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#### TOPICALITY

#### A. Restrictions are prohibitions on action --- excludes conditions

Jean Schiedler-Brown 12, Attorney, Jean Schiedler-Brown & Associates, Appellant Brief of Randall Kinchloe v. States Dept of Health, Washington, The Court of Appeals of the State of Washington, Division 1, http://www.courts.wa.gov/content/Briefs/A01/686429%20Appellant%20Randall%20Kincheloe%27s.pdf

3. The ordinary definition of the term "restrictions" also does not include the reporting and monitoring or supervising terms and conditions that are included in the 2001 Stipulation.

Black's Law Dictionary, 'fifth edition,(1979) defines "restriction" as;

A limitation often imposed in a deed or lease respecting the use to which the property may be put. The term "restrict' is also cross referenced with the term "restrain." Restrain is defined as; To limit, confine, abridge, narrow down, restrict, obstruct, impede, hinder, stay, destroy. To prohibit from action; to put compulsion on; to restrict; to hold or press back. To keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by interposing obstacle, to repress or suppress, to curb.

In contrast, the terms "supervise" and "supervisor" are defined as; To have general oversight over, to superintend or to inspect. See Supervisor. A surveyor or overseer. . . In a broad sense, one having authority over others, to superintend and direct. The term "supervisor" means an individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but required the use of independent judgment.

Comparing the above definitions, it is clear that the definition of "restriction" is very different from the definition of "supervision"-very few of the same words are used to explain or define the different terms. In his 2001 stipulation, Mr. Kincheloe essentially agreed to some supervision conditions, but he did not agree to restrict his license.

#### B. Voting Issue---Precision—restrictions must be a distinct term for debate to occur

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(Senior Lecturer in Law, University of London, Queen Mary. He has held fellowships from the Fulbright Foundation and the French and German governments. He teaches Legal Theory, Constitutional Law, Human Rights and Public International Law. JD Harvard) 2003 “The Logic of Liberal Rights A study in the formal analysis of legal discourse” http://mey.homelinux.org/companions/Eric%20Heinze/The%20Logic%20of%20Liberal%20Rights\_%20A%20Study%20in%20%20%28839%29/The%20Logic%20of%20Liberal%20Rights\_%20A%20Study%20in%20%20-%20Eric%20Heinze.pdf

Variety of ‘restrictions’

The term ‘restriction’, defined so broadly, embraces any number of familiar concepts: ‘deprivation’, ‘denial’, ‘encroachment’, ‘incursion’, ‘infringement’, ‘interference’, ‘limitation’, ‘regulation’. Those terms commonly comport differences in meaning or nuance, and are not all interchangeable in standard legal usage. For example, a ‘deprivation’ may be distinguished from a ‘limitation’ or ‘regulation’ in order to denote a full denial of a right (e.g. where private property is wholly appropriated by the state 16 Agents without compensation) as opposed to a partial constraint (e.g. where discrete restrictions are imposed on the use of property which nonetheless remains profitably usable). Similarly, distinctions between acts and omissions can leave the blanket term ‘restriction’ sounding inapposite when applied to an omission: if a state is accused of not doing enough to give effect to a right, we would not colloquially refer to such inaction as a ‘restriction’. Moreover, in a case of extreme abuse, such as extrajudicial killing or torture, it might sound banal to speak merely of a ‘restriction’ on the corresponding right. However, the term ‘restriction’ will be used to include all of those circumstances, in so far as they all comport a purpose or effect of extinguishing or diminishing the right-seeker’s enjoyment of an asserted right. (The only significant distinction which will be drawn will be between that concept of ‘restriction’ and the concept of ‘breach’ or ‘violation’. The terms ‘breach’ or ‘violation’ will be used to denote a judicial determination about the legality of the restriction.6) Such an axiom may seem unwelcome, in so far as it obliterates subtleties which one would have thought to be useful in law. It must be stressed that we are seeking to eliminate that variety of terms not for all purposes, but only for the very narrow purposes of a formal model, for which any distinctions among them are irrelevant.

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#### PRISON K

#### The 1AC frames its indictment of the war on terror through an appeal for reformed burdens of proof. This move replicates the error of normalizing the injustice of our domestic criminal justice system and foreclosing more effective criticism necessary to challenge the war on terror.

Forman-prof law Georgetown-9

ARTICLE: EXPORTING HARSHNESS: HOW THE WAR ON CRIME HELPED MAKE THE WAR ON TERROR POSSIBLE

33 N.Y.U. Rev. L. & Soc. Change 331

[\*331] I. Introduction During the Bush administration, opponents of the prosecution of the war on terror routinely denounced it as a betrayal of American values. The narrative went like this: the United States has a long-standing commitment to human rights and due process, reflected in its domestic criminal justice system's expansive protections, but after September 11, 2001, President Bush, Vice President Cheney, Defense Secretary Rumsfeld, and their allies dishonored this tradition. Consider the argument of Neal Katyal, the lead civilian lawyer for Salim Hamdan, Osama bin Laden's driver. Katyal describes meeting his client for the first time, when Hamdan asked him, "Why are you doing this?" Katyal responded: The reason that I am here is that my parents came to America with eight dollars in their pocket... . They came to America for a simple reason: they could land on its shores and they'd be treated fairly and their children would be treated fairly. And when the president issued this military order, which said, "If you're one of them, if you're a green card holder" - as my parents were - "or if you're a foreigner ... you get the beat-up Chevy version of Justice. You get sent to Guantanamo. But if you're an American citizen, accused of the most heinous crime imaginable, the detonation of a weapon of mass destruction, you get the Gold Standard. You get the American Civilian Trial." I told him that's why I was so offended. Because we haven't ever had Us versus Them justice. 1 [\*332] Katyal made the same point when testifying before Congress, contrasting the Bush administration's proposed military commissions for detainees held at Guantanamo with "the "Cadillac' version of justice" reserved for U.S. citizens. 2 Having represented indigent defendants for six years in the local courts of Washington, D.C., I was taken aback by Katyal's contention that Americans receive a "Cadillac' system of justice. 3 But Katyal is hardly alone. Consider the titles of three recent exposes of the Bush administration's policies in the war on terror. British human rights lawyer Philippe Sands's new book is called Torture Team: Rumsfeld's Memo and the Betrayal of American Values. 4 New York Times reporter Eric Lichtblau's investigation of the NSA spying program is Bush's Law: The Remaking of American Justice. 5 And the New Yorker's Jane Mayer has just released The Dark Side: The Insider Story of how the War on Terror Turned into a War on American Ideals. 6 Each of these titles tells the same familiar tale: the war on terror represents a sharp break from the past, with American values and ideals "betrayed," American law "remade." The truth is more complicated, and in this Article I seek to begin a more sustained comparison between the wars on terror and crime. 7 While I share much of the criticism of how we have waged the war on terror, I suspect it is both too simple and ultimately too comforting to assert that the Bush administration alone remade our justice system and betrayed our values. In this Article, I seek to turn Katyal's argument on its head and to explore the ways in which our approach to the war on terror is an [\*333] extension - sometimes a grotesque one - of what we do in the name of the war on crime. 8 By pursuing certain policies and using particular rhetoric domestically, I suggest, we have rendered thinkable what would otherwise have been unthinkable. Moreover, as the world's largest jailer, we are increasingly desensitized to the harsh treatment of criminals. We have come to accept such excesses as casualties of war - whether on crime, drugs, or terror. Indeed, more than that, we no longer see what we do as special, different, or harsh. Certain practices have become what David Garland calls "the taken-for-granted features of contemporary crime policy." 9 In part for this reason, despite the mounting evidence regarding secret memos, inhumane prison conditions, coercive interrogations, and interference with defense lawyers, the Bush administration's approach to the war on terror went largely unchecked and unchanged. Many critics of the Bush administration's terror policies open with some version of the question - how did it come to this? My Article seeks to address the same question. Specifically, I will explore five areas in which our domestic criminal system has informed our approach to the war on terror: (1) the scope of our prison complex, (2) prison conditions and prisoner abuse, (3) our harsh treatment of juveniles, (4) attacks on judicial authority, and (5) undermining the role of defense counsel. In addition, I will discuss the innocence movement, which I argue has somewhat tempered the prosecution of both the wars on crime and terror. Before turning to the details, I want to outline how some other critics have explained the forces that give rise to our current approach to the war on terror. Perhaps the most common explanation for why America has pursued such extreme measures is what might be called the Wartime Overreaction Theory. In this view, civil liberties always suffer in times of war. As Justice Brennan once put it: There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security... . After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But [\*334] it has proven unable to prevent itself from repeating the error when the next crisis came along. 10 More recently, Eric Lichtblau frames the history of the American criminal justice system as exercising "restraint over aggression" except in times of war. In Lichtblau's account, the American tradition is to place a "premium" on protecting "the rights of the innocent." Exceptions are few and far between and concern times of national emergency, like World Wars I and II and the ensuing Cold War. According to Lichtblau, For much of its history, the American justice system has placed a premium on ensuring that a society's zeal to rid its streets of the guilty does not trample the rights of the innocent in its path and, just as important, that the justice system includes enough checks and balances, enough safeguards, to know the difference. There have been, of course, the notable and in some ways predictable exceptions, especially in times of national fear and crisis. The Palmer Raids targeting some ten thousand suspected radicals, socialists, and anarchists in 1919 were one; the internment of some 120,000 Japanese-Americans during World War II was another; Senator Joseph McCarthy's Red Scare in the 1950s a third. More often, however, the justice system has tilted toward restraint over aggression. 11 The Wartime Overreaction Theory helps explain why Americans have accepted practices that have outraged much of the rest of the world. Foreigners might have the luxury to sympathize with the plight of those locked up in Guantanamo or Abu Ghraib or secret prisons. But American sympathies will naturally lie with the victims of the September 11 bombings and making sure it does not happen again. After all, America was attacked, and it is natural - even typical - for states to respond aggressively and with little regard for civil liberties in such circumstances. Closely related is what might be called the Blame Bush and Rove Theory. The argument here is that while war always leads to some level of overreaction, the fear generated by September 11 has been stoked by the [\*335] Bush administration to bully opponents and win support for various harsh measures. 12 In the words of 9/11 Commission Director Phillip Zelikow, the problem was that "fear and anxiety were exploited by zealots and fools." 13 In this account, the Bush administration consistently and "successfully invoked the threat of "mushroom clouds' to win support, or at least acquiescence, for the invasion of Iraq." 14 By the time it became clear Saddam Hussein had no weapons of mass destruction, the Bush administration began warning of the risks of losing to terrorists in Iraq - the new "central front" of the war on terror. 15 The name bin Laden disappeared for awhile, only to reemerge once reports of "secret CIA prisons, torture, and domestic spying" 16 surfaced. David Cole's Enemy Aliens Theory also deserves our attention. According to Cole, aliens have always been the first target during times of crisis. The government gets away with it precisely because the restrictions on liberty and privacy are directed at a group that is foreign, other, and politically weak. 17 Because foreign nationals have borne the brunt of the war on terror's harshness, American citizens have not internalized the costs. 18 When citizens' rights have been limited, says Cole, the political system has largely responded. In an effort to spur Americans out of their current complacency, Cole argues that past harms inflicted on aliens eventually expand to the rest of the population. 19 I think there is some truth in each of the above explanations, and I offer my Exporting Harshness Theory as a modification, not a rejection, of the others. Wartime Overreaction has surely been part of the explanation for the past seven years, but it does not explain why the United States resorted to tactics that Europe resisted, despite the fact that hundreds were killed in terrorist attacks in Madrid, in 2004, and London, in 2005. 20 Nor does it explain why the United States government has sought to extend executive authority and limit access to counsel for detainees much [\*336] more aggressively than did Britain or Israel - two countries which also have experience responding to terrorism. 21 Moreover, the reasonable claim that crisis can produce overreaction too often shades into the more doubtful one that, to quote Lichtblau, our peacetime criminal justice system typically "tilts toward restraint over aggression." Similarly, Blame Bush and Rove is partially correct. For example, it is clear that in areas such as executive privilege and secrecy the administration used 9/11 as an opportunity to push an agenda that pre-dated the crisis. 22 Yet why did they succeed? Leaders who make bad decisions ought to be held accountable, but in a country that holds elections, voters cannot avoid all responsibility for the actions of elected officials. As for Enemy Aliens, I agree with Cole that some of our most punitive tactics have been tried first on non-citizens. But there is a risk in advancing Enemy Aliens as the complete explanation. Unless we accompany the Enemy Aliens Theory with some account of our domestic criminal justice system's harshness, it becomes too easy to take the Cadillac metaphor seriously. So what to make of Katyal's Cadillac? I offer my criticism reluctantly because I am sympathetic to the agenda of ensuring fair process for those detained by the United States government. In characterizing the domestic criminal justice system as he does, Katyal knows the Cadillac only appears shiny and new in comparison with the awful condition of justice in Guantanamo Bay. Moreover, he and others making similar claims 23 are likely adopting a stance long familiar to human rights lawyers, civil rights advocates, and critical race theorists. The strategy requires first appealing to what Americans believe their nation and its Constitution stand for, and then highlighting the distance between the promise and the reality lived by the client. 24 Like Martin Luther King, Jr., the human rights lawyer is [\*337] asking America to "be true to what you said on paper." 25 Of course, the advocate may be doing this armed with the same doubts that King had about whether the nation meant it. 26 But the strategy - while a great one for Katyal's client and others like him - is risky for the rest of us. America suffers no lack of enthusiasm for the greatness of its legal system. 27 Instead, our failure is to see our flaws. Convinced that our system is the most rights-protective in the world, we are insufficiently self-reflective. For the same reasons, we are often highly suspicious of comparative or international reform models. 28 These tendencies have stunted the development of our criminal justice system. Worse, they have left us in the unenviable position of having one of the most punitive systems in the world while believing we have one of the most liberal. Images like that of Katyal's Cadillac both reflect and reinforce this state of affairs. To put the point another way, consider the words of Muneer Ahmad, who, like Katyal, is both a professor and Guantanamo defense attorney. [\*338] Ahmad's account of the bizarre world of Guantanamo Bay leads him to conclude that "the central cultural project of Guantanamo has been to normalize what is, on first inspection, extraordinarily aberrant, and to render intelligible the seemingly bizarre." 29 For those who believe Guantanamo Bay is an irredeemable human rights violation, it is essential to demonstrate how aberrant it truly is. That is what Katyal achieves with the comparison between Cadillacs and Chevrolets. My discomfort comes from the fact that in contrasting the aberrant (Guantanamo) with the normal (our domestic criminal justice system) we become blinded to the profound abnormality of our domestic criminal system. One of my goals in this Article is to counter this tendency by raising questions about our domestic criminal system by turning a mirror back on it. There is one more reason to pay close attention to how the war on crime has helped make the war on terror possible. It is the only way to achieve change that sticks in how we fight the war on terror. In the months following the release of the Abu Ghraib abuse photos, the administration claimed the scandal was the work of a few "bad apples" and that neither the administration nor the chain of command bore any responsibility. Critics of this excuse questioned the notion that removing the bad apples would solve the problem. It was more systemic, more deeply-rooted, they argued. 30 I think the critics were right then. In the waning days of the Bush administration, as disapproval of the prosecution of the war on terror mounted and a new administration prepared to take office, the bad apples explanation reemerged. This time, however, the alleged bad apples are not low-level officers but Bush, Rumsfeld, and Cheney themselves. 31 While placing blame on the leaders gets closer to the truth than accusing front-line officers, there is one sense in which the bad apples explanation is still unsatisfying. It lets some people - We the People - off the hook. [\*339] After all, to suggest that we were led - against our essential character - to do terrible things conveniently avoids some important questions. What caused our leaders to imagine such harsh tactics? Why did they think we would tolerate it? Why were they right? 32 These questions matter because although the Bush administration has left office, unless we confront why they succeeded, many of the tactics they adopted may survive their departure. 33 Before turning to the specifics of my argument, I want to offer two caveats. I will draw a number of analogies between tactics, practices, and rhetoric adopted in the war on crime and those employed in the war on terror. I am not arguing, however, that there is a jot-for-jot parallel between how we have prosecuted the two wars. To the contrary, some enormous differences exist. Some of the most notable distinctions of the war on terror include: secret prisons for terror suspects, indefinite detention without trial of the accused, and the systematic use of physical brutality as a method of interrogation. While physical brutality to obtain confessions was used extensively through the mid-twentieth century, 34 and still occurs occasionally, it is no longer widely practiced in domestic criminal cases. 35 Similarly, indefinite detention without trial and secret prisons are unknown to our criminal system. Second, when I discuss conditions of confinement or right to counsel, for example, I am not asserting that our domestic prisons are as awful as Abu Ghraib or that we deny lawyers to suspects domestically in the same way that we have to those held at Guantanamo. My argument, I hope, is more nuanced. I am interested in exploring continuities in places where the prevailing wisdom has been to emphasize discontinuity. I want to understand why we as a nation have allowed certain things to go on in our [\*340] name, even, in some cases, after we learned the truth about abuses in the war on terror. To answer those questions we must pay careful attention to what we do at home, to our own citizens, in our domestic criminal system. Even with these caveats, I confess some ambivalence about my argument. It, too, carries risks. Comparing tactics employed in the war on terror with those used in the war on crime invites defenders of our current anti-terror policy to say, "Stop complaining, we do this already." This is not a hypothetical risk. As I was working on this part of the Article, I watched Neal Katyal debate former federal prosecutor Andrew McBride on NewsHour with Jim Lehrer. When Katyal objected to the fact that Hamdan's lawyers were forced to wait until the eve of trial to interview a high-security witness with potentially exculpatory information, McBride responded with something along the lines of "when I was a federal prosecutor in similar cases, that is how we did it." 36 While my own defense practice was in state court, and did not involve the sorts of cases that make it onto NewsHour, my experience is that while our rules on paper favor what Katyal argued for, our routine practice is as McBride portrays it. Moreover, by placing our approach to the war on terror on a continuum with how we fight the war on crime, I worry I may help to normalize, or even justify, the egregious and inhumane. This is a tricky issue, similar to a divide that marks the debate over torture. To oversimplify, there are those who would treat torture as a categorically unique form of state violence, comparable only perhaps to genocide. 37 Others situate torture on a continuum with other forms of state violence and coercion. 38 Given what I have said so far, it is not surprising that my [\*341] sympathies lie with those who put torture on a continuum. I fear that viewing torture as categorically different can sustain a perverse result: we devote more attention to the (relatively) few individuals tortured in the war on terror than to the much larger number of Iraqi civilians killed during the same time period. 39 By analogy, I would argue that singling out our prosecution of the war on terror as categorically different runs a similar risk. It invites us to avoid more difficult conversations about our domestic war on crime.

#### Vote Negative. Reconceptualizing punishment is a prerequisite to renegotiating the war on terror

Michelle Brown, Professor/Criminologist Department of Sociology/Anthropology - Ohio University, 2005

(“Setting the Conditions for Abu Ghraib: The Prison Nation Abroad,” *American Quarterly* 57.3)

The register in which Americans are continuing to render meaningful the terrorist attacks of September 11 as well as the expansive war on terrorism in Afghanistan and Iraq is one that has dominated American notions of crime and punishment for more than three decades.[32](http://muse.jhu.edu/journals/american_quarterly/v057/57.3brown.html#FOOT32#FOOT32) It is a distinctly penaldiscourse centered upon a particular philosophy of punishment, retribution, with its attendant oppositional, binary, and dehumanizing logic. Retributive frames of punishment marked the contours of the war on terror from the beginning, as evidenced when President Bush assured the American public and the world in the hours after the events of September 11: "Make no mistake: The United States will hunt down and punish those responsible for these cowardly acts," those responsible being individuals, to employ the administration's binary rhetoric, who had "burrowed" into the everyday life of Americans, the hidden "cowards," "barbarians," and "evil-doers," lurking in the "shadows" and "caves," afraid to show their faces.[33](http://muse.jhu.edu/journals/american_quarterly/v057/57.3brown.html#FOOT33#FOOT33) It was also an event that occurred in an already entrenched penal context, in which the privileging of retribution, individual responsibility, and cultural denial had become the hallmarks of American justice. **This hyper-penal context creates the necessity for a reconceptualization of the way in which punishment is present and at work in the lived spaces and practices of everyday life, well beyond the institutional forms punishment may take.** In the story of Abu Ghraib, punishment circulates beyond the prison walls into every facet of social experience. It is apparent in the political rhetoric of war, in the rise of a nationalist solidarity built upon retribution and [End Page 981] aggression. It is found in the architecture and configuration of Abu Ghraib's "hard" site, the tiers in which the abuse occurred, in the policies and practices that defined life there, borrowed from the penal system at home. It is apparent in the precedents and policies reformulating and restricting the rights of prisoners, not just in war zones abroad, but in the domestic interior of the United States. And it networks through the biographies of those involved in the scandal, which have become the focus of soap-opera-style media coverage and thus constitute primary signs in the cultural decoding of the case.

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#### BOND DA

#### There will be a narrow ruling on Bond now but conservative advocates are pushing.

Donnelly 11-5-13

Tom, Constitutional Accountability Center’s Message Director and Counsel and former Climenko Fellow and Lecturer on Law at Harvard Law School, Constitutional law as soap opera: Bond v. United States http://blog.constitutioncenter.org/2013/11/constitutional-law-as-soap-opera-bond-v-united-states/

Colorful facts aside, in the conservatives’ rendering of Bond, the very fabric of the Republic is at stake. George Will has called it the Term’s “most momentous case,” arguing that the Roberts Court must step in to check a “government run amok.” The Heritage Foundation warns that the case challenges a key lesson that “Americans are taught from a young age” – that “our government is a government of limited powers.” And Ted Cruz frames the legal issue as follows: whether the “Treaty Clause is a trump card that defeats all of the remaining structural limitations on the federal government.” A scary proposition, indeed . . . But will the Court even get this far? Ms. Bond’s primary argument is that the chemical weapons treaty and its implementing statute should be read to exclude her conduct – a question of statutory interpretation and hardly the stuff of Tenthers’ dreams. If the Court decides the case on those grounds, Ms. Bond could very well prevail, while the ruling itself could be rather minor. The main reason that this case may prove “momentous” is that leading conservative academics, advocates, and legal groups are pushing the Roberts Court to turn this case from an interesting-but-far-from-historic statutory case into a monumental constitutional one. While the Court denied a request from Professor Nicholas Rosenkranz and the Cato Institute – the main proponents of the treaty-power-as-dangerous-trump-card theory – for time to press their argument during tomorrow’s hearing, the Court generally rejects such requests from amicus curiae, so we can’t read too much into that. And, following other recent cases addressing the scope of federal power – including, most prominently, the Affordable Care Act case – there is every reason to believe that the Court may wade into the important constitutional issues lurking just beneath the surface in Bond. The primary constitutional issue in the case involves the scope of the federal government’s treaty power – a power that was of central interest to George Washington and his Founding-era colleagues – and, in turn, Congress’s power under the Necessary and Proper Clause to pass laws to implement validly enacted treaties. However, in Bond, conservative legal groups have proceeded to turn the Constitution’s text and history on their head, arguing that the Constitution itself requires a ruling that sharply limits federal power and overturns nearly a century’s worth of precedent – dating back to a 1920 ruling by Justice Oliver Wendell Holmes. Indeed, Bond is just one of several cases this Term featuring an aggressive call by conservatives to overturn well-established precedent. Furthermore, a broad ruling by the Court’s conservatives could significantly limit Congress’s power to enact laws under the Necessary and Proper Clause, generally, opening up new challenges to various government programs and regulations. In the past, the right’s constitutional arguments may have gone unanswered. However, increasingly, leading progressive academics and practitioners have begun to stake their own claim to the Constitution’s text and history – the tired battle between the progressive community’s “living Constitution” and Justice Scalia’s “dead Constitution” replaced by new battles between the left and the right over the Constitution’s meaning. Bond is a clear example of this new dynamic. Rather than ceding the Constitution’s text and history to conservative legal groups, progressives have fought back in Bond with originalist arguments of their own in briefs authored by some of the progressive community’s leading lights, including Walter Dellinger, Marty Lederman, and Oona Hathaway. These briefs – as well as one filed by my organization, Constitutional Accountability Center – remind the Court that, in ditching the dysfunctional Articles of Confederation, the Founders sought to create a strong national government with the power to negotiate treaties with foreign nations, pass laws to fulfill those treaty obligations, and, in turn, enhance the young nation’s international reputation. With progressives fully engaged in the battle over the Constitution’s meaning, the question facing the Court in important constitutional cases is now less about whether the Constitution’s text and history should prevail and more about which side’s version rings truer.

#### Aff is a massive change – kills court capital and will be ignored by the President.

Devins 2010

Neal, Professor of Law at William and Mary, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1024&context=facpubs

Without question, there are very real differences between the factual contexts of Kiyemba and Bush-era cases. These differences, however, do not account for the striking gap between accounts of Kiyemba as likely inconsequential and Bush-era cases as "the most important decisions" on presidential power "ever., 20 In the pages that follow, I will argue that Kiyemba is cut from the same cloth as Bush-era enemy combatant decision making. Just as Kiyemba will be of limited reach (at most signaling the Court's willingness to impose further limits on the government without forcing the government to meaningfully adjust its policymaking), Bush-era enemy combatant cases were modest incremental rulings. Notwithstanding claims by academics, opinion leaders, and the media, Supreme Court enemy combatant decision making did not impose significant rule of law limits on the President and Congress. Bush-era cases were certainly consequential, but they never occupied the blockbuster status that so many (on both the left and the right) attributed to them. Throughout the course of the enemy combatant dispute, the Court has never risked its institutional capital either by issuing a decision that the political branches would ignore, or by compelling the executive branch to pursue policies that created meaningful risks to national security. The Court, instead, took limited risks to protect its turf and assert its power to "say what the law is." That was the Court's practice during the Bush years, and it is the Court's practice today.

#### Upholding Missouri v Holland is key to treaties but capital is key.

Spiro 2008

Peter J., Professor of Law, Temple University, Resurrecting Missouri v. Holland, Missouri Law Review http://law.missouri.edu/lawreview/files/2012/11/Spiro.pdf

Even with respect to the Children’s Rights Convention, the balance may change. At both levels, the game is dynamic. On the international plane, as more attention is focused on human rights regimes, the costs of nonparticipation rise. Other countries and other international actors (human rights NGOs, for example) will train a more focused spotlight on U.S. nonparticipation.28 From a human rights perspective, it’s low-hanging fruit; the mere fact that the United States finds itself alone with Somalia outside the regime suffices to demonstrate the error of the American stance as a leading example of deplored American exceptionalism. For progressive advocacy groups focusing on children’s rights, the Convention is emerging as an agenda item.29 More powerful actors, including states and such major human rights groups as Amnesty International and Human Rights Watch, may be unlikely to put significant political resources into the effort, but there is the prospect of a drumbeat effect and accompanying stress to U.S. decisionmakers. 30 In the wake of international opprobrium associated with post-9/11 antiterror strategies, U.S. conformity with human rights has come under intensive international scrutiny. That scrutiny is spilling over into other human rights-related issues; there will be no more free passes for the United States when it comes to rights.31 Human rights may present the most obvious flash point along the Holland front, but it will not be the only one. As Antonia Chayes notes, “resentment runs deep” against U.S. treaty behavior.32 International pressure on the United States to fully participate in widely-subscribed international treaty regimes, some of which could constitutionally ride on the Treaty Power alone, will grow more intense. At the same time that the international price of non-participation rises, a subtle socialization may be working to lower the domestic cost of exercising Holland-like powers. Globalization is massaging international law into the sinews of American political culture. The United States may not have ratified the Convention on the Rights of the Child, for example, but it has acceded to Hague Conventions on abduction33 and adoption,34 as well as optional protocols to the Children’s Rights Convention itself,35 and has enthusiastically pursued an agreement on the transboundary recovery of child support.36 As international law becomes familiar as a tool of family law, the Children’s Convention will inevitably look less threatening even against America’s robust sentiments regarding federalism. Regimes in other areas should be to similar effect and will span the political divide. It is highly significant, for instance, that conservative Americans have become vocal advocates of international regimes against religious persecution, a key factor in the aggressive U.S. stance on Darfur.37 To the extent that conservatives see utility in one regime they will lose traction with respect to principled category arguments against others. Which is not at all to say that Holland will be activated with consensus support. A clear assertion of the Treaty Power against state prerogatives would surely provoke stiff opposition in the Senate and among anti-internationalist conservatives, setting the scene for a constitutional showdown.38 The adoption of a treaty regime invading protected state powers would require the expenditure of substantial political capital. Any president taking the Treaty Power plunge would be well advised to choose a battle to minimize policy controversy on top of the constitutional one. A substantively controversial regime depending on Holland’s authority (say, relating to the death penalty) would increase the risk of senatorial rebuke. Perhaps the best strategy would be to plant the seeds of constitutional precedent in the context of substantively obscure treaties, ones unlikely to attract sovereigntist flak. If a higher profile treaty implicating Holland were then put on the table, earlier deployments would undermine opposition framed in constitutional terms. Such was the case with the innovation of congressional-executive agreements, which, before their use in adopting major institutional regimes in the wake of World War II, had been used with respect to minor agreements in the interwar years.39 In contrast to the story of congressional-executive agreements, advocates of an expansive Treaty Power will have the advantage of Holland itself, that is, a Supreme Court decision on point and not superseded by a subsequent ruling. That would lend constitutional credibility to the proposed adoption of any agreement requiring the Treaty Power by way of constitutional support. But it wouldn’t settle the question in the face of the consistent practice described above. Holland is an old, orphaned decision, creating ample space for contemporary rejection. An anti-Holland posture, the decision’s status as good law notwithstanding, would also be bolstered by the highly credentialed revisionist critique.40 That of course begs the question of what the Supreme Court would do with the question were it presented. The Court could reaffirm Holland, in which case its resurrection would be official and the constitutional question settled, this time (one suspects) for good. That result would comfortably fit within the tradition of the foreign affairs differential (in which Holland itself is featured).41 One can imagine the riffs on Holmes, playing heavily to the imperatives of foreign relations and the increasing need to manage global challenges effectively. The opinion might not write itself, but it would require minimal creativity. Recent decisions, Garamendi notably among them,42 would supply an updated doctrinal pedigree. And since the question would come to the Court only after a treaty had garnered the requisite two-thirds’ support in the Senate, the decision would not likely require much in the way of political fortitude on the Court’s part. It would also likely draw favorable international attention, reaffirming the justices’ membership in the global community of courts.43 IV. CONCLUSION:CONSTITUTIONAL LIFE WITHOUT MISSOURI V. HOLLAND Holland’s judicial validation would hardly be a foregone conclusion. The Supreme Court has grown bolder in the realm of foreign relations. Much of this boldness has been applied to advance the application of international norms to U.S. lawmaking, the post-9/11 terror cases most notably among them.44 The VCCR decisions, on the other hand, have demonstrated the Court’s continued resistance to the application of treaty obligations on the states. In Medellín, where the Court found the President powerless to enforce the ICJ’s Avena decision on state courts, that resistance exhibited itself over executive branch objections. The Court rebuffed the President with the result of retarding the imposition of international law on the states and at the risk of offending powerful international actors.

#### Treaties are key to cooperation on every issue – solve extinction

Koh and Smith 2003

Harold Hongju Koh, Professor of International Law, and Bernice Latrobe Smith, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, “FOREWORD: On American Exceptionalism,” May 2003, 55 Stan. L. Rev. 1479

Similarly, the oxymoronic concept of "imposed democracy" authorizes top-down regime change in the name of democracy. Yet the United States has always argued that genuine democracy must flow from the will of the people, not from military occupation. 67 Finally, a policy of strategic unilateralism seems unsustainable in an interdependent world. For over the past two centuries, the United States has become party not just to a few treaties, but to a global network of closely interconnected treaties enmeshed in multiple frameworks of international institutions. Unilateral administration decisions to break or bend one treaty commitment thus rarely end the matter, but more usually trigger vicious cycles of treaty violation. In an interdependent world, [\*1501] the United States simply cannot afford to ignore its treaty obligations while at the same time expecting its treaty partners to help it solve the myriad global problems that extend far beyond any one nation's control: the global AIDS and SARS crises, climate change, international debt, drug smuggling, trade imbalances, currency coordination, and trafficking in human beings, to name just a few. Repeated incidents of American treaty-breaking create the damaging impression of a United States contemptuous of both its treaty obligations and treaty partners. That impression undermines American soft power at the exact moment that the United States is trying to use that soft power to mobilize those same partners to help it solve problems it simply cannot solve alone: most obviously, the war against global terrorism, but also the postwar construction of Iraq, the Middle East crisis, or the renewed nuclear militarization of North Korea.

### 1NC

#### TERROR DA

#### Plan undermines detention policy by setting the bar too high-that wrecks intel gathering and solving terrorism

**Blum, DHS attorney advisor, 2008**

(Stephanie, The Necessary Evil of Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution, 54-5, ldg)

According to the Bush administration, individuals may be significant intelligence assets, and criminal charges with the ensuing rights to counsel and right to exculpatory material would greatly halt and disrupt interrogation. Under the criminal justice system, once in custody, a defendant must be warned of his rights to counsel and against self-incrimination.10 Furthermore, a defendant in a criminal proceeding is constitutionally entitled to obtain potentially exculpatory information in the possession of the government.11 As Yoo explains, introducing a lawyer immediately after capture of an enemy combatant would disrupt interrogation as any competent defense counsel would tell his client to remain silent.12 According to former White House counsel Alberto Gonzales (later the attorney general), "[t]he stream of intelligence would quickly dry up if the enemy combatants were allowed contact with outsiders during the course of an ongoing debriefing."13 He added that such a result would be "an intolerable cost" and not required by the Con¬stitution.14 Rosenzweig and Carafano discuss how "isolation" is one of the "most successful means of productive interrogation."15 Judge Posner describes how a "detainee who feels isolated and has no access to a lawyer can more easily be pressured to provide information sought by the government."16 In fact, Khalid Sheikh Mohammed (KSM), the mastermind behind 9/11, initially demanded an attorney upon arrest and stated that he would see his captors in court.17 As explained subsequently, KSM was not provided an attorney and, according to the administration, has provided substantial intelligence that has stopped specific terrorist plots. Therefore, one purpose for a preventive-detention regime is to interrogate a terrorist suspect in isolation who may prove to be a valuable intelligence asset before criminal charges and the ensuing rights to counsel accrue. This concern about Miranda protections interfering with needed inter-rogation is not just theoretical. As explained by FBI agent Coleen Rowley, Zacarias Moussaoui (the twentieth hijacker) was in custody on 9/11 due to an immigration violation. Because he had requested a lawyer, however, the FBI was prevented from questioning him when in theory he could have possessed further information about coconspirators or a second wave of attacks.18 The situation of Padilla is particularly enlightening on this issue of interrogation as a rationale for preventive detention. Yoo describes Padilla as "an intelligence prize."19 Based on information from other captured al Qaeda operatives (discussed subsequently), the administration had intelligence that Padilla, who was arrested at O'Hare International Airport in 2002, had just come from Pakistan where he had met with high-level al Qaeda operatives with plans to detonate a radioactive bomb in a large U.S. city. Yet, upon arrest, while he had approximately $10,000 and a cell phone with al Qaeda operatives' phone numbers on it, he did not have any of the bomb-making equipment or plans on him, and he did not have the expertise to construct such a weapon himself. There were obvious questions that needed to be answered: Where would Padilla, who had an extensive violent criminal record as a juvenile, get the money, supplies, and expertise to build such a bomb? Where would he get the radioactive material? Were there sleeper al Qaeda cells in the United States?20 Although Padilla's attorney argues that Padilla could have been charged with conspiracy or levying war,21 the Justice Department did not think that it could detain Padilla very long in the criminal justice system based on the amount of evidence it had, or that Padilla would likely reveal his al Qaeda contacts if he knew he was going to be released in a matter of months.22 In a June 2004 press release, former deputy attorney general James Comey stated, Had we tried to make a case against Jose Padilla through our criminal justice system, something that I as the United States attorney in New York could not do at that time without jeopardizing intelligence sources, he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right. He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week and hope—pray,—that we didn't lose him.23

#### High risk of nuclear terrorism-current safety is an incomplete patchwork.

**Luongo et al., Partnership for Global Security president, 2012**

(Kenneth, “Nuclear Terrorism: A Clear Danger”, 3-15, <http://www.nytimes.com/2012/03/16/opinion/nuclear-terrorism-a-clear-danger.html?_r=1&>, ldg)

Terrorists exploit gaps in security. The current global regime for protecting the nuclear materials that terrorists desire for their ultimate weapon is far from seamless. It is based largely on unaccountable, voluntary arrangements that are inconsistent across borders. Its weak links make it dangerous and inadequate to prevent nuclear terrorism. Later this month in Seoul, the more than 50 world leaders who will gather for the second Nuclear Security Summit need to seize the opportunity to start developing an accountable regime to prevent nuclear terrorism. There is a consensus among international leaders that the threat of nuclear terrorism is real, not a Hollywood confection. President Obama, the leaders of 46 other nations, the heads of the International Atomic Energy Agency and the United Nations, and numerous experts have called nuclear terrorism one of the most serious threats to global security and stability. It is also preventable with more aggressive action. At least four terrorist groups, including Al Qaeda, have demonstrated interest in using a nuclear device. These groups operate in or near states with histories of questionable nuclear security practices. Terrorists do not need to steal a nuclear weapon. It is quite possible to make an improvised nuclear device from highly enriched uranium or plutonium being used for civilian purposes. And there is a black market in such material. There have been 18 confirmed thefts or loss of weapons-usable nuclear material. In 2011, the Moldovan police broke up part of a smuggling ring attempting to sell highly enriched uranium; one member is thought to remain at large with a kilogram of this material. A terrorist nuclear explosion could kill hundreds of thousands, create billions of dollars in damages and undermine the global economy. Former Secretary General Kofi Annan of the United Nations said that an act of nuclear terrorism “would thrust tens of millions of people into dire poverty” and create “a second death toll throughout the developing world.” Surely after such an event, global leaders would produce a strong global system to ensure nuclear security. There is no reason to wait for a catastrophe to build such a system. The conventional wisdom is that domestic regulations, U.N. Security Council resolutions, G-8 initiatives, I.A.E.A. activities and other voluntary efforts will prevent nuclear terrorism. But existing global arrangements for nuclear security lack uniformity and coherence. There are no globally agreed standards for effectively securing nuclear material. There is no obligation to follow the voluntary standards that do exist and no institution, not even the I.A.E.A., with a mandate to evaluate nuclear security performance. This patchwork approach provides the appearance of dealing with nuclear security; the reality is there are gaps through which a determined terrorist group could drive one or more nuclear devices.

#### And, Nuclear terrorism attacks escalate and cause extinction.

**Morgan, Hankuk University of Foreign Studies, 2009**

(Dennis, World on fire: two scenarios of the destruction of human civilization and possible extinction of the human race Futures, Volume 41, Issue 10, December, ldg)

In a remarkable website on nuclear war, Carol Moore asks the question “Is Nuclear War Inevitable??” In Section , Moore points out what most terrorists obviously already know about the nuclear tensions between powerful countries. No doubt, they’ve figured out that the best way to escalate these tensions into nuclear war is to set off a nuclear exchange. As Moore points out, all that militant terrorists would have to do is get their hands on one small nuclear bomb and explode it on either Moscow or Israel. Because of the Russian “dead hand” system, “where regional nuclear commanders would be given full powers should Moscow be destroyed,” it is likely that any attack would be blamed on the United States” Israeli leaders and Zionist supporters have, likewise, stated for years that if Israel were to suffer a nuclear attack, whether from terrorists or a nation state, it would retaliate with the suicidal “Samson option” against all major Muslim cities in the Middle East. Furthermore, the Israeli Samson option would also include attacks on Russia and even “anti-Semitic” European cities In that case, of course, Russia would retaliate, and the U.S. would then retaliate against Russia. China would probably be involved as well, as thousands, if not tens of thousands, of nuclear warheads, many of them much more powerful than those used at Hiroshima and Nagasaki, would rain upon most of the major cities in the Northern Hemisphere. Afterwards, for years to come, massive radioactive clouds would drift throughout the Earth in the nuclear fallout, bringing death or else radiation disease that would be genetically transmitted to future generations in a nuclear winter that could last as long as a 100 years, taking a savage toll upon the environment and fragile ecosphere as well. And what many people fail to realize is what a precarious, hair-trigger basis the nuclear web rests on. Any accident, mistaken communication, false signal or “lone wolf’ act of sabotage or treason could, in a matter of a few minutes, unleash the use of nuclear weapons, and once a weapon is used, then the likelihood of a rapid escalation of nuclear attacks is quite high while the likelihood of a limited nuclear war is actually less probable since each country would act under the “use them or lose them” strategy and psychology; restraint by one power would be interpreted as a weakness by the other, which could be exploited as a window of opportunity to “win” the war. In other words, once Pandora's Box is opened, it will spread quickly, as it will be the signal for permission for anyone to use them. Moore compares swift nuclear escalation to a room full of people embarrassed to cough. Once one does, however, “everyone else feels free to do so. The bottom line is that as long as large nation states use internal and external war to keep their disparate factions glued together and to satisfy elites’ needs for power and plunder, these nations will attempt to obtain, keep, and inevitably use nuclear weapons. And as long as large nations oppress groups who seek self-determination, some of those groups will look for any means to fight their oppressors” In other words, as long as war and aggression are backed up by the implicit threat of nuclear arms, it is only a matter of time before the escalation of violent conflict leads to the actual use of nuclear weapons, and once even just one is used, it is very likely that many, if not all, will be used, leading to horrific scenarios of global death and the destruction of much of human civilization while condemning a mutant human remnant, if there is such a remnant, to a life of unimaginable misery and suffering in a nuclear winter. In “Scenarios,” Moore summarizes the various ways a nuclear war could begin: Such a war could start through a reaction to terrorist attacks, or through the need to protect against overwhelming military opposition, or through the use of small battle field tactical nuclear weapons meant to destroy hardened targets. It might quickly move on to the use of strategic nuclear weapons delivered by short-range or inter-continental missiles or long-range bombers. These could deliver high altitude bursts whose electromagnetic pulse knocks out electrical circuits for hundreds of square miles. Or they could deliver nuclear bombs to destroy nuclear and/or non-nuclear military facilities, nuclear power plants, important industrial sites and cities. Or it could skip all those steps and start through the accidental or reckless use of strategic weapons

### 1NC

#### AMENDMENT COUNTERPLAN

#### Text: The appropriate number of the fifty states will invoke their power under Article V of the Constitution to call a limited constitutional convention for the purpose of establishing that individuals in military detention when applying for habeas corpus receive burdens of proof and presumptions regarding evidence favoring those individuals

#### The Counterplan solves the case and preserves court capital and legitimacy

Vermule 2004(Adrian, Professor of Law at the University of Chicago, September, "Constitutional Amendments and the Constitutional Common Law", http://www.law.uchicago.edu/files/files/73-av-amendments.pdf)

There is another side to the ledger, however. Premise (i) holds that the lower the rate of amendment, the more updating that the Court must supply; and the need to update constitutional law can itself damage the Court’ s public standing in straightforward ways. Overrulings, switches in time, creative and novel interpretation, all the tools that judges use to change the course of constitutional adjudication, them selves may draw down the Court’s political capital by fracturing the legalistic façade of constitutional interpretation. An equally plausible causal hypothesis, then, is that increasing the rate of amendments might increase the Court’s sociological legitimacy by reducing the need f o r judicial self - correction. In particular cases, legitimacy-granting publics might react poorly to judicial flip-flops, while viewing form al amendments that overturn judicial decisions as the proper legal channel for change—the very use of which assumes that the judges have done their job well, not poorly. This is rankly speculative, but the point is that (ii) is rankly speculative as well. It is hard to know about any of this in the abstract; but we cannot simply assume (ii), in the faith that a world without (nonjudicial) amendments is the best of all possible worlds to inhabit.

### 1NC

#### CONTEST COUNTERPLAN

#### The Executive Branch of the United States should not contest habeas proceedings for detainees help under the war powers authority of the President if the detainees have been cleared for transfer or release by executive review.

#### The problem isn’t the remedy, it is that no one wins habeas since 2010-the CP resolves that.

**Frakt, Pittsburgh law professor, 2013**

(David, “Release the Cleared Guantanamo Detainees to End the Hunger Strike”, 4-30, <http://jurist.org/forum/2013/04/david-frakt-hunger-strike.php>, ldg)

One of the most vexing problems currently facing the administration of US President Barack Obama is its inability to release 85 detainees from Guantanamo Bay who were cleared for release by the Guantanamo Review Task Force (GRTF) more than three years ago. Many of these detainees are now engaged in a hunger strike, at least in part, to protest their continued, indefinite detention. Although cleared for release, politically motivated restrictions in the National Defense Authorization Act have made it virtually impossible for the administration to transfer these detainees out of Guantanamo absent a court order, such as a writ of habeas corpus from the US District Court for the District of Columbia. Unfortunately, the sole focus of the habeas review currently is on the legality of detention at the time of capture. If the US can establish that the detainee was lawfully detainable at that moment (and the standard of review created by the US Court of Appeals for the District of Columbia Circuit in Al-Adahi v. Obama makes this an easy burden for the government to meet) then the lawfulness of continued detention until the cessation of hostilities is conclusively presumed. Because the US loathes to admit that it has made a mistake and detained someone for many years without a legal basis, the US Department of Justice (DOJ) is in the awkward position of opposing habeas corpus petitions even when the GRTF has determined continued detention of the petitioner is unwarranted because he no longer poses a danger to the US. In fact, the DOJ has successfully blocked the release of eight detainees off the cleared list by opposing their habeas corpus petitions, including three cases where the detainee won the writ at the trial level and the Department of Justice won a reversal on appeal. One of those who won his petition only to have it reversed on appeal was Adnan Latif, whose resulting desperation drove him to commit suicide. In fact, no detainee has prevailed in a habeas corpus petition in three years. I have a proposed solution to this problem. I represented former detainee Mohammed Jawad (along with the ACLU) in his habeas corpus petition in 2009. After the district court judge ruled that most of the government's evidence was inadmissible, the DOJ filed a notice indicating that they were no longer treating Mohammed as detainable under the Authorization for Use of Military Force (AUMF) and would no longer oppose his habeas corpus petition. The government did not admit that Mohammed had been unlawfully detained. One month later, including a 15-day waiting period after notice of the transfer was provided to Congress, Jawad was home in Afghanistan. This proves that when the Obama administration really wants to transfer a detainee, they are quite capable of doing so. There is nothing to stop the DOJ from filing similar notices for the cleared detainees indicating that the government no longer considers them detainable and does not oppose their petitions for habeas corpus. If any explanation is required, the DOJ can inform the court that the government has revised its view of the propriety of indefinite detention of non-dangerous detainees under the laws of war, and now considers it to be inconsistent with the law of war to hold detainees indefinitely when the justification for their original detention no longer exists.

## Case

### 1NC Presumed Imminence

#### Squo due process protections are good enough and are evolving naturally to protect rights- the gov’t already loses most detention habeas cases

Wittes 11 (Benjamin, senior fellow in Governance Studies at The Brookings Institution. He is the author of Detention and Denial: The Case for Candor After Guantanamo, with Adam Klein, JD Columbia Law School and former Articles Editor of the Columbia Law Review, Preventive Detention in American Theory and Practice, 2 Harv. Nat'l Sec. J. 85, lexis)

Yet the evolution of this category of detention has also followed the pattern of a narrowing authority closely tailored to ensuring the accuracy of detention judgments. The Supreme Court in Boumediene grafted onto Guantánamo detentions habeas corpus review, providing robustly adversarial judicial processes for military detentions the courts had not traditionally supervised. 517 Military detainees, at least those at Guantánamo, thus get access to counsel, and an opportunity to challenge the legality of their detentions in federal court. At least for now, the burden of proof lies with the government, and the government has lost a majority of the habeas cases that have gone to decision. 518 The due process norms that are [\*189] developing here are quite elaborate -- and so are those in most of the proposals for statutory administrative detention schemes. 519 This new preventive detention variant is simultaneously emerging, out of a broader detention authority, because of perceived necessity and developing more rigorous due process protections to guarantee that it does not authorize more detention than is truly necessary. It is, in short, following the broader pattern relatively neatly. There is even some movement toward the formal use of multi-pronged triggers, though that is still nascent. In one habeas case, U.S. District Judge Ellen Huvelle created what is effectively a multi-pronged trigger as a test for detention, requiring the government to show not merely that the detainee was a part of enemy forces but also that he posed a risk of rejoining the enemy. 520 While the Court of Appeals for the D.C. Circuit has explicitly rejected this approach, 521 the use of multi-pronged triggers in prospective detention cases -- even if not in legacy cases like those from Guantánamo -- is a very live possibility. One proposal, by one of the present authors, suggests the following statutory trigger for future detentions: The model law authorizes the detention of an individual who is (1) an agent of a foreign power, if (2) that power is one against which Congress has authorized the use of force, and if (3) the actions of the covered individual in his capacity as an agent of the foreign power pose a danger both to any person and to the interests of the United States. 522 [\*190] Whether such a trigger eventually catches on is at this stage unclear. Right now, in the habeas cases, most of the judges have interpreted the government's detention authority as conditioned by only one factor: Whether the detainee is "part of" or "supporting" enemy forces. 523 Even before the D.C. Circuit weighed in, several district judges explicitly declined to follow Judge Huvelle's suggestion that the detention authority in the 2001 Authorization for Use of Military Force 524 covers only those who threaten to rejoin the fight. 525 This dispute reflects a deeper uncertainty about the degree to which terrorists actually are analogous to traditional state military forces. Traditionally, membership in a military force serves as a proxy for intent to continue fighting if released, since the soldier is presumed to be a loyal agent of the sovereign. 526 Whether one believes this principal-agent relationship holds in the case of terrorist groups should dictate whether the simple membership or "supporting" test, or Judge Huvelle's individualized determination of intent to rejoin the fight, is the most appropriate test for detainability. 527 What is clear is that whether America's ultimate administrative detention regime for counterterrorism emerges via common law or statutory development, it will have followed the basic pattern described by these other areas. It will not, as asserted by the civic mythology, be a radical departure from the American tradition, a writing into the law books of a preventive detention regime for the first time. It will, rather, have evolved from a much broader authority that has coexisted with criminal law detention powers for [\*191] hundreds of years -- and it will be a narrowing of that broader authority, one designed with an eye towards minimizing the possibility of error and of ensuring the true necessity of detentions.

#### Consequentialism First

Issac 2—Professor of Political Science at Indiana-Bloomington, Director of the Center for the Study of Democracy and Public Life, PhD from Yale (Jeffery C., Dissent Magazine, Vol. 49, Iss. 2, “Ends, Means, and Politics,” p. Proquest)

As a result, the most important political questions are simply not asked. It is assumed that U.S. military intervention is an act of "aggression," but no consideration is given to the aggression to which intervention is a response. The status quo ante in Afghanistan is not, as peace activists would have it, peace, but rather terrorist violence abetted by a regime--the Taliban--that rose to power through brutality and repression. This requires us to ask a question that most "peace" activists would prefer not to ask: What should be done to respond to the violence of a Saddam Hussein, or a Milosevic, or a Taliban regime? What means are likely to stop violence and bring criminals to justice? Calls for diplomacy and international law are well intended and important; they implicate a decent and civilized ethic of global order. But they are also vague and empty, because they are not accompanied by any account of how diplomacy or international law can work effectively to address the problem at hand. The campus left offers no such account. To do so would require it to contemplate tragic choices in which moral goodness is of limited utility. Here what matters is not purity of intention but the intelligent exercise of power. Power is not a dirty word or an unfortunate feature of the world. It is the core of politics. Power is the ability to effect outcomes in the world. Politics, in large part, involves contests over the distribution and use of power. To accomplish anything in the political world, one must attend to the means that are necessary to bring it about. And to develop such means is to develop, and to exercise, power. To say this is not to say that power is beyond morality. It is to say that power is not reducible to morality. As writers such as Niccolo Machiavelli, Max Weber, Reinhold Niebuhr, and Hannah Arendt have taught, an unyielding concern with moral goodness **undercuts political responsibility**. The concern may be morally laudable, reflecting a kind of personal integrity, but it suffers from three fatal flaws: (1) It fails to see that the purity of one's intention does not ensure the achievement of what one intends. Abjuring violence or refusing to make common cause with morally compromised parties may seem like the right thing; but if such tactics entail impotence, then it is hard to view them as serving any moral good beyond the clean conscience of their supporters; (2) it fails to see that in a world of real violence and injustice, moral purity is not simply a form of powerlessness; it is often a form of **complicity in injustice**. This is why, from the standpoint of politics--as opposed to religion--pacifism is always a potentially immoral stand. In categorically repudiating violence, it refuses in principle to oppose certain violent injustices with any effect; and (3) it fails to see that **politics is as much about unintended consequences as it is about intentions**; it is the effects of action, rather than the motives of action, that is most significant. Just as the alignment with "good" may engender impotence, it is often the pursuit of "good" that generates evil. This is the lesson of communism in the twentieth century: it is not enough that one's goals be sincere or idealistic; it is equally important, always, to ask about the effects of pursuing these goals and to judge these effects in pragmatic and historically contextualized ways. Moral absolutism inhibits this judgment. It alienates those who are not true believers. It promotes arrogance. And it undermines political effectiveness.

### 1NC Risk

#### Their arguments about effectuating change and skills development beg the question of the probability of our disads – no agency DA if we prove our disads are true.

#### Their evidence uses the example of Iraq – this isn’t constitutive of any our disadvantages – U.S. intelligence doesn’t want to make the same mistakes

#### Probabalistic thinking and existential risk should come first – its key to agency and refusal of consideration means our agency fails because efforts are limited by finite time and resources

Bostrum, Philosophy prof at Oxford, 02 (Nick, Existential Risks: Analyzing Human Extinction Scenarios and Related Hazards, Published in the Journal of Evolution and Technology, Vol. 9, No. 1 (2002), http://www.nickbostrom.com/existential/risks.html)

The unique challenge of existential risks Risks in this sixth category are a recent phenomenon. This is part of the reason why it is useful to distinguish them from other risks. We have not evolved mechanisms, either biologically or culturally, for managing such risks. Our intuitions and coping strategies have been shaped by our long experience with risks such as dangerous animals, hostile individuals or tribes, poisonous foods, automobile accidents, Chernobyl, Bhopal, volcano eruptions, earthquakes, draughts, World War I, World War II, epidemics of influenza, smallpox, black plague, and AIDS. These types of disasters have occurred many times and our cultural attitudes towards risk have been shaped by trial-and-error in managing such hazards. But tragic as such events are to the people immediately affected, in the big picture of things – from the perspective of humankind as a whole – even the worst of these catastrophes are mere ripples on the surface of the great sea of life. They haven’t significantly affected the total amount of human suffering or happiness or determined the long-term fate of our species. With the exception of a species-destroying comet or asteroid impact (an extremely rare occurrence), there were probably no significant existential risks in human history until the mid-twentieth century, and certainly none that it was within our power to do something about. The first manmade existential risk was the inaugural detonation of an atomic bomb. At the time, there was some concern that the explosion might start a runaway chain-reaction by “igniting” the atmosphere. Although we now know that such an outcome was physically impossible, it qualifies as an existential risk that was present at the time. For there to be a risk, given the knowledge and understanding available, it suffices that there is some subjective probability of an adverse outcome, even if it later turns out that objectively there was no chance of something bad happening. If we don’t know whether something is objectively risky or not, then it is risky in the subjective sense. The subjective sense is of course what we must base our decisions on.[2] At any given time we must use our best current subjective estimate of what the objective risk factors are.[3] A much greater existential risk emerged with the build-up of nuclear arsenals in the US and the USSR. An all-out nuclear war was a possibility with both a substantial probability and with consequences that might have been persistent enough to qualify as global and terminal. There was a real worry among those best acquainted with the information available at the time that a nuclear Armageddon would occur and that it might annihilate our species or permanently destroy human civilization.[4] Russia and the US retain large nuclear arsenals that could be used in a future confrontation, either accidentally or deliberately. There is also a risk that other states may one day build up large nuclear arsenals. Note however that a smaller nuclear exchange, between India and Pakistan for instance, is not an existential risk, since it would not destroy or thwart humankind’s potential permanently. Such a war might however be a local terminal risk for the cities most likely to be targeted. Unfortunately, we shall see that nuclear Armageddon and comet or asteroid strikes are mere preludes to the existential risks that we will encounter in the 21st century. The special nature of the challenges posed by existential risks is illustrated by the following points: · Our approach to existential risks cannot be one of trial-and-error. There is no opportunity to learn from errors. The reactive approach – see what happens, limit damages, and learn from experience – is unworkable. Rather, we must take a proactive approach. This requires foresight to anticipate new types of threats and a willingness to take decisive preventive action and to bear the costs (moral and economic) of such actions. · We cannot necessarily rely on the institutions, moral norms, social attitudes or national security policies that developed from our experience with managing other sorts of risks. Existential risks are a different kind of beast. We might find it hard to take them as seriously as we should simply because we have never yet witnessed such disasters.[5] Our collective fear-response is likely ill calibrated to the magnitude of threat. · Reductions in existential risks are global public goods [13] and may therefore be undersupplied by the market [14]. Existential risks are a menace for everybody and may require acting on the international plane. Respect for national sovereignty is not a legitimate excuse for failing to take countermeasures against a major existential risk. · If we take into account the welfare of future generations, the harm done by existential risks is multiplied by another factor, the size of which depends on whether and how much we discount future benefits [15,16]. In view of its undeniable importance, it is surprising how little systematic work has been done in this area. Part of the explanation may be that many of the gravest risks stem (as we shall see) from anticipated future technologies that we have only recently begun to understand. Another part of the explanation may be the unavoidably interdisciplinary and speculative nature of the subject. And in part the neglect may also be attributable to an aversion against thinking seriously about a depressing topic. The point, however, is not to wallow in gloom and doom but simply to take a sober look at what could go wrong so we can create responsible strategies for improving our chances of survival. In order to do that, we need to know where to focus our efforts.

#### Attempts to foresee existential risks is the best approach to policy-making

Bostrom 02, Professor of Philosophy at Oxford University and Director of the Future of Humanity Institute, ’2 (Nick, March, “Existential Risks: Analyzing Human Extinction Scenarios and Related Hazards” Journal of Evolution and Technology, Vol 9, http://www.nickbostrom.com/existential/risks.html

I shall use the following definition of existential risks: Existential risk – One where an adverse outcome would either annihilate Earth-originating intelligent life or permanently and drastically curtail its potential. An existential risk is one where humankind as a whole is imperiled. Existential disasters have major adverse consequences for the course of human civilization for all time to come. 2 The unique challenge of existential risks Risks in this sixth category are a recent phenomenon. This is part of the reason why it is useful to distinguish them from other risks. We have not evolved mechanisms, either biologically or culturally, for managing such risks. Our intuitions and coping strategies have been shaped by our long experience with risks such as dangerous animals, hostile individuals or tribes, poisonous foods, automobile accidents, Chernobyl, Bhopal, volcano eruptions, earthquakes, draughts, World War I, World War II, epidemics of influenza, smallpox, black plague, and AIDS. These types of disasters have occurred many times and our cultural attitudes towards risk have been shaped by trial-and-error in managing such hazards. But tragic as such events are to the people immediately affected, in the big picture of things – from the perspective of humankind as a whole – even the worst of these catastrophes are mere ripples on the surface of the great sea of life. They haven’t significantly affected the total amount of human suffering or happiness or determined the long-term fate of our species. With the exception of a species-destroying comet or asteroid impact (an extremely rare occurrence), there were probably no significant existential risks in human history until the mid-twentieth century, and certainly none that it was within our power to do something about. The first manmade existential risk was the inaugural detonation of an atomic bomb. At the time, there was some concern that the explosion might start a runaway chain-reaction by “igniting” the atmosphere. Although we now know that such an outcome was physically impossible, it qualifies as an existential risk that was present at the time. For there to be a risk, given the knowledge and understanding available, it suffices that there is some subjective probability of an adverse outcome, even if it later turns out that objectively there was no chance of something bad happening. If we don’t know whether something is objectively risky or not, then it is risky in the subjective sense. The subjective sense is of course what we must base our decisions on.[2] At any given time we must use our best current subjective estimate of what the objective risk factors are.[3] A much greater existential risk emerged with the build-up of nuclear arsenals in the US and the USSR. An all-out nuclear war was a possibility with both a substantial probability and with consequences that might have been persistent enough to qualify as global and terminal. There was a real worry among those best acquainted with the information available at the time that a nuclear Armageddon would occur and that it might annihilate our species or permanently destroy human civilization.[4] Russia and the US retain large nuclear arsenals that could be used in a future confrontation, either accidentally or deliberately. There is also a risk that other states may one day build up large nuclear arsenals. Note however that a smaller nuclear exchange, between India and Pakistan for instance, is not an existential risk, since it would not destroy or thwart humankind’s potential permanently. Such a war might however be a local terminal risk for the cities most likely to be targeted. Unfortunately, we shall see that nuclear Armageddon and comet or asteroid strikes are mere preludes to the existential risks that we will encounter in the 21st century. The special nature of the challenges posed by existential risks is illustrated by the following points: · Our approach to existential risks cannot be one of trial-and-error. There is no opportunity to learn from errors. The reactive approach – see what happens, limit damages, and learn from experience – is unworkable. Rather, we must take a proactive approach. This requires foresight to anticipate new types of threats and a willingness to take decisive preventive action and to bear the costs (moral and economic) of such actions. · We cannot necessarily rely on the institutions, moral norms, social attitudes or national security policies that developed from our experience with managing other sorts of risks. Existential risks are a different kind of beast. We might find it hard to take them as seriously as we should simply because we have never yet witnessed such disasters.[5] Our collective fear-response is likely ill calibrated to the magnitude of threat. · Reductions in existential risks are global public goods [13] and may therefore be undersupplied by the market [14]. Existential risks are a menace for everybody and may require acting on the international plane. Respect for national sovereignty is not a legitimate excuse for failing to take countermeasures against a major existential risk.

#### Reducing existential risk is desirable in every framework—our argument doesn’t require extreme utilitarianism.

Nick Bostrom, Professor in the Faculty of Philosophy & Oxford Martin School, Director of the Future of Humanity Institute, and Director of the Programme on the Impacts of Future Technology at the University of Oxford, recipient of the 2009 Eugene R. Gannon Award for the Continued Pursuit of Human Advancement, holds a Ph.D. in Philosophy from the London School of Economics, 2011 (“The Concept of Existential Risk,” Draft of a Paper published on ExistentialRisk.com, Available Online at <http://www.existentialrisk.com/concept.html>, Accessed 07-04-2011) We have thus far considered existential risk from the perspective of utilitarianism (combined with several simplifying assumptions). We may briefly consider how the issue might appear when viewed through the lenses of some other ethical outlooks. For example, the philosopher Robert Adams outlines a different view on these matters: I believe a better basis for ethical theory in this area can be found in quite a different direction—in a commitment to the future of humanity as a vast project, or network of overlapping projects, that is generally shared by the human race. The aspiration for a better society—more just, more rewarding, and more peaceful—is a part of this project. So are the potentially endless quests for scientific knowledge and philosophical understanding, and the development of artistic and other cultural traditions. This includes the particular cultural traditions to which we belong, in all their accidental historic and ethnic diversity. It also includes our interest in the lives of our children and grandchildren, and the hope that they will be able, in turn, to have the lives of their children and grandchildren as projects. To the extent that a policy or practice seems likely to be favorable or unfavorable to the carrying out of this complex of projects in the nearer or further future, we have reason to pursue or avoid it. … Continuity is as important to our commitment to the project of the future of humanity as it is to our commitment to the projects of our own personal futures. Just as the shape of my whole life, and its connection with my present and past, have an interest that goes beyond that of any isolated experience, so too the shape of human history over an extended period of the future, and its connection with the human present and past, have an interest that goes beyond that of the (total or average) quality of life of a population-at-a-time, considered in isolation from how it got that way. We owe, I think, some loyalty to this project of the human future. We also owe it a respect that we would owe it even if we were not of the human race ourselves, but beings from another planet who had some understanding of it. (28: 472-473) Since an existential catastrophe would either put an end to the project of the future of humanity or drastically curtail its scope for development, we would seem to have a strong prima facie reason to avoid it, in Adams’ view. We also note that an existential catastrophe would entail the frustration of many strong preferences, suggesting that from a preference-satisfactionist perspective it would be a bad thing. In a similar vein, an ethical view emphasizing that public policy should be determined through informed democratic deliberation by all stakeholders would favor existential-risk mitigation if we suppose, as is plausible, that a majority of the world’s population would come to favor such policies upon reasonable deliberation (even if hypothetical future people are not included as stakeholders). We might also have custodial duties to preserve the inheritance of humanity passed on to us by our ancestors and convey it safely to our descendants.[24] We do not want to be the failing link in the chain of generations, and we ought not to delete or abandon the great epic of human civilization that humankind has been working on for thousands of years, when it is clear that the narrative is far from having reached a natural terminus. Further, many theological perspectives deplore naturalistic existential catastrophes, especially ones induced by human activities: If God created the world and the human species, one would imagine that He might be displeased if we took it upon ourselves to smash His masterpiece (or if, through our negligence or hubris, we allowed it to come to irreparable harm).[25] We might also consider the issue from a less theoretical standpoint and try to form an evaluation instead by considering analogous cases about which we have definite moral intuitions. Thus, for example, if we feel confident that committing a small genocide is wrong, and that committing a large genocide is no less wrong, we might conjecture that committing omnicide is also wrong.[26] And if we believe we have some moral reason to prevent natural catastrophes that would kill a small number of people, and a stronger moral reason to prevent natural catastrophes that would kill a larger number of people, we might conjecture that we have an even stronger moral reason to prevent catastrophes that would kill the entire human population.

#### Affirming prediction reclaims the future for the forces of pragmatic political change and sparks ideas on how to overcome problematic futurisms.

Kurasawa 2004

Fuyuki, Constellation, v. 11, no. 4, “Cautionary Tales,” Blackwell

As we float in a mood of post-millennial angst, the future appears to be out of favor. Mere mention of the idea of farsightedness – of trying to analyze what may occur in our wake in order to better understand how to live in the here and now – conjures up images of fortune-telling crystal balls and doomsday prophets, or of eccentric pundits equipped with data-crunching supercomputers spewing forth fanciful prognostications. The future, then, has seemingly become the province of mystics and scientists, a realm into which the rest of us rarely venture. This curious situation goes back to a founding paradox of early modernity, which sought to replace pagan divination and Judeo-Christian eschatology with its own rational system of apprehending time. Thus came into being the philosophy of history, according to which human destiny unfolds teleologically by following a knowable and meaningful set of chronological laws leading to a final state of perfection; Condorcet, Kant, Hegel, and Marx, to name but a few, are the children of this kind of historicism that expresses an unwavering faith in the Enlightenment’s credo of inherent progress over time. Yet in our post-metaphysical age, where the idea of discovering universal and stable temporal laws has become untenable, the philosophy of history lies in ruins. What has stepped into the breach is a variety of sciences of governance of the future, ranging from social futurism to risk management. By developing sophisticated modeling techniques, prognosticators aim to convert the future into a series of predictable outcomes extrapolated from present-day trends, or a set of possibilities to be assessed and managed according to their comparative degrees of risk and reward.1 Although commendable in their advocacy of farsightedness, these scientistic forms of knowledge are hampered by the fact that their longing for surefire predictive models have inevitably come up short. If historicism and scientistic governance offer rather unappealing paradigms for contemplating the future, a turn to the conventional political forecasts of the post-Cold War world order hardly offers more succor. Entering the fray, one is rapidly submerged by Fukuyama’s “end of history,” Huntington’s “clash of civilizations,” Kaplan’s “coming anarchy,” or perhaps most distressing of all, the so-called ‘Bush Doctrine’ of unilateral pre-emption. For the Left, this array of unpalatable scenarios merely prolongs the sense of hope betrayed and utopias crushed that followed the collapse of the socialist experiment. Under such circumstances, is it any wonder that many progressive thinkers dread an unwelcomed future, preferring to avert their gazes from it while eyeing foresight with equal doses of suspicion and contempt? But neither evasion nor fatalism will do. Some authors have grasped this, reviving hope in large-scale socio-political transformation by sketching out utopian pictures of an alternative world order. Endeavors like these are essential, for they spark ideas about possible and desirable futures that transcend the existing state of affairs and undermine the flawed prognoses of the post-Cold War world order; what ought to be and the Blochian ‘Not-Yet’ remain powerful figures of critique of what is, and inspire us to contemplate how social life could be organized differently. Nevertheless, my aim in this paper is to pursue a different tack by exploring how a dystopian imaginary can lay the foundations for a constructive engagement with the future.

#### Predictions avoid genocide. They allow us to reclaim our agency from passivity.

Bindé 2k Jérôme, Dir. Analysis and Forecasting Office – UNESCO, Public Culture, “Toward an Ethics of the Future”, 12:1, Project Muse

An ethics of the future is not an ethics in the future. If tomorrow is always too late, then today is often already very late. The disparities between North and South, and increasingly between North and North and between South and South, the growing rift within the very heart of societies, population growth, the threat of an ecological crisis on a planetary scale, and the way societies have lost control and surrendered to the hands of "anonymous masters" all call for a new paradoxical form of emergency, the emergency of the long term. To adopt, as quickly as possible, a constructive and preventive attitude means preserving future generations from the fever of immediacy, from reactive passivity, from refuge in artificial or virtual illusory paradises, and from omnipotent emergency. Through a forward-looking approach, we can be in a position to offer generations to come what we are deprived of today--a future. Institutions have the power to forecast or not to forecast. This is an awesome responsibility. By choosing not to forecast, they choose to postpone indefinitely their much needed long-term action for the sake of short-term emergency: They condemn themselves, literally, **to passivity, dependency, and, ultimately, to obsolescence and nonexistence**. **By choosing to forecast and by refusing to become purely reactive agents**, they will not only preserve their institutional independence but also send a strong message to other policymakers and decisionmakers worldwide that the first object of policy, and its first responsibility, is the future. Max Weber justly warned that "the proper business of the politician is the future and his responsibility before the future." The failure to use foresight, in other words, is not just a benign failure of intelligence: It is a culpable neglect of future generations. Is it not therefore surprising that, once foresight has been applied, once an issue has been recognised as a policy priority by all parties concerned, once international instruments have been signed that declare the commitment to act on this [End Page 56] foresight, we should fail so miserably to take the appropriate measures? Take development aid: In 1974, developed countries solemnly agreed to dedicate 0.7 percent of their GDP to development aid; nearly a quarter of a century later, in 1997, they contribute 0.22 percent of their GDP to development aid, and one superpower dedicates only 0.09 percent to it. 5 Take the issue of the global environment: Seven years after the 1992 Earth Summit in Rio, Agenda 21 remains, for the greater part, a dead letter, and the promising but timid advances made at the Kyoto Summit have since been all but forgotten. In both instances, foresight was exerted and solemn oaths taken to act on this foresight, in order to remedy pressing problems. In both instances, action has been delayed, and problems have been allowed to become more pressing. How long can we afford the luxury of inactivity? An ethics of the future, if it remains an ethics in the future, is an injustice committed against all generations, present and future. To paraphrase a common saying, the future delayed is the future denied.

#### ---Human action makes predictions possible – we can deduce value and the probability through observation that avoids essentialist views of the subject.

Caplan 2001

Bryan, assistant professor of economics at George Mason University, PROBABILITY, COMMON SENSE, AND REALISM: A REPLY TO HÜLSMANN AND BLOCK, THE QUARTERLY JOURNAL OF AUSTRIAN ECONOMICS VOL. 4, NO. 2 (SUMMER 2001): 69–86, https://mises.org/journals/qjae/pdf/qjae4\_2\_6.pdf

But how can these claims about probability be reconciled with realism? Hülsmann (1999, p. 12) makes the fair point that university professors spend far more time explicitly calculating probabilities than businessmen (though, contrary to Hülsmann, even moderately sophisticated **businessmen habitually compute** expected present discounted values **using elementary probability theory**). To this, I respond that a probability assessment is exactly analogous to a willingness-to-pay. People may be unable to articulate, for example, that “I would be willing to pay $200 per month in additional rent to live in a safer neighborhood.” They might even nonsensically assert that “You can’t put a price on safety.” But in acting, they **implicitly make** such **trade-offs**. Similarly, people may be unable to articulate that “I believe the probability of being murdered in my neighborhood is .001 percent per year,” **and** they might evasively respond, “I just don’t know.” **But in acting, they implicitly set probabilities**. If they thought the probability of being murdered was 90 percent per year, they would move; conversely, if they thought the probability was 0 percent, they would stop wasting time on ordinary precautions. In short, just as demand theory does not commit us to the view that the typical person explicitly ponders, “How much Gouda cheese would I buy if the price were a penny per pound?” probability theory does not commit us to the view that the typical person explicitly ponders, “What is the probability that I have an evil twin?”

#### Our epistemological conception of terrorism is true

Whitman 7 (Jeffery, Prof of Philosophy, Religion, and Classical Studies Susquehanna University, “Just War Theory and the War on Terrorism A Utilitarian Perspective,” http://www.mesharpe.com/PIN/05Whitman.pdf)

Nonetheless, there was something different about the 9/11 attacks that is troubling, and that difference is the nihilistic nature of the attackers. Most, but not all, terrorist activity has a political or religious goal of some sort as its aim—the liberation of a minority group, the establishment of a new state, the removal of a perceived oppressor. Al-Qaeda professes a political goal, but its actions belie its claims. It claims to be fighting for the cause of Palestinian freedom and for oppressed Muslims everywhere, but it has appropriated the Islamic religion and the concept of jihad in order to recruit suicide bombers with the promise of martyrdom and entry into Paradise. In so doing, the political goal, if it ever existed, has become subservient to eschatological concerns. Political failure has become an irrelevant distraction that is trumped by the reward of eternal life. As Michael Ignatieff notes concerning al-Qaeda, their goals are less political than apocalyptic, securing immortality for themselves while calling down a mighty malediction on the Great Satan. Goals that are political can be engaged politically. Apocalyptic goals, on the other hand, are impossible to negotiate with. They can only be fought by force of arms. (2004, 125–126) This version of Islamic fundamentalist terrorism, represented by such groups as Hamas, Hezbollah, and al-Qaeda, seems particularly intractable. These groups, especially insofar as they employ suicide-bomber tactics, have become death cults (Ignatieff 2004, 126–127). There can be no negotiated settlement, so the only solution seems to be a violent one aimed at the utter destruction of the terrorists. And yet, a purely violent and largely military response runs significant risks, both morally and pragmatically, for the counterterrorist forces. The risks are especially poignant for a liberal democracy like the United States, for the use of purely military means, particularly the brutal military means that may seem necessary to defeat terrorism, may run contrary to the very principles a liberal democracy represents (Ignatieff 2004, 133–136).6 Thus the terrorist threat represented by al-Qaeda–like groups presents a difficult and somewhat unique challenge for the United States. Nonetheless, I remain convinced that a utilitarian conceptualization of just war theory can help us to successfully navigate between the Scylla of losing the fight against terrorism and the Charybdis of abandoning the principles that define our liberal democracy.

## 2nc

## Contest CP

### S

#### 5. Empirically works in getting people out

**Worthington, investigate reporter, 2013**

(Andy, “Some Progress on Guantánamo: The Envoy, the Habeas Case and the Periodic Reviews”, 10-13, <http://www.andyworthington.co.uk/2013/10/13/some-progress-on-guantanamo-the-envoy-the-habeas-case-and-the-periodic-reviews/>, ldg)

The Justice Department’s decision about Idris was issued on October 2, and in it the lawyers stated: In late 2009, the Executive Branch decided, pursuant to the recommendation of the Guantánamo Review Task Force, that the United States could relinquish custody of Petitioner with certain assurances from a receiving country, including assurances related to the availability of medical care in the receiving country … Based on consideration of all relevant information specific to the circumstances of Petitioner, including that decision, the Executive Branch has determined that it will no longer contest Petitioner’s Petition for Writ of Habeas Corpus. The Justice Department lawyers added that they were “withdrawing their reliance upon their amended factual return, filed on October 22, 2008,” which, essentially, rehashed the implausible story contained in Idris’ Detainee Assessment Brief. In a two-line order issued on October 4, Judge Lamberth ordered Idris’ release. His order stated, “Petitioner’s unopposed Petition for Writ of Habeas Corpus is hereby granted. The United States shall take all necessary and appropriate diplomatic steps to facilitate Petitioner’s release.” What is particularly noteworthy about the Justice Department’s decision in the case of Ibrahim Idris is that it marks the first time that the Civil Division lawyers — those responsible for dealing with the prisoners’ habeas petitions — have backed down. In place since the days of George W. Bush, the lawyers have vigorously contested every petition as though the fate of the United States depended on it. This may make sense given the adversarial nature of the law, but what doesn’t make sense is that petitions have been fought even when the men in question have been cleared for release by President Obama’s Guantánamo Review Task Force.

## K

### A2 Framework

#### The Judge is an intellectual and the roll of the ballot is to vote for the team with the best political methodology. This requires the affirmative defend their representations

#### Position yourself as a judge and ask if you are willing to condemn another person to the ever-growing prison population

Angela Y. DAVIS, professor of history consciousness – UC Santa Cruz, 2003

(Are Prisons Obsolete?, 10-11)

The question of whether the prison has become an obso­lete institution has become **especially urgent** in light of the fact that more than two million people (out of a world total of nine million) now inhabit U.S. prisons, jails, youth facili­ties, and immigrant detention centers. **Are we willing to rel­egate ever larger numbers of people** from racially oppressed communities **to an isolated existence marked by authoritari­an regimes, violence, disease, and technologies of seclusion** that produce severe mental instability? According to a recent study, there may be twice as many people suffering from mental illness who are in jails and prisons than there are in all psychiatric hospitals in the United States combined. When I first became involved in antiprison activism dur­ing the late 1960s, I was astounded to learn that there were then close to two hundred thousand people in prison. Had anyone told me that in three decades ten times as many peo­ple would be locked away in cages, I would have been absolutely incredulous. I imagine that I would have respond­ed something like this: "As racist and undemocratic as this country may be [remember, during that period, the demands of the Civil Rights movement had not yet been consolidat­ed], I do not believe that the U.S. government will be able to lock up so many people without producing powerful public resistance. No, this will never happen, not unless this coun­try plunges into fascism." That might have been my reac­tion thirty years ago. The reality is that we were called upon to inaugurate the twenty-first century by accepting the fact that two million people—a group larger than the population of many countries—are living their lives in places like Sing Sing, Leavenworth, San Quentin, and Alderson Federal Reformatory for Women. The gravity of these numbers becomes even more apparent when we consider that the U.S. population in general is less than five percent of the world's total, whereas more than twenty percent of the world's combined prison population can be claimed by the United States. In Elliott Currie's words, "Nile prison has become a looming presence in our society to an extent unparalleled in our history or that of any other industrial democracy. Short of major wars, mass incarceration has been the most thoroughly implemented government social program of our time."2

### 2NC Link-Innocence (Cal MS)

#### The post 9/11 war on terror was not a break from the rule of law but rather an extension of the war on crime that came before it-The focus on innocence is grounded in a call to replace the war on terror with a law enforcement approach-The 1AC is chasing its own tail.

Forman-prof law Georgetown-9

ARTICLE: EXPORTING HARSHNESS: HOW THE WAR ON CRIME HELPED MAKE THE WAR ON TERROR POSSIBLE

33 N.Y.U. Rev. L. & Soc. Change 331

VII. Innocence To this point I have focused on connections between the wars on crime and terror that point towards harshness. But there is one final comparison worth our attention, and it pushes back in the other direction. [\*368] This is the innocence movement, which has done something to shake the certainty with which our nation has prosecuted both wars. Not long after Guantanamo Bay opened, reports began to emerge that some of the suspects held there were innocent. 194 That innocent people had been hauled to Guantanamo was of little surprise to those familiar with errors in our domestic criminal system. After all, our criminal system errs most often in cases where informant testimony plays a large role, defendants are not caught at the scene, and defendants do not confess or confess in unreliable circumstances (such as coercion). 195 These circumstances marked many of the arrests in the war on terror. Initially, however, the Bush administration and its allies in the media mocked these suggestions, much as defenders of the domestic criminal system long scoffed at the notion that innocents were on death row. In both cases, the arguments were the same: we have extensive screening processes so that only the worst of the worst get to Guantanamo, just as we have elaborate procedural protections to ensure that only the guiltiest of the guilty end up on death row. Even in individual cases where the evidence of innocence was overwhelming, the government fought tenaciously against release. Clive Stafford Smith, an anti-death penalty crusader turned Guantanamo detainee advocate, describes this dynamic in one of his Guantanamo cases. The government had long alleged that Smith's client appeared in a video linking him to terrorism. Even after a BBC Newsnight report produced compelling evidence that the man in the video was not Smith's client, the government still refused to relinquish its case. Instead, the government simply said that rather than being in the tape, he was only "suspected" of being in the tape. 196 [\*369] Domestic prosecutors have sometimes been just as reluctant to accept that they were wrong, even in cases where the evidence was overwhelming. I once represented a client who had served over a decade in prison before Laura Hankins, a public defender and attorney at the NAACP Legal Defense Fund, took his case and those of his two friends. Hankins's meticulous reinvestigation of the case produced exculpatory evidence sufficiently compelling that Nightline picked up the story. The accused men had time-stamped receipts proving their alibi - that they were shopping at a nearby mall - which made it physically impossible for them to have reached the crime scene in time. 197 I still show the Nightline video to my first year criminal procedure students, who every year remain flabbergasted that the prosecutors refused to relent after seeing the proof of innocence. 198 Despite these obstacles, the innocence movement has raised important questions about the accuracy of our criminal justice system. 199 As the empirical evidence of innocent people convicted mounts, 200 it has become increasingly difficult for even staunch defenders of the system to deny its flaws. 201 Numerous states have launched task forces or commissioned [\*370] studies examining the causes of error in their systems. 202 Nationwide, the number of executions has declined, 203 as has support for the death penalty. 204 In some unlikely places, prosecutors have even been able to run for office on reform platforms. 205 Dallas County, Texas, was once known as "the one county that you did not wanna get accused of a crime in, because in this county, if you got charged with a crime you were likely gonna go to prison." 206 In 2006, a new district attorney, Craig Watkins, was elected and his office is now spending state funds to re-examine past convictions. Watkins also invited the Innocence Project of Texas to review cases back to the 1970s involving DNA evidence, which has resulted in clearing the convictions of at least seventeen men. 207 That followed other reforms, including the use of the open-file policy of the Tarrant County District Attorney's Office, which allows defense attorneys access to some of the prosecutors' evidence. 208 Finally, while it is always perilous to speculate as to what may have caused changes in judges' thinking, it is worth noting that the increased proof of innocence coincided with more rigorous review of the domestic criminal justice system by Supreme Court Justices Sandra Day O'Connor and Anthony Kennedy. Justice O'Connor - a supporter of the death penalty since her time in the Arizona legislature - provided the deciding vote to the conservative majority in several death penalty cases during her [\*371] time on the Court. 209 In 1989 she wrote the majority opinion ruling that a mentally retarded murderer with the reasoning capacity of a seven-year-old could be executed. 210 But by 2002 she had reversed her view, joining five other justices in Atkins v. Virginia in ruling that "death is not a suitable punishment for a mentally retarded criminal." 211 So too with Justice Kennedy, who voted to uphold the death penalty for some juvenile offenders in 1989, 212 but wrote the majority opinion overturning that holding sixteen years later in Roper v. Simmons. 213 In between those reversals, both justices made some startlingly candid statements about the criminal justice system. In 2001, Justice O'Connor gave a speech in which she said, "If statistics are any indication, the system may well be allowing some innocent defendants to be executed." 214 She pointed out that "serious questions are being raised about whether the death penalty is being fairly administered in this country" and argued that we should "look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." 215 For Justice Kennedy's part, he gave a highly publicized speech in 2003 to the American Bar Association in which he discussed the "inadequacies - and the injustices - in our prison and correctional systems." 216 He argued that the entire legal profession holds a responsibility to convicted individuals to improve our correctional system. In particular, he noted the issues of racial disparities in prison systems, the high cost of imprisoning people, and the severity of punishments within our criminal justice system. 217 Even if confidence in the domestic criminal system has been somewhat undermined by the evidence of innocents being convicted, it is unclear whether the same thing will happen in the context of the war on terror. The evidence of innocence is certainly present, as administration and military officials have occasionally admitted. 218 A study conducted in 2006 [\*372] by Mark and Joshua Denbeaux revealed staggering numbers pertaining to the possible innocence of many detainees at Guantanamo Bay. The study found that for fifty-five percent of the detainees, there is no determination that they have committed any hostile acts against the United States or its allies, and that forty percent of the detainees have no connection with al-Qaeda. Only eight percent have fought for a terrorist group, while sixty percent are accused of merely being "associated with' terrorists - the lowest such categorization possible. 219 Many were also affiliated with groups not on the Department of Homeland Security's terrorist watchlist. 220 Was Justice Kennedy, the deciding vote in Boumediene v. Bush, 221 influenced by the increasing evidence that many innocent men had been swept into Guantanamo? Did this influence him to be less deferential to the government's claim that courts should stay out of the way and trust the executive? Is this part of what he had in mind when he discussed the value of the great writ of habeas corpus as a hedge against "the practice of arbitrary imprisonments," which "have been, in all ages, the favorite and most formidable instruments of tyranny?" 222 After all, Kennedy openly expressed his doubts about the government's proposed tribunals, noting that "even where 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." 223 Given the influence that the evidence of innocence appears to have had on his domestic criminal law jurisprudence, there is reason to suspect that Kennedy had similar concerns in the terror context. In the same vein, it is worth paying careful attention to the future habeas proceedings and trials of terror detainees. In the first habeas hearing after the Supreme Court's decision in Boumediene, U.S. District Court Judge Richard Leon ordered the government to free five detainees because the evidence against them was too weak to stand up in court. 224 Evidence that the executive branch detained innocent people is likely to continue to be the strongest argument available for those who would restrain the harshness with which we prosecute the war on terror. 225 [\*373] VIII. Conclusion: War Metaphors Throughout this article, I have attempted to show how, in some important ways, 9/11 did not change everything. In comparing the war on terror with our domestic war on crime, I have tried to raise questions about how we have prosecuted both. There is one final analogy that is worth our consideration, one which might help explain all the others. It concerns the very metaphor of war. From the inception of the war on terror, many criticized the Bush administration's use of a "war" approach, instead arguing for what they called a "law enforcement" approach. 226 The Obama administration has, for its part, signaled that it will no longer use the term "war on terror." But one of the lessons of this Article is that American "law enforcement" can be quite war-like in its approach, so there may be less gained from the rebranding than advocates of the "law enforcement" approach might hope. Indeed, it is worth remembering that our current law enforcement approach was - just like the war on terror - originally presented and defended as a series of wars. The first war was on crime, and closely thereafter the nation launched the war on drugs. The arguments themselves were similar. Like the advocates of harsh tactics in the war on terror, domestic crime warriors have also claimed to be combating a new [\*374] breed of violence that is uniquely threatening and will only be contained with an iron-fisted response. In arguing for harsh laws against drug users and drug dealers in the 1970s, for example, New York Governor Nelson Rockefeller said, "The crime, the muggings, the robberies, the murders associated with addiction continue to spread a reign of terror... . Whole neighborhoods have been as effectively destroyed by addicts as by an invading army." 227 A generation later, California Governor Pete Wilson echoed Rockefeller's characterization of domestic crime as form of terrorism, calling on the state legislature to create a set of laws for juvenile criminals that are "as unforgiving as the terrorism that's been inflicted on innocent victims for too long now." 228 Because it is war, there will be casualties; innocent people will be hurt as we hunt down the terrorists. "In a war like this, where our enemies fight that way, I think the error rate is necessarily going to be higher than what it is in other kinds of conflicts," argued Bradford Berenson, an aide to Alberto Gonzalez during his time as White House Counsel. "That's regrettable. It's also inevitable." 229 This too we have heard before. In calling the fight against crime a war, advocates for harsher measures told us we must accept that some innocents will suffer. James Q. Wilson, one of the most well-known criminologists of the past forty years, said street searches of innocent people, mostly black and Hispanic men, would be a necessary sacrifice in order to reduce the violence on America's streets. In a piece entitled "Just Take Away Their Guns," Wilson said, "innocent people will be stopped. Young black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race. But if we are serious about reducing drive-by shootings, fatal gang wars and lethal quarrels in public places, we must get illegal guns off the street." 230 Nelson Rockefeller, Pete Wilson, and James Q. Wilson all employed rhetoric that both responded to, and reinforced, our fear of domestic crime. They did so in service of punitive criminal legislation. Advocates for the war on terror have chosen a similar set of tactics to accomplish even more extreme ends. Like the crime warriors, and in part because of the foundation laid by the crime warriors, they have largely succeeded.

### 2NC Link-Burden of Proof (Cal MS)

#### A focus on burdens of proof misunderstands the way in which structural racism pervades the criminal justice system-The 1AC is incapable of reforming the war on terror because it ignores the true location of domination

Harris-prof law UC Davis-2

Crossroads, Directions, and a New Critical Race Theory p.2 Google Books

The second popular belief about racial injustice that CRT challenges is tha: racism is a matter of individuals, not systems. The goal of antidiscrimination law, as under- stood historically and currently by courts, was to search for perpetrators and victims: perpetrators could be identified through "bad" acts and intentions, while victims were (only) those who could meet shifting, and increasingly elusive, burdens of proof. Instead, critical race theorists have located racism and its everyday operation in the very structures within which the guilty and the innocent were to be identified: not individual "bad-apple" police officers, but the criminal justice system; not bigoted school-board members, but the structures of segregation and wealth transmission. In its first decade, CRT described and critiqued not a world of bad actors, wronged victims, and innocent bystanders, but a world in which all of us are more or less complicit in sociolegal webs of domination and subordination.

### Link—Gitmo/Specific Prison—2NC

#### Shame is redemption – the affirmatives apology for the transgression of Guantánamo preemptively forecloses radical criticism by locating inexcusable violence within this one instance and pointing to the broader good of our ways

Sexton, African American Studies – UC Irvine, and Lee, Geography – University British Columbia, 2006

(“Figuring the Prison,” *Antipode* 38)

Rather than join the clamor that has arisen on the subject of Abu Ghraib, weighing in on precisely what it tells us about the folly of Operation Iraqi Freedom or the ferocity of the neoconservative program or the miserable character of contemporary US society, we may do better to consider why so many observers, observers who quite frankly know better, have seen fit to speak of it in such evocative, often melodramatic and bewildered, language? In the scramble to provide explanation for the litany of violence—presuming that such images of violence shock and confuse and disorient viewing audiences, rather than corroborating our existing knowledge and outrage and dissent—our critical commentators have, each in their own ways, attempted to **reduce an elusive and disturbing** political, economic, social, and cultural **complex to a fixed aspect or moment or source in US society, to fashion an identifiable and stable object of criticism and opposition.** Though the tropes vary somewhat, it is the Janus head that has surfaced, if inexactly, as the leitmotif of this drive ([Carby 2004](javascript:popRef('b10'))), a restorative figure upholding the possibility that the ideal, to say nothing of the infrastructure, of "American democracy" is, in fact, the other face of the gruesome visage revealed behind the prison wall, the promise on the periphery of the current and continuous mortification: the better angels of the indomitable democratic experiment, the old Spirit of '76: **infinitely redeemable and fundamentally decent** ([Whitney 2004](javascript:popRef('b56'))). We submit, in contrast, that this overarching metaphorical initiative is as inapt as those that serve as its supports. Without the buttressing of its figurative keystone, the initiative may give way altogether.

### A2 Reform Good/Permutation

#### A. Building better prisons – reformism supports the inevitability of imprisonment. This is not a link of omission their position actively marginalizes debates about decarceration

Angela Y. DAVIS, professor of history consciousness – UC Santa Cruz, 2003

(Are Prisons Obsolete?, 20-21)

Over the last few years the previous absence of critical positions on prison expansion in the political arena has given way to proposals for prison reform. While public dis­course has become more flexible, the emphasis is almost inevitably on generating the changes that will produce a bet­ter prison system. In other words, the increased flexibility that has allowed for critical discussion of the problems asso­ciated with the expansion of prisons also restricts this dis­cussion to the question of prison reform.

As important as some reforms may be—the elimination of sexual abuse and medical neglect in women's prison, for example—**frameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison. Debates about strategies of decarceration**, which should be the focal point of our conversations on the prison crisis**, tend to be marginalized when reform takes the center stage.** The most immediate question today is how to prevent the further expansion of prison populations and how to bring as many imprisoned women and men as possible back into what prisoners call "the free world." How can we move to decriminalize drug use and the trade in sexual service? How can we take seriously strategies of restorative rather than exclusively punitive justice? Effective alternatives involve both transformation of the techniques for addressing "crime" and of the social and economic conditions that track so many children from poor communities, and espe­cially communities of color, into the juvenile system and then on to prison. The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor.

#### Forecloses questioning – the plan prematurely ties us to a concrete action, refuse to pander and embrace open-ended criticism

Dylan **Rodriguez**, Assistant Professor – UC Riverside, **NO DATE**

(http://www.historyisaweapon.com/defcon1/davisinterview.html)

Dylan: I think you make a subtle but important point here: prison and penal abolition imply an analysis of society that illuminates the repressive logic, as well as the fascistic historical trajectory, of the prison's growth as a social and industrial institution. Theoretically and politically, this "radical position," as you call it, introduces **a new set of questions that does not necessarily advocate a pragmatic "alternative" or a concrete and immediate "solution"** to what currently exists. In fact, I think this is an entirely appropriate position to assume when dealing with a policing and jurisprudence system that inherently disallows the asking of such fundamental questions as: Why are some lives considered more disposable than others under the weight of police policy and criminal law? How have we arrived at a place where killing is valorized and defended when it is organized by the state -- I'm thinking about the street lynchings of Diallo and Dorismond in New York City, the bombing of the MOVE organization in Philadelphia in 1985, the ongoing bombing of Iraqi civilians by the United States -- yet viciously avenged (by the state) when committed by isolated individuals? Why have we come to associate community safety and personal security with the degree to which the state exercises violence through policing and criminal justice? You've written elsewhere that the primary challenge for penal abolitionists in the United States is to construct a political language and theoretical discourse that disarticulates crime from punishment. In a sense, this implies a principled **refusal to pander** to the typically pragmatist impulse to demand absolute answers and solutions right now to a problem that has deep roots in the social formation of the United States since the 1960s. I think your **open-ended** conception of prison abolition also allows for a more comprehensive understanding of the prison-industrial complex as a set of institutional and political relationships that extend well beyond the walls of the prison proper. So in a sense, prison abolition is itself a broader critique of society. This brings me to the next question: What are the most crucial distinctions between the political commitments and agendas of prison reformists and those of prison abolitionists?

### Alternative—Solvency—Ballot

#### Prison literature – the ballot is a dialogue across prison walls. The question for this debate is not the impossibility of our alternative, but why the struggle against imperialism should settle for anything less

Sexton, African American Studies – UC Irvine, and Lee, Geography – University British Columbia, 2006

(“Figuring the Prison,” *Antipode* 38)

Yet, **there is something disingenuous about the unwillingness to advocate the abolition of prison—at home and abroad—unless and until a clear alternative is on hand.** "Disingenuous" because **it bespeaks** **a refusal to engage the lived experience of the imprisoned, to enter serious dialogue across prison walls**, to become conversant with the archive of research and testimony about their political location, about existence in a state and status of civic death**. This disposition**, which, needless to say, **concedes to criminalization**, has a general salience, given that prisoners in the US are officially disregarded and popularly despised as a class. However, the particular virulence that characterizes the institutionalized fear and hatred of prisoners in the US, both men and increasingly women, is thoroughly coded by race, and racial blackness unquestionably functions here as its chief abbreviation. "In racial constructs, the 'hyper-black'-as-prisoner is slave and so she stands distinctly debased from all other racial formations in society" ([James 2005a](javascript:popRef('b30')):xiii, emphasis added). Thus we offer that the societal derogation of the imprisoned draws its principal affective power and its strictest ideological cast from the deep wells of anti-blackness, and that the "prisonization" of the US is more accurately discussed as a reverberation or derivation of the social death implanted at the heart of black existence, the quintessence of racial slavery and the principle legacy of its afterlife in altered structural modalities ([Hartman 1997](javascript:popRef('b25')); [Patterson 1982](javascript:popRef('b40'))).

The reticence of the Left to engage arguments, and efforts for prison abolition within the US and to center therein the ongoing struggle for black freedom, serves to **hamstring its critical resistance to US imperialism abroad**, leaving it open to capitulation on the emancipation of those with which it seeks to forge solidarity. It does so by approaching sovereignty as a matter of degree. Still, it is not hard to imagine scenarios—indeed, they already exist—in which **the Left licenses itself to pursue radical platforms against imperialism**, which is to say abolitionist campaigns overseas, **while allowing the historical condition of blacks**, irreducible to the shifting objectives of empire (or Empire), to serve as little more than convenient metaphor: source of insight and outrage, but only insofar as the **trouble is quarantined to the past** (as lessons learned) **or rendered on scales too small or too big to demand action** (as either nagging residue or eternal national shame). On this note, we should admit that there is something unconvincing, unpersuasive, and perhaps even fraudulent about the analogical links drawn between, on the one hand, the scandal at Abu Ghraib and, on the other, the fetid history of lynching or the contemporary horrors of mass imprisonment or both. The pretense is due not so much to the moral non-equivalence of the respective institutions ([Winn 2004](javascript:popRef('b61'))) as to their strict political incommensurability. Thinking productively about this incommensurability, rendering it legible, requires, above all else, the working through of a persistent screen memory—for "them" and for "us"—that dispatches racial slavery as an allegory for regarding the torture of others:

As an African American, these actions are all too familiar to me … When Blacks arrived from Africa during the 1600's, they were stripped of their clothes, pride, dignity and religion. Africans that were enslaved in America went through a tortuous process known as "seasoning," which is a term referring to the process of breaking down the African physically, emotionally, and psychologically, hence making him/her submissive. Once the slaves arrived in America, members of the dominant culture raped women repeatedly, men were publicly humiliated and children were sold and separated. It is probably safe to assume that at Abu Ghraib the similarities vastly outweigh the differences. ([Slater 2004](javascript:popRef('b49')))

### Alternative—Solvency—Imagination

#### Now key time - take the leap of faith away from mere temporary stability and into the dream of abolition

Kim GILMORE, graduate student in history at NYU, 2000

(“Slavery and Prison,” *Social Justice* vol. 27 issue 3)

As prison construction and the crime frenzy continue around the U.S. (and indeed, the world) at such a dizzying pace, calls for prison abolition risk being perceived as utopian. The state, as it is currently configured in the U.S., has a primary investment in making the world safe for free trade, with domestic "stability" through state violence and brutality a key method of achieving the **temporary facade of stability**. In rural and urban areas crippled by the slow decline in manufacturing and skilled jobs, the punishment industry has emerged as the new jobs program, a role it plays with the military. [2] In this moment, it may seem more difficult than ever to envision a state that supports humanity rather than eviscerates the possibility of freedom and health for so many of its people**.** Yet it is **precisely now, when prisons crowd the physical and psychic landscape, that imagining abolition is most critical.** Thus, the new abolitionism has arisen out of the communities most affected by the prison state -- those least able to conceptualize anything other than a transformation of the state as it is currently configured.

## Amendment

### A2: Perm do the Counterplan

#### Its severance---Constitutional Amendment isn’t statutory

Difference Between 13

(<http://www.differencebetween.info/difference-between-statutory-law-and-constitutional-law>)

Laws are an important part of society; they ensure peace and tranquility throughout the land. Imagine a world without laws, where everyone would be allowed to do as they wish. It would be chaos! Everyone would be free to steal, murder, do business as they please, etc. There would be no one to make sure everyone is treated fairly, business is being lawfully, people are being treated properly, etc. Hence, laws are very important to ensure that everyone is treated fairly and right. No one under the law is given extra power and everyone is treated the same. There are various different types of laws that are used to monitor different parts of the society and each law created monitors that specific part only. For people that are not well versed with the law and its studies can often become confused (with the language adding to the confusion). Statutory Law and Constitutional Law are two different types of law that are used to govern different aspects of the society. Statutory Laws are laws that have been written down and codified by the legislative branch of a country. The law has been set down by a legislature or legislator (if it is a monarchy) and codified by the government. These laws are also known as written law or session law. Statutory laws are often subordinate to the higher constitutional laws. The laws are written on a bill and must be passed by the legislative body of the government. Statutory laws originate from municipalities, state legislature or national legislature. The term ‘codified’ states that the law is organized by the subject matter. However, not all statutory laws are considered as ‘codified’. The statues are often referred to as code. Codifying a law can also refer to taking a common law and putting it in statute or code form. Statues are prone to being over written or expiring, depending on the law that was passed. Many countries depend on a mixed law system to provide the proper justice. This is because statutory laws are often written in general language and may not govern every situation that may arise. In cases like these, the courts must interpret and determine the proper meaning of the statute that is most relevant to the case. Both statutory laws and common laws can be disputed and appealed in higher courts. Constitutional Law is the body of law that defines the relationship between different entities within a nation, most commonly the judiciary, the executive and the legislature bodies. Not all nations have a codified constitution, though all of them have some sort of document that states certain laws when the nation was established. These rules could state the basic human rights of the man and women of that state, including rights to own property, freedom of speech, etc. The main purpose of the constitutional law is to govern the law making bodies in the nation. It gives them set boundaries of the laws they cannot violate. For example, the law makers cannot violate the public’s rights to do certain things such as freedom of speech, right to petition, freedom of assembly, etc. The constitutional law of a country can be changed if the government falls or changes. Additions can also be made to the constitution in form of amendments.

#### And, Court rulings on an issue are distinct from upholding the amendment-Severance is illegitimate because if the 2AC could pick and choose what part of the plan to defend, no counterplan would compete.

Worthen 4<Kevin J. (Professor of Law and Associate Dean, J. Reuben Clark Law School, Brigham Young University), *BYO Journal of Public Law*, “Same-Sex Marriage Symposium Issue: Who Decides and What Difference Does It Make?: Defining Marriage in “Our Democratic, Federal Republic,” 18 BYU J. Pub. L. 273, 2004, lexis>

 [\*306]  As a practical matter, recent experience has demonstrated that state court judicial review of state statutes can too easily lead to judicial resolution of the issue contrary to the will of the people and the legislature. [n135](http://www.lexisnexis.com.turing.library.northwestern.edu/us/lnacademic/frame.do?tokenKey=rsh-20.325260.5364442395&target=results_DocumentContent&reloadEntirePage=true&rand=1247449490054&returnToKey=20_T6946651637&parent=docview#n135) At least some state court judges appear to be too eager to the resolve the issue for themselves, without a careful consideration of their proper role in the system. The risk of tyranny of the judiciary is therefore somewhat high on such an impassioned issue. This, in turn, lessens the net benefit of a "double" judicial security. More importantly, as a theoretical matter, in our system, the ultimate sovereign who must remain responsible for whatever acts the government takes is the people. [n136](http://www.lexisnexis.com.turing.library.northwestern.edu/us/lnacademic/frame.do?tokenKey=rsh-20.325260.5364442395&target=results_DocumentContent&reloadEntirePage=true&rand=1247449490054&returnToKey=20_T6946651637&parent=docview#n136) While there are filters though which the people's judgment must pass before it is properly implemented in our system, in the long run, it is their judgment, not that of the judiciary, which should control. If a state constitutional amendment were adopted through the non-initiative process, the people's judgment would have passed through the requisite filters, and federal judicial review would be available to further ensure that other more process-oriented norms were not violated. Thus, while a proponent of "our democratic, federal, republican" form of government might be persuaded either way on the matter, this particular proponent concludes that the optimum form of resolution of the same-sex marriage issue is to specifically address the issue through a non-initiative generated state constitutional amendment.

#### ---Severs judicial restriction-Judicial restrictions are initiated by the Judiciary and distinct from Congressional action

Sullivan-JD Candidate Baylor-4 56 Baylor L. Rev. 253, \*

NOTE: The Grizzle Bear: Lingering Exculpatory Clause Problems Posed by Texas Commerce Bank, N.A. v. Grizzle

Exculpatory clauses are governed not only by legislative requirements but also by judicial restrictions as well. This Note next explores the additional requirements imposed by the judiciary. IV. Judicial Restrictions on Exculpatory Clauses Before the TTA, then under the TTA, and then under the TTC, Texas courts supplemented statutory law with judicial restrictions on exculpatory clauses. Texas courts thereby ensured additional protections against breaches committed with reckless indifference, in bad faith, or with intentional adversity to the beneficiary's interests. Courts, however, often employed imprecise language in attempting to constrain exculpation. This imprecise language created a trap for future unwary courts.

#### There is a distinction between initiation and following along---Judicial restrictions are legal opinions created by the judiciary.

Lenz-prof political science, Florida Atlantic University-96 59 Alb. L. Rev. 1685

STATE CONSTITUTIONAL COMMENTARY: ARTICLE: THE RESTRICTION OF ABORTION PROTESTERS IN FLORIDA

One consequence of political jurisprudence, the legal theory that describes courts as governmental institutions and judges as political actors who make legal policy by interpreting the law, 1 is increased acceptance of civil liberties as instrumental, rather than intrinsic, values whose worth is empirically measured by social utility. 2 This Article examines judicial restrictions on abortion protesters to describe how social utilitarianism is used to decide civil liberties conflicts and to explain its substantive impact on individual rights in state and federal law. The primary focus is Florida state court opinions determining the extent of governmental power to regulate abortion protesters at an abortion clinic in Melbourne, Florida. 3 Some attention is also paid to the United States Supreme Court's decision in Madsen v. Women's Health Center, Inc. 4 Judicial reasoning in this controversial area of free speech reveals a great deal about contemporary foundations of civil liberties in a post-individual rights era of American politics, an era characterized by [\*1686] widespread public and professional criticism of "legalism" and "rights talk" for impoverishing public discourse. 5

### 2NC CP Legitimate (Baker)

#### ---Baker Concludes Negative-Amendment option plays a vital role in Constitutional revision

Baker 10

[Director of the Con Law Center at Drake, 10 Widener J. Pub. L. 1]

II. AMENDING THE CONSTITUTION A. Amendment Procedures The procedures for amending the Constitution represent the Framers' best efforts to reconcile the need for change with the desire for stability in government structures. In the words of James Madison, [\*2] the father of the Constitution, the amending procedures are designed to "guard[] equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." 1 The power to amend, an important responsibility of self-government, was essential and vital to them and remains so today. 2 As we shall see, however, the relative difficulty of amending the Constitution has proven over time to be one of its chief virtues. 3 Article V provides for two procedural steps to amend the Constitution. 4 There are also two alternatives for each step, arranged in what Madison described as a process that is "partly federal and partly national." 5 First, amendments may be proposed either by a two-thirds majority in both houses of Congress or by a special convention called at the request of two-thirds of the state legislatures. 6 Second, amendments are ratified by three-fourths of the states, either by the existing state legislatures or by special state conventions, depending on which forum Congress designates. 7 In recent years, some prominent professors of constitutional law have published books and articles to argue that the provisions of Article V may not be exclusive and that amendments might be proposed and adopted by other means--such as a popular referendum election or a coalescing consensus understood at some higher level of politics--which would make amending the Constitution easier and most probably more frequent and elaborate. 8 Other scholars seek to [\*3] revise our historical understanding, arguing that the actual amendments are of little constitutional consequence--failed amendments have been accepted and ratified amendments have been ignored as if Article V was not part of the Constitution. So what really counts as constitutional amendments are de facto changes in the small-c constitution in practice and not de jure changes in the text of the capital-C Constitution itself. 9 Those academic arguments go beyond the text and the history of the Constitution. Neither the Congress nor the Supreme Court has paid any attention to the theories of extra-constitutional amendments, and they are mentioned here only for the sake of completeness, except to observe that I find them more provocative than persuasive. 10 The Article V procedures are best understood to be the exclusive methods for formal amendment. 11 B. Intent of the Framers Like so many other provisions of the Constitution, Article V was the product of some initial disagreement and an eventual compromise at the Constitutional Convention of 1787. 12 The historic fact that the [\*4] delegates were overstepping their own authority in Philadelphia by writing an entirely new constitution instead of merely proposing changes in the Articles of Confederation as they had been instructed to do by the Congress, perhaps, may have given the delegates pause to consider how best to provide for future changes without having to start all over again. 13 The two-step procedure was a deliberate compromise between two camps with opposing fears for the future: those who feared that the Congress would seek to increase its powers at the expense of the states and those who feared that the states would seek to truncate the powers of the fledgling federal government. 14 Like so many other Madisonian compromises at the Convention, the delegates resolved to align those competing jealousies in direct opposition to each other, to check and balance each other. 15 Neither the Congress nor the States would have an exclusive prerogative over amendments; rather, they would share the power to amend the Constitution. The final drafting finesse was worked out only a matter of hours before the adjournment of the Convention, with little formal debate, though the amending corollary in the Constitution would soon prove to be a useful and persuasive argument towards ratification by the states. 16 Indeed, the price of ratification--and the proof of the Constitution--was the immediate recourse to Article V to add a Bill of Rights. 17 Thus, amending the Constitution was made difficult, but not impossible, in distinct contrast to the predecessor constitution, the Articles of Confederation, which had required the political impossibility of the unanimous consent of all the states for amendments. 18 The Framers of the Constitution did not anticipate [\*5] frequent or detailed amendments. Rather, they understood that regular lawmaking in the form of statutes would respond to economic, political, cultural, and moral developments in American society. They understood the Constitution to be a permanent and higher law intended to last for the ages. Our two-century experience with their design in Article V has contributed significantly to the reconciliation of democracy and constitutionalism that defines us as a nation. 19 What amendments we have ratified and what proposed amendments we have rejected, as well as how we have gone about considering them, have helped to define our essential Constitution. 20

#### ---Don’t get it twisted---the plan also does something that never happens i.e. the Court contradicting something when both branches agree it’s a national security issue.

#### ---The counterplan is proposed in the topic literature which makes it predictable and a germane policy consideration

Goldstein 1988(Yonkel, J.D. from Stanford Law School, July, "The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment", 40 Stan. L. Rev. 1543, Lexis)

None of the proposals to control nuclear weapons discussed above provide the kind of clarity and definitiveness which one would hope would characterize the rules governing the initiation and prosecution of a nuclear war. These proposals are grounded not in a line of clear precedent, but in a soggy morass of conflicting principles. Equally important, there is the perception, by people who regard themselves as hardened realists, that to adhere religiously to orthodox principles of congressional war declaration would be to render the entire nuclear defense deterrence system virtually worthless. [\*1587] Because of these considerations, a constitutional amendment concerning the appropriate distribution of war powers should be adopted. More than any other legislative or rulemaking device, a constitutional amendment has a chance of commanding sufficient authority to be credible, especially in time of crisis. Because the constitutional problems associated with the control of nuclear weapons are so closely related to the war powers in general, the amendment must deal with war powers generally. Because technical capabilities of weapons and defense systems can change relatively rapidly, it is important that the amendment does not rigidly lock the nation into any specific procedure which is sure to become obsolete. Finally, the amendment ought to account for the recent congressional tendency to avoid taking stands on controversial issues until public opinion has clearly been discerned. Although the desire of members of Congress to see how their constituencies regard an issue is understandable, following massive public sentiment is not a viable option in many nuclear scenarios. Analogous to this congressional hesitancy is the Judiciary's reluctance to involve itself in questions of this kind. If my characterization of the problem is correct, namely that the Executive, aided by judicial acquiescence, has expanded its powers at the expense of congressional power, only one additional source of power on the federal level remains -- that is, of course, the people. The amendment proposed below attempts to take all of the above considerations into account.

#### --- Their interpretation is like a bad high school civics class-multiple actors is an intrinsic element in policymaking

GEYH 98 Georgetown Law Journal

<http://www.findarticles.com/p/articles/mi_qa3805/is_199810/ai_n8809190>

Despite the high school civics mantra that our government is comprised of three separate and independent branches, the paradoxical interdependence of these "independent" branches-brought about by a system of checks and balances in which each branch possesses the means to make the others miserable if they get out of line-is widely understood. Thus, we all know that legislators depend on judges to interpret the meaning of statutes and assess their constitutionality, while judges depend on legislators for the resources needed to perform their interpretive functions.

### 2NC-Delay

#### ---The counterplan specifies immediate release which beats this argument

Strauss 01 [David A., not David P. but Prof of Law @ Chicago, 114 Harv. L. Rev. 1457, ln]

Finally, for an amendment to matter, it must be unusually difficult to evade. An amendment that specifies a precise rule, for example, is more likely to have an effect than one that establishes only a relatively vague norm. If its text is at all imprecise, an amendment that is adopted at the high-water mark of public sentiment will be prone to narrow construction or outright evasion once public sentiment recedes, as the Fourteenth and Fifteenth Amendments were.

#### ---Fiat is immediate and reciprocal—ensures fair division of ground between the aff and neg, their interpretation means all counterplans would be delay, and the neg could never win.

#### ---There evidence is one line long from a House Rep and doesn’t come close to providing a warrant-If there is one, it’s that the amendment process is slow which it doesn’t have to be

Jackson ’01 (Jesse L. Jackson, Jr., 2001, U.S. Representative, “A More Perfect Union: Advancing New American Rights”)

Some will say that amending the Constitution once, not to mention eight times, takes too long, requires too much energy, and costs too much money – that it’s an inefficient stewardship of time and resources. The answer to the first argument is that the Constitution has been amended twenty-seven times, including seventeen times since the original Bill of Rights was passed. (The Bill of Rights itself required 811 days – from September 25, 1789, to December 15, 1791 – for ratification.) Following the initial, usually lengthy struggle to get an amendment through two-thirds of the House and Senate, there is no time limit for ratifying it – that is, no seven-year limitation on ratifying amendments, as many people believe. This schedule was arbitrarily placed on the Equal Rights Amendment (and later extended to ten years) and the D.C. Statehood Amendment. Once a state legislature votes for an amendment, that affirmation remains in place, unless a later body reverses it. How long it takes for my amendments to be passed by House and Senate, and ratified by three-quarters of the state legislatures, will be determined by a combination of political leadership and the will of the American people. If Americans have a strong desire for these rights – have a political fire burning in their bellies – such amendments can be shuttled through the House and Senate and ratified relatively quickly after a legitimate national debate on their substance and implications.

#### ---Plan is slow-massive delay

**Rosenberg, McClatchy Newspaper, 2011**

(Carol, “How Congress helped thwart Obama's plan to close Guantanamo”, 1-22, <http://www.mcclatchydc.com/2011/01/22/107255/how-congress-helped-thwart-obamas.html>, ldg)

Key among the factors, the cables suggest: Congress' refusal to allow any of the captives to be brought to the United States. In cable after cable sent to the State Department in Washington, American diplomats make it clear that the unwillingness of the United States to resettle a single detainee in this country — even from among 17 ethnic Muslim Uighurs considered enemies of China's communist government — made other countries reluctant to take in detainees. Europe balked and said the United States should go first. Yemen at one point proposed the United States move the detainees from Cuba to America's SuperMax prison in the Colorado Rockies. Saudi Arabia's king suggested the military plant micro-chips in Guantanamo captives before setting them free. A January 2009 cable from Paris is a case in point: France's chief diplomat on security matters insisted, the cable said, that, as a precondition of France's resettling Guantanamo captives the United States wants to let go, "the U.S. must agree to resettle some of these same LOW-RISK DETAINEES in the U.S.'' In the end, France took two. Closing the Guantanamo detention center had been a key promise of the Obama presidential campaign, and the new President Barack Obama moved quickly to fulfill it. Just two days after taking the oath of office, on Jan. 22, 2009, Obama signed an executive order instructing the military to close Guantanamo within a year. European countries were effusive in their praise. But as the second anniversary of that order passed Saturday, the prison camps remain open, and the prospects of their closure appear dim. Prosecutors are poised to ramp up the military trials that Obama once condemned, and the new Republican chairman of the House Armed Services Committee, Rep. Buck McKeon of California, last week said the U.S. should grow the population to perhaps 800 from the current 173. Many factors worked to thwart Obama's plans to close the camps — from a tangled bureaucracy to fears that released detainees would become terrorists. But Congress' prohibition on resettling any of the detainees in the United States hamstrung the administration's global search for countries willing to take the captives in. The U.S. refusal to take in the captives "comes up all the time," acknowledged a senior Obama administration official of U.S. efforts to find homes for released detainees. "Were we willing to take a couple of detainees ourselves, it would've made the job of moving detainees out of Guantanamo significantly easier,'' said the official, who agreed to speak only anonymously because of the delicacy of the diplomacy.

**Extrajudicial decisions are more stable than judicial decisions because they require input by the general public**

Whittington, 02

(Keith E. Whittington, Assoc. Professor of Politics, Princeton. “Extrajudicial Constitutional Interpretation: Three Objections and Responses.” March 2002. Lexis)

If critics of extrajudicial constitutional interpretation overstate the stability of judicial interpretation, they also underestimate the stability of nonjudicial interpretation. Judicial supremacy is not necessary to settle constitutional understandings. Examples of extrajudicial settlement of constitutional disputes are commonplace. Britain has long relied on constitutional convention rather than constitutional law to provide such settlements, and analogous practices exist in the United States. n133 Policymakers were faced with constitutional indeterminacies early on in the nation's history and had little expectation that the judiciary either would or could clarify and stabilize the constitutional rules. Elected officials reached constitutional settlements of their own. Congress determined, for example, that the President could unilaterally remove executive officials. n134 The President successfully vetoed legislation on policy grounds n135 and excluded the Senate from the negotiation of treaties. n136 Congress and the President agreed on procedures for acquiring new territory and admitting new states into the union. n137 The House and Senate established an understanding of impeachable offenses, and insisted that partisanship was inconsistent with judicial office. n138 George Washington set an enduring precedent of the two-term presidency, and Abraham Lincoln marshaled support for the view that states did not have a right to secede from the Union. The Senate understands that Presidents will generally nominate only members of [\*805] their own party to serve in government offices, while the President understands the requirements of "senatorial courtesy." These settlements and others have endured through most of the nation's history with little assistance from the judiciary. Other political interpretations of the Constitution have structured government behavior for decades at a time. The Federalists established a broad interpretation of federal powers that embraced the incorporation of a national bank, and the Jacksonian Democrats replaced it with a narrow interpretation - John Marshall's formal endorsement of the broad interpretation notwithstanding. n139 The Federalists successfully claimed that the federal tariff power could be used to protect domestic manufacturers, and the Jacksonian Democrats forcefully abandoned that claim. n140 Presidents through most of American history claimed a power to impound appropriated funds, and in the 1970s Congress successfully established a framework for regulating the presidential spending power and clarifying the congressional power of the purse. n141 Congress regularly passes "framework legislation" and "statutes revolving in constitutional law orbits." n142 For much of the nineteenth century, legislatures were the primary institution for determining the scope of individual rights and were able to settle such disputes at least as effectively as the judiciary. n143 Extrajudicial constitutional settlements gain their stability from a variety of sources, despite the absence of a formal commitment to the authority of precedent. Not least among these supports for settlement is popular opinion. As Edward Corwin noted in outlining departmentalist theory, "finality of interpretation is hence the outcome - when indeed it exists - not of judicial application of the Constitution ... but of a continued harmony of views among the three [\*806] departments. It rests, in other words, in the last analysis, on the voting power of public opinion." n144

Constitutional Conventions solve comparatively better than court action—the same mechanisms which insure the smooth functioning of the judiciary prevent it from having the same precedential powers as a convention.

Labunski 2000—Professor of Journalism, University of Kentucky

(The Second Constitutional Convention: How American People Can Take their Government Back, p. 177-8)

For the judicial branch to serve its indispensable function within a complicated political and legal environment, it must be able to create certain standards that preserve its independence and legitimacy. Many of those standards permit judges to be creative in advancing the law and shaping it to reflect changing conditions. But many of the self-imposed rules and procedures — which have developed over a long period of time and which judges believe are necessary for the courts to function—significantly limit the scope and pace of constitutional change. The American people cannot wait while the courts make incremental modifications to the Constitution one case at a time over many years. They must take bolder and more comprehensive action by holding a second convention to recommend amendments that will help to restore democratic principles and make government more accountable.

Con Con’s solve better than the court—only an amendment can cause comprehensive, long lasting change.

Labunski 2000—Professor of Journalism, University of Kentucky

(The Second Constitutional Convention: How American People Can Take their Government Back, p. 111)

Judges cannot, however, be the sole source of constitutional interpretation, aided by an occasional amendment. Because of political nature of the court system — especially the way cases come to and are decided by courts — judges cannot be expected to solve the problems created by an out-of-control campaign finance system and the other challenges that must be addressed by a second constitutional convention. The judicial branch plays an indispensable role in preserving civil liberties against encroachment by government, in striking down laws that violate the Constitution, in interpreting statutes, and by settling other legal disputes. But judges cannot do more than make incremental changes in a system that cries out for more comprehensive reform.

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### 1NR Impact

#### And Smith says that treaties are key to check warming – its existential and 100% probable

Deibel-prof IR National War College-7—Prof IR @ National War College (Terry, “Foreign Affairs Strategy: Logic for American Statecraft,” Conclusion: American Foreign Affairs Strategy Today)

Finally, there is one major existential threat to American security (as well as prosperity) of a nonviolent nature, which, though far in the future, demands urgent action. It is the threat of global warming to the stability of the climate upon which all earthly life depends. Scientists worldwide have been observing the gathering of this threat for three decades now, and what was once a mere possibility has passed through probability to near certainty. Indeed not one of more than 900 articles on climate change published in refereed scientific journals from 1993 to 2003 doubted that anthropogenic warming is occurring. “In legitimate scientific circles,” writes Elizabeth Kolbert, “it is virtually impossible to find evidence of disagreement over the fundamentals of global warming.” Evidence from a vast international scientific monitoring effort accumulates almost weekly, as this sample of newspaper reports shows: an international panel predicts “brutal droughts, floods and violent storms across the planet over the next century”; climate change could “literally alter ocean currents, wipe away huge portions of Alpine Snowcaps and aid the spread of cholera and malaria”; “glaciers in the Antarctic and in Greenland are melting much faster than expected, and…worldwide, plants are blooming several days earlier than a decade ago”; “rising sea temperatures have been accompanied by a significant global increase in the most destructive hurricanes”; “NASA scientists have concluded from direct temperature measurements that 2005 was the hottest year on record, with 1998 a close second”; “Earth’s warming climate is estimated to contribute to more than 150,000 deaths and 5 million illnesses each year” as disease spreads; “widespread bleaching from Texas to Trinidad…killed broad swaths of corals” due to a 2-degree rise in sea temperatures. “The world is slowly disintegrating,” concluded Inuit hunter Noah Metuq, who lives 30 miles from the Arctic Circle. “They call it climate change…but we just call it breaking up.” From the founding of the first cities some 6,000 years ago until the beginning of the industrial revolution, carbon dioxide levels in the atmosphere remained relatively constant at about 280 parts per million (ppm). At present they are accelerating toward 400 ppm, and by 2050 they will reach 500 ppm, about double pre-industrial levels. Unfortunately, atmospheric CO2 lasts about a century, so there is no way immediately to reduce levels, only to slow their increase, we are thus in for significant global warming; the only debate is how much and how serous the effects will be. As the newspaper stories quoted above show, we are already experiencing the effects of 1-2 degree warming in more violent storms, spread of disease, mass die offs of plants and animals, species extinction, and threatened inundation of low-lying countries like the Pacific nation of Kiribati and the Netherlands at a warming of 5 degrees or less the Greenland and West Antarctic ice sheets could disintegrate, leading to a sea level of rise of 20 feet that would cover North Carolina’s outer banks, swamp the southern third of Florida, and inundate Manhattan up to the middle of Greenwich Village. Another catastrophic effect would be the collapse of the Atlantic thermohaline circulation that keeps the winter weather in Europe far warmer than its latitude would otherwise allow. Economist William Cline once estimated the damage to the United States alone from moderate levels of warming at 1-6 percent of GDP annually; severe warming could cost 13-26 percent of GDP. But the most frightening scenario is runaway greenhouse warming, based on positive feedback from the buildup of water vapor in the atmosphere that is both caused by and causes hotter surface temperatures. Past ice age transitions, associated with only 5-10 degree changes in average global temperatures, took place in just decades, even though no one was then pouring ever-increasing amounts of carbon into the atmosphere. Faced with this specter, the best one can conclude is that “humankind’s continuing enhancement of the natural greenhouse effect is akin to playing Russian roulette with the earth’s climate and humanity’s life support system. At worst, says physics professor Marty Hoffert of New York University, “we’re just going to burn everything up; we’re going to heat the atmosphere to the temperature it was in the Cretaceous when there were crocodiles at the poles, and then everything will collapse.” During the Cold War, astronomer Carl Sagan popularized a theory of nuclear winter to describe how a thermonuclear war between the Untied States and the Soviet Union would not only destroy both countries but possibly end life on this planet. Global warming is the post-Cold War era’s equivalent of nuclear winter at least as serious and considerably better supported scientifically. Over the long run it puts dangers from terrorism and traditional military challenges to shame. It is a threat not only to the security and prosperity to the United States, but potentially to the continued existence of life on this planet

### 1NR A2: Conjunctive Fallacy

#### They have the equation backwards – the bias is AGAINST making doomsday predictions – our form of calculations are necessary

Bostrom 02, Professor of Philosophy at Oxford University and Director of the Future of Humanity Institute, ’2 (Nick, March, “Existential Risks: Analyzing Human Extinction Scenarios and Related Hazards” Journal of Evolution and Technology, Vol 9, http://www.nickbostrom.com/existential/risks.html

8.5 Psychological biases? The psychology of risk perception is an active but rather messy field [80] that could potentially contribute indirect grounds for reassessing our estimates of existential risks. Suppose our intuitions about which future scenarios are “plausible and realistic” are shaped by what we see on TV and in movies and what we read in novels. (After all, a large part of the discourse about the future that people encounter is in the form of fiction and other recreational contexts.) We should then, when thinking critically, suspect our intuitions of being biased in the direction of overestimating the probability of those scenarios that make for a good story, since such scenarios will seem much more familiar and more “real”. This Good-story bias could be quite powerful. When was the last time you saw a movie about humankind suddenly going extinct (without warning and without being replaced by some other civilization)? While this scenario may be much more probable than a scenario in which human heroes successfully repel an invasion of monsters or robot warriors, it wouldn’t be much fun to watch. So we don’t see many stories of that kind. If we are not careful, we can be mislead into believing that the boring scenario is too farfetched to be worth taking seriously. In general, if we think there is a Good-story bias, we may upon reflection want to increase our credence in boring hypotheses and decrease our credence in interesting, dramatic hypotheses. The net effect would be to redistribute probability among existential risks in favor of those that seem to harder to fit into a selling narrative, and possibly to increase the probability of the existential risks as a group.

### 1NR A2: DA Has Logical Holes

#### Political capital is finite in the context of treaty law

Baum and Devins 2010

Lawrence and Neal, Law Profs at Ohio St and William & Mary, Why the Supreme Court Cares About Elites, Not the American People http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs

As we have suggested already, legal academics may be an especially salient audience within the legal profession. The news media may also be a salient audience, and the impact of these two groups is parallel in some important respects. The potential salience of academics and the news media has three different sources. First, the news media and academia play an important role in deﬁning the Justices’ status and reputation within their own inner circles. Supreme Court Justices read the newspapers, as do their family and friends. Their clerks and the advocates who appear before them typically served as the editors of the nation’s leading law reviews, and many of their clerks will become academics—writing journal articles and books about their handiwork. Supreme Court Justices, moreover, are part of the larger law school culture. They frequently travel to law schools and have strong ties to the elite schools that they and their clerks attended.143 Second, the news media and academia also deﬁne the Justices’ status and reputation to society at large.144 Political elites in general and the news media in particular play a signiﬁcant role in opinion formation among the mass public. Indeed, on issues “that are not ideologized in the mass public,” there is a convergence between elite opinion (typically reinforced by Supreme Court decision making) and public opinion—as “media discussion [of a Court decision] and elite behavior” change public norms in ways that “reduce the differences between the pattern of elite and mass opinion on an issue.”145 Third, whereas the mass public knows very little about the speciﬁc decisions of the Court,146 elites are far more likely to pay attention to reports on Court decision making. In other words, elites are the principal consumers of media reports about the Court, especially in specialized media such as legal newspapers and blogs. The media’s inﬂuence in shaping the Justices’ decision making is something that we will take up in Part III, when we discuss whether there is empirical evidence backing the so-called Greenhouse effect, whereby Justices shift their views to reﬂect the left-leaning values of media and academic elites.147 At this point, two observations are in order: First, there is little question that Justices pay attention to reports about the Court and about themselves personally in the news media. Although the Justices interact with reporters far less than their counterparts in the other branches, such interactions are not rare148 and they are becoming more common. Justices may engage in those interactions for several reasons, but it is likely that an interest in shaping news coverage is one of those reasons.149 Second, there is good reason to think that the Court’s swing Justices are especially sensitive to their reputations among academic and media elites. Swing Justices typically have comparatively weak legal policy preferences, and as such, are more likely to engage in externally focused impression management.150 In particular, rather than seeking to win the esteem of some ideologie cally identiﬁable group, swing Justices are often drawn to the norm of judicial independence and the idea that a neutral, impartial arbiter would not join one or another faction that regularly favors liberal or conservative outcomes.151 For example, Justice Anthony Kennedy—the super median on today’s Roberts Court—seems particularly concerned with his public persona. According to one of his law clerks, Justice Kennedy “‘would constantly refer to how it’s going to be perceived, how the papers are going to do it, [and] how it’s going to look.’”152 On the very day that the Court reafﬁrmed Roe in Planned Parenthood v. Casey, Justice Kennedy told a reporter that “‘[s]ometimes you don’t know if you’re Caesar about to cross the Rubicon or Captain Queeg cutting your own tow line.’”153 No doubt, Justice Kennedy may be an extreme case. Nevertheless, there is good reason to think that swing Justices are more apt to be externally focused and, as such, more interested in press and academic commentary about the Court. D. SUMMARY Social psychology provides important insights into Supreme Court decision making. Unlike political science models which emphasize the pursuit of legal policy preferences, social psychology highlights how issues of self presentation also contribute to the choices Justices make. In so doing, social psychology takes into account both the legal policy preferences of Justices (by recognizing that a Justice will only back up legal or policy positions that are roughly in sync with their personal preferences) and a Justice’s interest in power and reputation (by recognizing that a Justice’s preferences and votes—consciously or unconsciously—are inﬂuenced by audiences they care about). By highlighting how Justices take audiences into account, this Part has called attention to divergences between the social psychology and political science models. At the same time, it is important to recognize that both models anticipate that Justices will diverge from favored policy positions to pursue other objectives. Political science models that argue that the Court accommodates itself to public opinion, for example, anticipate that Justices will calibrate their decision making to stave off public disapproval. The social psychology model, on the other hand, highlights the pivotal role that personal motivation plays in judicial decision making. There is reason to think that political science models that view public opinion as a signiﬁcant inﬂuence on the Justices anticipate greater divergence by the Justices from positions that reﬂect their policy preferences than does the social psychology model. Social psychology anticipates that the formation of legal policy preferences is driven by both ideological and personal motivations, so there is likely to be considerable agreement between Justices’ preferences and the preferences of the audiences that are most important to them. In contrast, any mechanisms that lead to agreement in preferences between the Justices and the general public are likely to be weaker. Social psychology is important for three other related reasons. First, even though the Supreme Court Justices are members of a single Court, it is wrong to describe the Court as a unitary body. Not only do the Justices have different legal policy preferences, they also place different values on power and reputation—including their willingness to be associated with ideologically identiﬁable groups. Second, in looking at the Supreme Court as a conglomeration of individual preferences, social psychology—consistent with the political science models— calls attention to the often pivotal role that median Justices play in Court decision making.154Unlike the political science models, however, social psychology calls attention to the important role that audiences play in the decision making of median Justices. Third, and ﬁnally, social psychology is instructive in understanding which audiences matter most to Justices. Supreme Court Justices are elites whose reference groups are also elites. And although there are both liberal and conservative elite audiences—so that highly ideological Justices are likely to garner praise from the interest groups they identify with so long as they generally support the positions of those groups—the Court’s swing Justices are especially likely to look to the media, law professors, and lawyers’ groups like the American Bar Association. These are the very audiences that will dissect and write about the Justices’ opinions, both in specialty journals for the legal profession and in books and articles that reach across elite audiences (and ultimately ﬁlter to the mass public).155 As it turns out, these audiences are left-leaning, at least on civil liberties issues, in the current era.156 For that reason, it is to be expected that Supreme Court decision making will sometimes favor these elite preferences over the preferences of the American people.157

#### Detention creates political backlash to the court.

Devins 2010

Neal, Professor of Law at William and Mary, Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1024&context=facpubs

In Part III of this Essay, I will argue that the Court’s actions in the first year of the Obama administration are cut from the same cloth as its decision to intervene in Bush-era disputes. As this section has suggested, the Court has never risked national security or executive branch non-acquiescence in its enemy combatant decision making. Moreover, as I argued in Part I, Court decision making in this area has largely tracked social and political forces. For reasons I will now detail, the Court’s decisions both to steer clear of this issue in the spring and summer of 2009 and its fall 2009 decision to hear the Uighur petition match past Court practices. Throughout the enemy combatant dispute, the Court has found ways to expand its authority without risking an institutionally costly backlash. III. CONCLUSION: THE PAST IS PROLOGUE Supreme Court interventions in the enemy combatant disputes never pushed the limits of what was acceptable to the political branches of government. The Court, instead, maximized its authority by moving incrementally and expanding judicial power in ways generally acceptable to the political branches. This was true of Bush-era decision making and there is no reason to think that the Court will depart from past practices during the Obama administration.

## \*\*\*Risk

### 1NR A2: Structural Violence DA

#### All of our impacts turn and are constitutive of structural violence

Joshua Goldstein, Int’l Rel Prof @ American U, 2001, War and Gender, p. 412

First, peace activists face a dilemma in thinking about causes of war and working for peace. Many peace scholars and activists support the approach, “if you want peace, work for justice.” Then, if one believes that sexism contributes to war one can work for gender justice specifically (perhaps among others) in order to pursue peace. This approach brings strategic allies to the peace movement (women, labor, minorities), but rests on the assumption that injustices cause war. The evidence in this book suggests that causality runs at least as strongly the other way. War is not a product of capitalism, imperialism, gender, innate aggression, or any other single cause, although all of these influence wars’ outbreaks and outcomes. Rather, war has in part fueled and sustained these and other injustices.9 So,”if you want peace, work for peace.” Indeed, if you want justice (gender and others), work for peace. Causality does not run just upward through the levels of analysis, from types of individuals, societies, and governments up to war. It runs downward too. Enloe suggests that changes in attitudes towards war and the military may be the most important way to “reverse women’s oppression.” The dilemma is that peace work focused on justice brings to the peace movement energy, allies, and moral grounding, yet, in light of this book’s evidence, the emphasis on injustice as the main cause of war seems to be empirically inadequate.

#### Structural violence can’t turn our impacts and you shouldn’t prioritize it

Sambanis 2004

Nicholas, Associate Professor of Political Science at Yale University, Brookings Trade Forum, p. 201-203

Importantly, preliminary evidence presented here suggests no significant effect of poverty on within-country variation in civil war onset. This may suggest that only long-term differences across countries' levels of poverty matter in explaining cross-national differences in the onset of civil war. A related conjecture is that short-term fluctuations in the level of poverty should not increase the risk of violence (though there was some evidence from instrumental variables models that find a significant correlation between income shocks and violence in African countries). It may be the case that violence risks are magnified in countries with chronic poverty (these poverty rates are more stable and more likely to be picked up in cross-national studies). But these macrolevel results are suggestive at best. Data from microlevel studies are still not sufficient to confirm whether the socioeconomic characteristics of those who actually engage in violence conform with the theoretical interpretations given to empirical analyses that use macrolevel data. A serious challenge to the microfoundations of rational choice economic theories of political violence (notably the opportunity cost theory) was presented by a recent study on terrorism.166 That study revealed that terrorists are on average more educated and have a higher standard of living than the rest of their society. This is consistent with relative deprivation theories that were reviewed early on in this paper, but it may also be a region-specific effect. This finding can be reconciled with theories of civil war if one views terrorism as proto-civil war, fought by elites with more education and greater commitment to their cause than the average rebel in a civil war. A final conjecture is that economic incentives and opportunity are not the only explanations of political violence. Ideology, ethnicity, coercion, and religion can all motivate participation in insurgency. The type of insurgency (ethnic versus nonethnic) and the form the violence assumes (coup, terrorism, civil war) influence the mix of recruitment incentives. Thus, while there is ample evidence that increasing the level of economic development will reduce the overall prevalence of political violence in the world, this alone will not be sufficient to eliminate political violence. Violence changes forms over time and across space and forms a cycle that stops recurring only with successful nation-building, combined with high levels of economic development. Policy interventions aimed at reducing violence should indeed have an economic core. But a strategy to eliminate, or reduce, organized political violence must necessarily be complex, targeting the various forms that violence might take at different stages in the political evolution of different countries

### 1NR A2: Cognitive Bias

#### Climate change overcomes cognitive bias

Mulgan 2006

Tim, Professor of Moral & Political Philosophy University of St. Andrews, Future People, http://cryptome.org/2013/01/aaron-swartz/019928220X.pdf

A necessary condition for the valuable exercise of autonomy is the presence of a background social framework providing a range of independendy valu- able goals. A healthy global ecosystem is a necessary precondition for the existence of any social framework whatever, whether within or between groups. As climate change threatens the viability of the global ecosystem, those who have internalized the ideal code will take it extremely seriously. Obligations relating to climate change will have higher priority than almost any of the other intra- or Inter-group obligations canvassed in this chapter. A full discussion of what those obligations will be is beyond the scope of this book. However, Rule Consequentialism does help to explain the real significance of climate change, and sketch some moral priorities for inter-group efforts to deal with it. In the real world, of course, a persistent feature of climate change debate is disagreement over the empirical facts. Section 8.2 showed that those who have internalized the ideal code will be risk-averse in the face of such dis- agreement—adopting the pessimistic model, favouring policies designed to mitigate the worst feasible effects of climate change, and attaching a high priority to the acquisition of more reliable empirical information. The fact that climate change potentially involves catastrophe caused by human action strongly reinforces these conclusions. Those who have internalized the ideal code want their descendants to have lives that are both personally worthwhile and morally respectable. They will thus be especially concerned to avoid a future where, owning to their present behaviour, their descend- ants face extremely demanding obligations of reparations to people in other nations devastated by climate change. (Another striking feature of climate change in the real world is the extent of partial compliance with the behaviour we would expect from anyone who had internalized the ideal code. We return to this issue in Section 10.4.1.) Rule Consequentialism does not definitively settle the behaviour of the luck)' group in our simple tale, or in more complex real-life analogues. However, it does show how a complex range of factors are to be balanced. We now turn to a series of more specific international issues, where Rule Consequentialism supports some departures from conventional international practice.

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#### Institutional capital governs court decisions

Davidov and Davidov 2013

Guy Davidov and Maayan Davidov How Judges Use Weapons of Inuence: The Social Psychology of Courts Israel Law Review / Volume 46 / Issue 01 / March 2013

It would hardly be surprising to learn that professional judges – like other humans – might use the weapons of inﬂuence identiﬁed in the literature in their personal interactions with other people, including fellow judges. Consider, for example, judges A and B, who are sitting on the same bench and have disagreements about the merits of a case. It is certainly plausible that A would try to convince B not only by putting forward her best arguments, but also by subtly reminding him that she sided with him in the past (thus relying on the principle of reciprocation); by trying to show how her position can be derived from his own previous judgments (relying on the principle of consistency); by pointing out that other judges support her position (relying on the principle of social proof); by being socially likeable (relying on the principle of liking); by emphasising her knowledge and credentials in the speciﬁc area under consideration (relying on the principle of authority); or by arguing that her position is unique and original and therefore likely to attract the attention of appeal court judges (relying on the principle of scarcity). Surely not all judges use such methods, but nothing in such interactions would be especially noteworthy. It is, however, much less obvious to argue that weapons of inﬂuence are also used by courts institutionally (that is, in their judgments). In this article we make this argument, proposing that courts may be seen as using such inﬂuence methods in their relationship vis-à-vis other institutional actors – particularly the government and the legislature – as well as the public at large. From a formalistic (and in our opinion, naïve) viewpoint, it could be argued that courts do not try to inﬂuence anyone. They are not making requests and they are not selling anything; they have the power to make legally binding rulings unilaterally. But courts, in fact, work within a complex web of relations with the government, the legislature, the legal community and the public at large. While courts generally develop the law within the conﬁnes of their legal mandate, the boundaries of this mandate are far from clear. Moreover, formal authority aside, they frequently prefer to minimise conﬂict with the other branches of government, to secure broad support for their judgments and preserve legitimacy. Holding neither sword nor purse,3 courts often have to manage conﬂicts with the other branches – and they have limited ‘institutional capital’ to do so.4 It is therefore clear that courts do not simply lay down the law; rather, they need to convince the other branches to accept it with minimum resistance. Weapons of inﬂuence can thus become useful, as courts attempt to inﬂuence others or secure their support.