war: As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. n151 [\*1120] Again, the President has a sworn duty to "preserve, protect and defend" the nation. n152 He cannot take office until he takes an oath that he will do so to the best of his ability. If there were a danger threatening the existence or welfare of the United States, the President would be duty-bound to take action to stanch its advancement and to protect the Union. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." n153 Once there is a show of force that the President determines to be a threat to the nation, the President is bound to meet the force with force. War exists from the unilateral action of the hostile enemy. n154 As Commander-in-Chief, the President is responsible fully for the conduct of war. Incident to the President's duty to conduct war is his power to prevent an invasion before it takes place. Justice Story wrote: [T]he power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil. n155 Further support for this assertion may be found in the Constitution itself, by looking at the whole document. Article I, Section [\*1121] 8, Clause 15, of the Constitution, empowers Congress To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. Later, in the Bill of Rights, the Constitution provides as follows: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . . n156 The limitation upon the President's use of the militia is, for the protection of individual and of states' rights, much stricter than the limitation upon the President's use of the armed forces. n157 The President always is in command of the armed forces. He commands the militia only when called into actual service of the United States. Nevertheless, even the limitation on the President's use of the states' militia is not quite as restrictive as that imposed upon the states themselves. The Constitution states that "[n]o state shall . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." n158 Because this language, borrowed from Article VI of the Articles of Confederation, is used as applied to the states but not as applied to the federal use of the states' militia, the limitations on the powers differ in degrees. If the states must wait until actually invaded or until the states are in such imminent danger of being invaded as will not admit of delay, the federal government need not wait until such an emergency exists. This distinction rests upon the different principles that apply to private and to public self-defense powers. n159 The language [\*1122] of the Constitution that describes Congress's power to call forth the militia -- before placing the militia under the President's command to be employed, as he deems necessary, for the public safety -- does not use the same restrictive language that applies to the states. Public danger is not "imminent danger." If the President can employ the militia in times of public danger, not amounting to imminent danger, and to repel invasions, without waiting until actually invaded, then the President must be able to deploy federal armed forces to prevent a potential threat to the security of the United States from approaching the magnitude of "imminent danger" or of an actual invasion. [P]rivate war extends only to self-defence, whereas sovereign powers have a right not only to avert, but to punish wrongs. From whence they are authorised to prevent a remote as well as an immediate aggression. n160 This right and power of public self-defense, which includes collective self-defense of a community of nations, n161 requires no declaration of war. n162 Under the Constitution, it is the duty of the President to "protect and defend" the nation. The powers of Congress are enumerated expressly. Conversely, the President's power is defined but not enumerated: It extends as far as the exigency of the moment dictates. Moreover, Congress must make those laws that are necessary and proper to carry into effect the direction of a war by the Commander-in-Chief. Therefore, Congress may make far-reaching laws, in support [\*1123] of the military campaign, if the President deems such measures necessary, but cannot impair the authority of the Commander-in-Chief. n163 Such appropriate means are incidental to the powers of the President. The President's public war power includes the authority to defend the nation and permits punishment of aggression and the prevention of future conflict. n164 This authority also comprehends collective self-defense. n165 The power to declare war clearly is not a defense power. n166 The legislative authorities essential to the common defense are the powers to raise and support armies, to provide and maintain a navy, and to prescribe rules for their government and regulation. n167 The defense power, once armed forces are provided, resides with the President (except with respect to prescribing rules for the government and regulation of the forces). Congress may not intrude upon the President's power to "protect and defend" the nation, which includes the power to punish aggression. There is no constitutional limitation or check on the commander-in-chief power, once Congress provides manpower and money, other than that it extends only so far as its object: The power must be exercised to "preserve, protect and defend" the nation. n168 Nonetheless, the people (as the electorate) and Congress [\*1124] (possessing the impeachment power) have some authority to ensure that the President stays within these bounds, as well as within the bounds of his foreign affairs power. The commander-in-chief power, indeed, necessarily, is very broad. Its purpose is to protect public liberty. The contours of this authority may be defined only by an understanding of the powers vested in the legislature to guard against oppression by the executive of the people and of the states. n169 Together, the President's war and foreign affairs powers equip him with the necessary authority to make peace and to keep the peace. One method of accomplishing this is diplomacy -- another is war.

#### JUDICIAL restrictions are limitations on action by the courts

Charles Grove Haines – PhD, Fellow @ Columbia University – 2001, The Conflict over Judicial Powers, googlebooks

The political theories of the time favored judicial restriction of state laws to the point of practical nullification. The same trend of thought regarded the federal courts as the only proper tribunals to determine the validity or the invalidity of state laws contrary to the terms of the treaty of peace or to the principles of the law of nations. In practice a principle was emerging, not sanctioned by any positive enactment, which dealt a severe blow to the power of the legislative department. State courts were asserting authority above that of the legislative assemblies. Federal courts were claiming the right to declare void state laws contrary to national laws and treaties, and contrary to the “sovereign rights of peace and war” vested in the Confederate Congress. It was but a short step, therefore, to Mar- bury vs. Madison.

#### Overlimits the topic—every type of detention has some access to some remedial form of habeas and all detention ends when the WOT ends—kills affirmative flex which drives topic debates and innovation

#### Predictability—their interpretation conflates “indefinite” with “permanent”—only our interpretation reflects topic precision—their limit isn’t valuable if it isn’t predictable

#### Good is good enough

### 2AC K

#### Framework—the primary purpose of debate should be to improve our skills as decisionmakers through a discussion of public policy

#### Decisionmaking skills are necessary to decide between individual courses of action that affect us on a daily basis—flexing our muscles in the high-stakes games of public policymaking is necessary to make those individual decisions easier

#### 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’.

#### Discussions of structure should precede substance—second generation Guantanamo issues require a more detailed focus on the legal system—student advocacy enables us to make change

Marguiles 11, Professor of Law

[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.

#### Legal reforms restrain the cycle of violence and prevent error replication

Colm O’Cinneide 8, Senior Lecturer in Law at University College London, “Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat,” Ch 15 in Fresh Perspectives on the ‘War on Terror,’ ed. Miriam Gani and Penelope Mathew, <http://epress.anu.edu.au/war_terror/mobile_devices/ch15s07.html>

This ‘symbiotic’ relationship between counter-terrorism measures and political violence, and the apparently inevitable negative impact of the use of emergency powers upon ‘target’ communities, would indicate that it makes sense to be very cautious in the use of such powers. However, the impact on individuals and ‘target’ communities can be too easily disregarded when set against the apparent demands of the greater good. Justice Jackson’s famous quote in Terminiello v Chicago [111] that the United States Bill of Rights should not be turned into a ‘suicide pact’ has considerable resonance in times of crisis, and often is used as a catch-all response to the ‘bleatings’ of civil libertarians.[112] The structural factors discussed above that appear to drive the response of successive UK governments to terrorist acts seem to invariably result in a depressing repetition of mistakes.¶ However, certain legal processes appear to have some capacity to slow down the excesses of the counter-terrorism cycle. What is becoming apparent in the UK context since 9/11 is that there are factors at play this time round that were not in play in the early years of the Northern Irish crisis. A series of parliamentary, judicial and transnational mechanisms are now in place that appear to have some moderate ‘dampening’ effect on the application of emergency powers.¶ This phrase ‘dampening’ is borrowed from Campbell and Connolly, who have recently suggested that law can play a ‘dampening’ role on the progression of the counter-terrorism cycle before it reaches its end. Legal processes can provide an avenue of political opportunity and mobilisation in their own right, whereby the ‘relatively autonomous’ framework of a legal system can be used to moderate the impact of the cycle of repression and backlash. They also suggest that this ‘dampening’ effect can ‘re-frame’ conflicts in a manner that shifts perceptions about the need for the use of violence or extreme state repression.[113] State responses that have been subject to this dampening effect may have more legitimacy and generate less repression: the need for mobilisation in response may therefore also be diluted.

#### The alternatives focus on storytelling and experiences creates a therapeutic model of debate that merely counsels the individual victims of oppression. This locates the cause of problems and solutions within the self, which invites political inaction and leaves structural causes of oppression untouched as long as we have adopted their method This effectively absolves intellectuals of responsibility for racism while allowing it to thrive.

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(Mari, “Taking Conversation, Dialogue, and Therapy Public ,” Rhetoric & Public Affairs 8.3 (2005) 405-430)

Approaching public controversies through a conversational model informed by therapy also enables political inaction in two respects. First, an open-ended process lacking mechanisms for closure thwarts progress toward resolution. As Freeman writes of consciousness raising, an unstructured, informal discussion [End Page 418] "leaves people with no place to go and the lack of structure leaves them with no way of getting there."70 Second, the therapeutic impulse to emphasize the self as both problem and solution ignores structural impediments constraining individual agency. "Therapy," Cloud argues, "offers consolation rather than compensation, individual adaptation rather than social change, and an experience of politics that is impoverished in its isolation from structural critique and collective action." Public discourse emphasizing healing and coping, she claims, "locates blame and responsibility for solutions in the private sphere."71¶ Clinton's Conversation on Race not only exemplified the frequent wedding of public dialogue and therapeutic themes but also illustrated the failure of a conversation-as-counseling model to achieve meaningful social reform. In his speech inaugurating the initiative, Clinton said, "Basing our self-esteem on the ability to look down on others is not the American way . . . Honest dialogue will not be easy at first . . . Emotions may be rubbed raw, but we must begin." Tempering his stated goal of "concrete solutions" was the caveat that "power cannot compel" racial "community," which "can come only from the human spirit."72¶ Following the president's cue to self-disclose emotions, citizens chiefly aired personal experiences and perspectives during the various community dialogues. In keeping with their talk-show formats, the forums showcased what Orlando Patterson described as "performative 'race' talk," "public speech acts" of denial, proclamation, defense, exhortation, and even apology, in short, performances of "self" that left little room for productive public argument.73 Such personal evidence overshadowed the "facts" and "realities" Clinton also had promised to explore, including, for example, statistics on discrimination patterns in employment, lending, and criminal justice or expert testimony on cycles of dependency, poverty, illegitimacy, and violence.¶ Whereas Clinton had encouraged "honest dialogue" in the name of "responsibility" and "community," Burke argues that "The Cathartic Principle" often produces the reverse. "[C]onfessional," he writes, "contains in itself a kind of 'personal irresponsibility,' as we may even relieve ourselves of private burdens by befouling the public medium." More to the point, "a thoroughly 'confessional' art may enact a kind of 'individual salvation at the expense of the group,'" performing a "sinister function, from the standpoint of overall-social necessities."74 Frustrated observers of the racial dialogue—many of them African Americans—echoed Burke's concerns. Patterson, for example, noted, "when a young Euro-American woman spent nearly five minutes of our 'conversation' in Martha's Vineyard . . . publicly confessing her racial insensitivities, she was directly unburdening herself of all sorts of racial guilt feeling. There was nothing to argue about."75 Boston Globe columnist Derrick Z. Jackson invoked the game metaphor communication theorists often link to [End Page 419] skills in conversation,76 voicing suspicion of a talking cure for racial ailments that included neither exhaustive racial data nor concrete goals. "The game," wrote Jackson, "is to get 'rid' of responsibility for racism while doing nothing to solve it."77

#### This means the affirmative actively provides fuel to the fire of hegemonic debate practices. As long as the community provides an avenue for self-expression, the issue is resolved. This actively discourages structural solutions to problems of inequality because it makes narrative as a sufficient remedy.

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(Mari, “Taking Conversation, Dialogue, and Therapy Public ,” Rhetoric & Public Affairs 8.3 (2005) 405-430)

Fourth, a communicative model that views public issues through a relational, personal, or therapeutic lens nourishes hegemony by inviting political inaction. Whereas the objective of conventional public argument is achieving an instrumental goal such as a verdict or legislation, the aim of social conversation generally stops with self-expression. As Schudson puts it, "Conversation has no end outside itself."39 Similarly, modeling therapeutic paradigms that trumpet "talking cures" can discourage a search for political solutions to public problems by casting cathartic talk as sufficient remedy. As Campbell's analysis of consciousness-raising groups in the women's liberation movement points out, "[S]olutions must be structural, not merely personal, and analysis must move beyond personal experience and feeling . . . Unless such transcendence occurs, there is no persuasive campaign . . . [but] only the very limited realm of therapeutic, small group interaction."40¶ Finally, and related, a therapeutic framing of social problems threatens to locate the source and solution to such ills solely within the individual, the "self-help" on which much therapy rests. A postmodern therapeutic framing of conflicts as relational misunderstandings occasioned by a lack of dialogue not only assumes that familiarity inevitably breeds caring (rather than, say, irritation or contempt) but, more importantly, provides cover for ignoring the structural dimensions of social problems such as disproportionate black [End Page 412] poverty. If objective reality is unavoidably a fiction, as Sheila McNamee claims, all suffering can be dismissed as psychological rather than based in real, material circumstance, enabling defenders of the status quo to admonish citizens to "heal" themselves.

#### The alternative methodology prioritizes discussions of who holds knowledge rather than what the content of that knowledge is. This makes us more concerned with interrogating social location than working for justice for others. This leads to authenticity challenges and endless searches for purification of identity that preclude effective political strategies. Their focus on the self leads to a shrinking of the moral imaginations that limits politics to what is immediately connected to our personal identities. This standpoint can and should be challenged.

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(John, with Johan Muller, University of Cape Town “The Discourse of Voice and the Problem of Knowledge and Identity in the Sociology of Education,” British Journal of Sociology of Education 20 (2) p. 199-200)

The pedagogic device (Bernstein, 1990) of voice discourse promotes a methodology in which the explication of a method's social location precludes the need to examine the content of its data as grounds for valid explanation. Who says it is what counts, not what is said. This approach favours an ethnography that claims to reveal the cultural specificity of the category--the 'voice' of membership. What is held to be the facts, to be the case, is only so-and can only be so-from a particular perspective. The world thus viewed is a patchwork of incommensurable and exclusive voices or standpoints. Through the process of sub-division, increasingly more particularised identity categories come into being, each claiming the unique specificity of its distinctive experience and the knowledge authorised by it. ¶ The consequence of the abolition of the knowledge boundary that follows from the epistemological theses of postmodernism is the increasing specialisation of social categories (see Maton, 1998). Maton describes this process of proliferation in terms of the way such 'knower' discourses, ¶ ... base their legitimation upon the privileged insight of a knower, and work at maintaining strong boundaries around their definition of this knower-they celebrate difference where 'truth' is defined by the 'knower' or 'voice'. As each voice is brought into the choir, the category of the privileged 'knower' becomes smaller, each strongly bounded from one another, for each 'voice' has its own privileged and specialised knowledge. The client 'knower' group thus fragments, each fragment with its own representative ... The procession of the excluded thus becomes, in terms of the privileged 'knower', an accretion of adjectives, the 'hyphenation' which knower modes often proclaim as progress. In summary, with the emergence of each new category of knower, the categories of knowers become smaller, leading to proliferation and fragmentation within the knowledge formation. (ibid., p. 17) ¶ As Maton argues, this move promotes a fundamental change in the principle of legitimation-from what is known (and how) to who knows it. ¶ The device that welds knowledge to standpoint, voice and experience, produces a result that is inherently unstable, because the anchor for the voice is an interior authenticity that can never be demonstrated, only claimed (Taylor, 1992; Siegel, 1997; Fuss, 1990, 1995). Since all such claims are power claims, the authenticity of the voice is constantly prone to a purifying challenge, 'If you do not believe it you are not one of us' (Hammersly & Gomm, 1997, para. 3.3) that gears down to ever more rarefied specialisations or iterations of the voice category; an unstoppable spiral that Bernstein (1997, p. 176) has referred to as the 'shrinking of the moral imagination [10]. ¶ As Bernstein puts it, 'The voice of a social category (academic discourse, gender subject, occupational subject) is constructed by the degree of specialisation of the discursive rules regulating and legitimising the form of communication' (1990, p.23). ¶ If categories of either agents or discourse are specialised, then each category necessarily has its own specific identity and its own specific boundaries. The speciality of each category is created, maintained and reproduced only if the relations between the categories of which a given category is a member are preserved. What is to be preserved? The insulation between the categories. It is the strength of the insulation that creates a space in which a category can become specific. If a category wishes to increase its specificity, it has to appropriate the means to produce the necessary insulation that is the prior condition to its appropriating specificity. (ibid.) ¶ Collection codes employ an organisation of knowledge to specialise categories of person, integrated codes employ an organisation of persons to specialise categories of knowledge (Bernstein, 1977, pp. 106-111). The instability of the social categories associated with voice discourse reflects the fact that there is no stable and agreed-upon way of constructing such categories. By their nature, they are always open to contestation and further fragmentation. In principle, there is no terminal point where 'identities' can finally come to rest. It is for this reason that this position can reappear so frequently across time and space within the intellectual field-the same move can be repeated endlessly under the disguise of 'difference'. In Bernstein's terms, the organisation of knowledge is, most significantly, a device for the regulation of consciousness. ¶ The pedagogic device is thus a symbolic ruler of consciousness in its selective creation, positioning and oppositioning of pedagogic subjects. It is the con- dition for the production, reproduction, and transformation of culture. The question is: whose ruler, what consciousness? (1990, p. 189) ¶ The relativistic challenge to epistemologically grounded strong classifications of knowledge removes the means whereby social categories and their relations can be strongly theorised and effectively researched in a form that is other than arbitrary and can be challenged by anyone choosing to assert an alternative perspective or standpoint.

#### Being able to talk about your personal issues is the privilege—who is here to speak about their experience at Guantanamo?—their kritik mirrors acts of distancing that say we should only focus on what’s in our purview—indefinite detention has maintained its legitimacy precisely because we view it as out there and not affecting us—we must bring the voices of those who can’t speak for themselves here

Park 10

[2010, James Park, “EFFECTUATING PRINCIPLES OF JUSTICE IN ENDING INDEFINITE DETENTION: HISTORICAL REPETITION AND THE CASE OF THE UYGHURS”, 31 Whittier L. Rev. 785]

George Orwell once wrote in The Road to Wigan Pier regarding empire and the complicity of a nation that enjoys its fruits: For in the last resort, the only important question is, Do you want the British Empire to hold together or do you want it to disintegrate?... For, apart from any other consideration, the high standard of life we enjoy in England depends upon our keeping a tight hold on the Empire, particularly the tropical portions of it such as India and Africa. Under the capitalist system, in order that England may live in comparative comfort, a hundred million Indians must live on the verge of starvation. 128 How the old British Empire relates to the detention of Haitians and Uyghurs at Guantanamo Bay involves the very question of conscious awareness and the difficulties in piercing the veil of physical and metaphysical detachment. 129 Descriptions of events transcribed through the filter of media form a buffer to action due to its intangible nature-there is an unreality to the medium of television where elements of reality that play across the screen can take on the discursive properties of the imaginary. 130 As a result, there can be quiet and passive acquiescence when terms, such as, "exceptional," "unprecedented," and "the normal rules do not apply" are heard and used to form the exigencies and justifications for "intensive interrogation methods" and indefinite detention without charge. 131 Spatial separation and isolation also create impediments to rectifying injustice. In the case of the Haitian refugees, service organizations had to go through the judiciary and spend years in litigation to gain access to the refugees at Guantanamo Bay. 13 In the case of Guantanamo Bay detainees caught up in the "War on Terror," there were explicated policies against denying access. 133 For instance, "[a] confidential 2003 manual for operating the Guantanamo detention center shows that military officials had a policy of denying detainees access to independent monitors" from the Red Cross. 134 In other words, those who had done no wrong were denied access and, as a result, justice. The indefinite detention of the Haitians and Uyghurs and the years they have spent and are spending in extra-territorial detention can, similarly, be examined through the prism of "punishment" as there have been alterations to the order and methodology of punishment and incarceration over time. 135 Punishment has changed from something that was acutely visible to something that has become cloaked and secreted away. 136 At one time, the public spectacle of punishment took center stage as a gory spectacle of physical pain. 137 These dramatic displays of "justice" provided all concerned with a specific role: The criminal to be punished acted as the star, the innocent public witnesses supplied the captivated audience, and the government authority directed this macabre melodrama. 138 These displays were therefore meant to educate both the individual criminals living (or in some cases dying), as well as the watching public as to the concepts of justice and punishment. 139 These theatrics later gave way to a less sensational mode of education which focused less on physical torment in pursuit of justice and sought to internalize a sense of a moral code in all individuals. 140 Thus, what was once a passive group of mere voyeurs has been disbanded to become a cluster of individual productions-each person now internalizes and imagines the process of punishment through the censored lens of courtroom dramas and the scripted cinema of the prison yard in popular culture, rather than bear witness to the realities of society's retribution. This more sanitary, internal approach to punishment is particularly pronounced when examined in the context of the "War on Terror." In this instance, the institutions of punishment are not only removed from the public eye, but from the very soil of our nation. 141 In point of fact, Guantanamo Bay is based in a country where United States citizens cannot visit without obtaining a license through the United States government due to a long-existing trade embargo which has only recently been revisited. 142 Guantanamo Bay has been argued to be territory that is outside the bounds of United States' sovereignty, thereby, prohibiting detainees from invoking habeas corpus to challenge their detention. 143 Proponents of this argument used the United States Supreme Court decision in Johnson v. Eisentrager, decided in 1950, which held that those detained in territories beyond the borders of United States sovereignty are unable to invoke the writ of habeas corpus. 144 Thus, Guantanamo Bay was argued to be the sovereign territory of the nation of Cuba as a convenient fiction despite the years of isolation between the two nations. 145 This argument was shattered when the United States Supreme Court held that habeas corpus for "War on Terror" detainees was due in Boumediene v. Bush, decided in 2008. 146 Even further tucked away from the public eye are the secret prisons-socalled "black sites"-instituted by the Bush Administration, operating extra-judicially and containing the faceless "ghost detainee," subject to "intensive interrogation methods."' 147 As the form of punishment and detention shifts further afield, it takes on a profound dimension of separation. George Orwell, in the excerpt above, was alluding to the natural tendency to accept the conditions with which people are presented. The automatic supposition that what may be taking placing is unjust and perhaps beyond the constitutional limits can be seemingly driven from conscious awareness by the public's separation from events and the lack of information. As a consequence, justice has proceeded at a slow, aggravated plod in rectifying wrong where, oftentimes, individuals are simply "released" quietly after years of imprisonment without the subject of their innocence ever being addressed.