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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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Every year the Supreme Court hears a few cases weighty and portentous enough to make it into the casebooks. 2012 has been no exception. One of these soon-to-be-anthologized cases is *Fisher v. University of Texas, Austin*, which the Court heard October 10 but has yet to rule on. This case, yet another involving a prospective white university student claiming reverse discrimination after being denied admission, has the potential to change—and perhaps even end—the healing practice of race-conscious affirmative action in American education for all time. In “The Future of Diversity,” legendary constitutional scholar and esteemed advisor to this *Review*, Erwin Chemerinsky, analyzes precisely what’s at stake with *Fisher*. In the same clear and incisive style we’ve come to appreciate in his invaluable law school textbooks and scholarly articles, he presents the issues at play and explains how the personnel and politics of the court have changed, in an ominously rightward direction, since it last ruled on this contentious matter nine years ago.

By codifying and authorizing barbarous interrogation techniques such as water boarding, stress positions, sexual humiliation, sensory deprivation, claustrophobic confinement, and numerous others previously regarded as indications of despotism, George W. Bush and Dick Cheney turned the United States, swiftly and brazenly, into a torture regime. To use a phrase once dear to Cheney, only “dead-enders” would now dare publicly argue otherwise, as some have recently come out of the woodwork to do with the release of the Hollywood torture apologia *Zero Dark Thirty*. Bush’s successor, Barack Obama, has plainly stated that these techniques are illegal and, despite continued advocacy for them by Bush and Cheney during their respective book tours, has explicitly refused to reauthorize them. As chief of our federal government’s executive branch, Obama is charged with the enforcement of our laws. If the culprits

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Erwin Chemerinsky

THE FUTURE OF DIVERSITY

All who are part of higher education, and all who care about equality in American society, are fearful of what the Supreme Court might do in *Fisher v. University of Texas, Austin*.¹ The case was argued on Wednesday, October 10, 2012 and the issue is whether colleges and universities may continue to use race as a factor in admissions decisions to benefit minorities and enhance diversity.

Fisher involves the admissions policy for undergraduates at the University of Texas, Austin. To facilitate diversity, Texas adopted a policy of taking the top 10 percent from high schools across the state. For the time period covered by the litigation, about 70 to 80 percent of the undergraduates were admitted via this Top Ten Percent Plan. Texas found, though, that this did not yield the desired diversity. In the fall of 2002, African-Americans comprised only 3.4 percent of the students and Hispanics were only 14.3 percent. This was less than the fall 1996 levels, despite a significant increase in the Hispanic population of Texas during this time period.

In 2004, the Regents of the University of Texas adopted a policy to further diversity. This involved a “holistic” review of each application, with race being a small part in the consideration. Each applicant was assigned a numerical score, and placed on a grid, based on two assessments: an Academic Index (based on grades and test scores) and a Personal Achievement Index. The Personal Achievement Index is a product of the evaluation of two essays and a Personal Achievement Score. Race is one of seven factors used in determining an applicant’s Personal Achievement Score.

In 2008, Abigail Fisher applied to the University of Texas, Austin and was not admitted to their undergraduate program. She sued claiming that the use of race in the admissions process violated the Fourteenth Amendment’s Equal Protection Clause. The federal district court ruled in favor of the University of Texas and the Fifth Circuit affirmed.

The University of Texas plan seems to be exactly what the Supreme Court upheld in *Grutter v. Bollinger*.¹ There the Court, in a 5–4 decision, held that colleges and universities have a compelling interest in having a diverse student body and may use race as one factor in admissions decisions to enhance diversity. In fact, in *Grutter*, the Court indicated that for the next 25 years colleges and universities should be able to engage in such affirmative action programs.

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Why then, less than a decade later, is the Court reconsidering the issue? Since 2003, the Court's composition has changed dramatically and there seems little doubt that *Fisher* will move the law of affirmative action in a much more conservative direction; the only question is how far the Court will go.

In *Grutter*, Justice Sandra Day O'Connor wrote for the Court and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. The dissent was comprised of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Four of these justices—O'Connor, Stevens, Souter, and Rehnquist—are no longer on the Court.

Justice Kagan, who replaced Justice Stevens, has recused herself from participating in *Fisher*. Justice Souter was replaced by Justice Sotomayor and based on her rulings in favor of affirmative action as a judge on the Second Circuit, and her overall ideology, it is expected that Sotomayor will vote to affirm *Grutter*.

Chief Justice Roberts and Justice Alito made their views on the issue clear in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*. The issue was whether school boards in Seattle and Louisville could use race as a factor in assigning students to schools so as to achieve desegregation. The Court, in a 5–4 decision, declared such efforts to violate equal protection. Chief Justice Roberts wrote in part for a majority and in part for a plurality of four. His opinion was joined in its entirety by Justices Scalia, Thomas, and Alito. Justice Kennedy concurred in part and concurred in the judgment in part.

In writing for the plurality, Chief Justice Roberts rejected the claim that diversity in elementary and high schools constitutes a compelling government interest. Although he distinguished *Grutter*, by saying that case involved diversity at the college and university level, his opinion left no doubt that he rejects that racial diversity is a compelling interest in any educational context. In his conclusion, Chief Justice Roberts emphatically declared that the Constitution requires color-blindedness. He ended his opinion by stating: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

Roberts and Alito thus seem sure to take the position urged by the three dissenters in *Grutter*, Justices Scalia, Kennedy, and Thomas. In comparing the current Court to the one that decided *Grutter* the key is the shift from Justice O'Connor, who upheld affirmative action, to Justice Alito, who clearly rejects it.

The only hope for affirmative action surviving is Justice Kennedy. Yet since joining the Court in 1987, he has never voted to uphold any affirmative action program and, at times, has written opinions strongly condemning such efforts.⁴

However, in *Parents Involved*, Justice Kennedy did not join the parts of Chief Justice Roberts' opinion rejecting diversity as a compelling interest.

But he did join the parts of the opinion, and wrote separately to emphasize, that race-conscious remedies are permissible only if there is no race-neutral alternative that can achieve the objective. In *Grutter*, Justice O'Connor's majority opinion expressly held the opposite and said that the constitutionality of affirmative action programs does not depend on proof that there is no other way to achieve racial diversity.

It thus seems very unlikely that Justice Kennedy will join with Justices Ginsburg, Breyer, and Sotomayor to create a 4-4 split and uphold the University of Texas affirmative action program. The realistic question is whether Justice Kennedy will be a fifth vote to end all affirmative action by colleges and universities or whether he will concur in the judgment, as he did in *Parents Involved*, to make affirmative action much more difficult by allowing it only where there is proof that no other alternative can achieve diversity.

Either way diversity in higher education will suffer tremendously. After California adopted Proposition 209 in 1996, which amended the California Constitution to prohibit affirmative action, the percentages of African-Americans and Latinos at the University of California, Berkeley and UCLA plummeted. In light of the long history of race discrimination, as well as current inequities in elementary and secondary education, the elimination of affirmative action will have a devastating effect on diversity in schools across the country.

Unlike Proposition 209, which concerned only government institutions in California, the Supreme Court's decision in *Fisher* likely will apply to private colleges and universities as well. The Supreme Court has stated that Title VI of the 1964 Civil Rights Act, which prohibits race discrimination by recipients of federal funds, is identical to the equal protection clause in its requirements. Virtually every private college and university receives federal money and thus will be bound by a Supreme Court decision limiting or forbidding affirmative action.

Those who oppose affirmative action must argue that diversity does not matter in education or that diversity can be achieved without affirmative action or that the loss of diversity is offset by other more important reasons. None of these are tenable.

As Justice O'Connor expressly recognized, diversity matters enormously in the classroom. I have been a law professor for 30 years now and have taught constitutional law in classes that are almost all white and those that are racially diverse. The conversations are vastly different and the education of all is enhanced by diversity. It is different to talk about racial profiling by the police when there are African-American and Latino men in the room who can talk powerfully about their experience of being stopped for driving while black or driving while brown. It is different to talk about affirmative action

with a diverse classroom. Preparing students for the racially diverse world they will experience requires that they learn in racially diverse classrooms. This is exactly why the Court found diversity to be a compelling interest in *Grutter v. Bollinger*.

Nor are there realistic alternatives for achieving diversity without affirmative action. Giving preferences based on social class fails because there are many more poor whites than poor African-Americans, even if the percentage in poverty in the latter group is larger. Color blindness in admissions will mean dramatic decreases in racial diversity in colleges and universities across the country.

Those who oppose affirmative action assert that it undermines admissions based on merit. But under affirmative action plans, schools are taking only qualified students. And no school has ever admitted students based solely on test scores and grades. It always has been easier to get into Harvard or Yale if an applicant is from North Dakota than from New York City. That is because schools long have recognized that diversity matters. Schools take applicants with lower grades and test scores if they have unusual talents, such as athletes.

The effect of overruling *Grutter* will be especially felt in law schools and the legal profession where diversity is already seriously lacking. From 2000 to 2009, the percentage of African-Americans in law schools decreased, from 7.5 percent of law students to 7.2 percent of law students. African-Americans are 12.3 percent of the population but only 4.7 percent of attorneys. Latinos are 15.8 percent of the population, but only 2.8 percent of attorneys.

In 2011 (2012 statistics are not yet available), there were only 47 African-Americans applying to law school with LSATs above 165 and GPAs above 3.5. Those are shocking and appalling statistics, but they show that the elimination of affirmative action will have a devastating effect on law schools and the legal profession.

Fisher v. University of Texas, Austin has the real risk of changing the racial composition, and thus the education for all students, at colleges and universities across the country. Perhaps the conservatives on the Court will practice the restraint that they have so long preached and follow precedent and defer to the decision of the State of Texas. But I am not optimistic.

NOTES

1. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2012).
2. 539 U.S. 306 (2003).
3. 551 U.S. 701(2007).
4. *Metro Broadcasting v. F.C.C.*, 497 U.S. 547 (1990) (Kennedy, J., concurring).



Stacy Cammarano

**I BEG YOUR PARDON: MAINTAINING
THE ABSOLUTE BAN ON TORTURE
THROUGH THE PRESIDENTIAL PARDON**

Introduction

In 2009, Barack Obama became President of the United States. With his title he inherited a legacy of torture from the Bush Administration's reaction to international terrorism.¹ President Obama had several options when confronting and disavowing the Bush Administration's legacy of torture: (1) prosecute the torturers, (2) pardon the torturers, or (3) make a statement and move on. President Obama chose the third route: he renounced any future use of torture, but did not acknowledge that torture had in fact occurred under the Bush Administration.² This political move undermines the universality of the prohibition on torture and sends a message that torturers can expect impunity.

Torture is universally prohibited in democratic states, but also widely practiced.³ As the United States faces increased terrorist threats, many theorists have attempted to justify torture to combat terrorism.⁴ Such scholarly justifications of torture provided the legal underpinnings of the Bush Administration's torture policies.⁵ This paper argues that the Obama Administration should, beyond its rhetorical affirmation of the United States' existing legal obligations,⁶ reinforce its commitment to prevent torture in all circumstances.⁷ The President can establish a foundation that holds torturers accountable through prosecution and admits the remote possibility of pardon. If individual actors genuinely believe they must use torture to avoid an existential threat, they may choose to break the law and face criminal liability. In that case, where truly justified, the president may pardon the torturers. The process for pardons must involve public justification both by the torturers and the president. Ultimately, the president may ratify the torturers actions, and the public can appraise the president's actions through the democratic process. The system can only work, however, if the prohibition on torture is enforced in the first place. Therefore, the U.S. must change course and prosecute previously exposed cases of torture.

The first section provides background on the legal status of torture and the divergent approaches to torture in the "ticking time bomb" hypothetical. The second section explains how the pardon power can be used to ratify illegal acts

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of torture in a system that adheres to torture's absolute prohibition. The third section recognizes jury nullification as an alternative way to ratify torturers' actions in cases of emergency, but explains why the pardon power is preferable. The fourth section will explore the need for strong prosecution of human rights abuses such as torture. To demonstrate the necessity of prosecution, I will examine three case studies: South Africa's Truth and Reconciliation Commission, Argentina's response to Dirty War transgressions, and Israel's weak prosecution of torture and recognition of a necessity defense.

The General Prohibition of Torture, State Practices, and the Moralism/Consequentialist Debate

The absolute legal prohibition of torture is a widely accepted principle globally. Under international law, torture is prohibited entirely, and this prohibition cannot be legally derogated in times of emergency.⁸ The Third Geneva Convention prohibits torture, or any coercion, of prisoners of war.⁹ The Fourth Geneva Convention prohibits, among other things, "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment."¹⁰ The U.S.-ratified Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT") prohibits torture, defined as follows:

[T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."¹¹

Article 2 of CAT provides that no exceptions exist to justify torture.¹² The International Covenant on Civil and Political Rights similarly prohibits torture, and does not allow any derogation.¹³ Many regional treaties, and treaties devoted to a specific issue, also prohibit torture within their respective areas.¹⁴

Most states, including the U.S., also have provisions outlawing torture.¹⁵ The Eighth Amendment of the United States Constitution forbids the infliction of "cruel and unusual punishment."¹⁶ While the Eighth Amendment applies to torture as punishment,¹⁷ the U.S. also outlaws torture in interrogation.¹⁸ Subsequent to ratifying CAT, Congress passed implementing legislation, 18 U.S.C. §2340, criminalizing torture.¹⁹ The War Crimes Act also provides punishment for grave breaches of the Geneva Conventions' Common Article 3, thereby prohibiting the infliction of severe physical or mental pain or suffering.²⁰

Despite the broad prohibition of torture, states throughout the world routinely practice torture.²¹ For example, in its "war on terror," the Bush Admin-

istration sanctioned torture of detainees at Guantanamo Bay,²² military bases in Afghanistan and Iraq,²³ and CIA “black sites” at unknown locations.²⁴ The United States has also transferred detainees to authorities in other states that are known to use torture.²⁵ Nevertheless, nearly all states including the U.S. generally maintain that torture is illegal,²⁶ and either hide their use of torture,²⁷ attempt to justify their actions with narrow definitions of what constitutes torture,²⁸ or appeal to necessity and national security.²⁹

With the rise of decentralized global terrorist networks,³⁰ scholars have attempted to rationalize torture under certain circumstances to deal with the increased risk.³¹ Very broadly speaking, theoretical debates about torture largely fit into two categories—consequentialist and moralist.³² Consequentialists contend that torture may be justified if the ends justify the means; after a utilitarian cost-benefit analysis torture becomes permissible to save many people.³³ The moralist approach argues that torture is always morally reprehensible and therefore has no possible justification; torture remains prohibited under all circumstances.³⁴

In assessing whether torture has any place to combat terrorism, theorists inevitably address the problem of the “ticking time bomb” in which a hypothetical bomb, biological hazard, etc., with the capability of widespread destruction is set to explode or be released, but the government may stop it by torturing a suspect to discern its whereabouts.³⁵ Scholars have criticized the ticking time bomb as an extremely improbable hypothetical designed specifically to achieve the result that torture is justified.³⁶ A litany of assumptions underlie the ticking time bomb scenario: that the police have a suspect in custody, the suspect knows the information the police seek, that a professional torturer is on hand,³⁷ the suspect will divulge the information under pressure of torture, and the information will enable the police to stop the attack.³⁸

Henry Shue famously deconstructed the notion that the rationale for legal killing in war applies to the supposedly lesser evil of interrogational torture, particularly in the ticking time bomb hypothetical.³⁹ Shue argued that in order for the same justification to apply to torture as killing, the victim of torture must have the ability to surrender.⁴⁰ In an adequate surrender, the victim must be able to divulge the information, the torture must be the least harmful means, and there must exist a clearly identifiable stopping point.⁴¹ The ticking time bomb hypothetical builds the satisfaction of these criteria into the scenario, but their satisfaction is unlikely in practice.⁴²

A moralistic approach to the prohibition of torture resists the ticking time bomb hypothetical. It contrasts with a utilitarian view in that it assumes that torture is inherently wrong and no weighing of costs and benefits can justify it.⁴³ The moralist view emphasizes torture’s disregard for human dignity and its degrading effect on torturers themselves.⁴⁴

A middle ground exists in which the absolute legal ban on torture remains but torture would still occur if the ticking time bomb hypothetical happened in reality.⁴⁵ Some scholars, including Henry Shue, Oren Gross, and Richard Posner, argue for official disobedience rather than legal accommodation,⁴⁶ if torture could prevent a catastrophic event.⁴⁷ Gross defines official disobedience as follows: “in circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats *may* entail going outside the legal order, at times even violating otherwise constitutional principles.”⁴⁸ Elaine Scarry implicitly builds on the notion of official disobedience by highlighting the moral competence of the public: if we can imagine someone overcoming their aversion to torture, surely we can imagine someone willing to face prosecution in order to save thousands.⁴⁹ Scarry’s point is that the prohibition of torture is unlikely to stop someone faced with an actual ticking time bomb scenario, and perhaps rightly so.⁵⁰ Nevertheless, that person should not automatically avoid punishment. Instead, I argue, an uncertain possibility of pardon will maintain the rule of law, strengthen the prohibition of torture, and allow mercy if an unlikely situation occurs that justifies torture.

The Pardon Power and Official Disobedience

Use of the pardon power to provide mercy for a ticking time bomb torturer comports with the above scheme combining an absolute prohibition with official disobedience. Broadly, this scheme is an “extra-legality model” because it maintains a fixed definition of the law in times of emergency, and, where the law is inadequate, envisions action outside of the law in order to meet the existential threat.⁵¹ Extra-legality contrasts with accommodation in which the law adapts to meet exigent circumstances.⁵² The pardon power itself is not the extra-legal action, but an ex-post ratification of extra-legal action.⁵³

Advantages of the Possibility of Pardon

Maintaining the torture ban and anticipating official disobedience with the possibility of pardon in the time of a crisis has several advantages. In general, leaving the prohibition in place protects the rule of law for ordinary times,⁵⁴ and avoids the temptation for law enforcement to push the bounds of what is authorized and regularize the practice of torture.⁵⁵ President Obama’s 2009 Executive Order required that all interrogations involve humane treatment and that detained persons “shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment).”⁵⁶ President Obama clearly outlined the legal prohibition, its application to bodies such as the Central Intelligence Agency, and applied an even more detailed set of guidelines, the Army Field Manual 2 22.3.⁵⁷ These

statements clarify the law and leave little room for legal maneuvering that accommodates torture.⁵⁸ A further commitment, with prosecutions, would delineate even more precisely what actions constitute torture and any acts for which an individual requests a pardon would necessarily fall outside legal constraints.

The pardon scheme also has the particular advantage of uncertainty.⁵⁹ The potential torturer has no guarantees that she will be pardoned. As a result, she must make a determination whether the result of torture is worth facing prosecution and incarceration.⁶⁰ The torturer also is in the best position to evaluate the likely results of the torture—how sure is she that the suspect is involved with the impending catastrophe and has information that can stop it?⁶¹ Consequently, the “prospective and uncertain” nature of the pardon creates caution in the potential torturer so she will only act when absolutely necessary.⁶² Moreover, the uncertainty of pardon may limit the torturer’s actions to the minimal extent necessary to avoid the catastrophe. For example, if one illegal action—or a less severe form of torture—is effective, the fear of prosecution may stop the torturer from using more illegal measures or more severe forms of torture.⁶³

Public justification emerges as another advantage to the official disobedience scheme. Recognizing the illegality of the act of torture, and asking for mercy ex-post, requires the torturer to justify her actions to the public. In order for a morally repugnant action such as torture to be pardoned, the actor will need to make a case explaining why it was necessary and consequently justified. The need for justification may act as a further deterrent for unnecessary illegal action.⁶⁴ Likewise, it provides a reinforced method for accountability.⁶⁵ The public record and NGOs currently provide some scrutiny and accountability for illegal government action.⁶⁶ If however, a torturer must broadcast her justification for torture when seeking a pardon, it will improve the public record and heighten the opportunity for scrutiny and accountability. Public justification is necessary to ensure that the extra-legal acts, in this case torture, are truly executed for the public good.⁶⁷ Similarly, public justification, with its acknowledgement that illegal acts occurred, supports the contention that it would have been better for Obama to pardon the transgressors in the Bush Administration for using torture, rather than simply moving on.⁶⁸

Moreover, the president faces public scrutiny for pardoning an illegal action,⁶⁹ thereby reducing the likelihood of pardon in undeserving situations.⁷⁰ In order for this scheme to work, it is imperative that the president also explains the rationale underlying the pardon.⁷¹ This is not current practice with pardons.⁷² There is no constitutional requirement for the president to justify the pardon,⁷³ but, along with the forthcoming recommendations, such a practice should emerge as custom. Congress can exercise oversight over the pardon

process informally by requesting information and holding hearings.⁷⁴ The public can similarly pressure Congress to punish or deter the president from an egregious pardon by controlling funds and stalling legislation.⁷⁵ Additionally, the public can act as a final critic of the president's use of the pardon through ordinary elections.⁷⁶

A final advantage to the proposed scheme is that the pardon power is already an enumerated power, therefore reinforcing strict adherence to the rule of law. Article II, section 2, clause 1 of the U.S. Constitution enumerates the president's power to "grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."⁷⁷ Alexander Hamilton clarified in *The Federalist No. 74* that the prerogative power to grant pardons belongs to the president because of the office's "expediency," its ability to quickly confront a crisis.⁷⁸ Moreover, Hamilton noted that "the benign prerogative of pardoning should be as little as possible fettered or embarrassed" because the criminal system is so harsh, that justice will inevitably require some leniency.⁸⁰ Furthermore, U.S. caselaw has upheld the proposition that only the Constitution can (formally) limit the president's power to grant pardons.⁸¹ As a result, almost any act of pardoning would be within the bounds of ordinary law, with extremely minor limitations from the Constitution's equal protection and due process requirements.⁸² In other words, no legal accommodations would be necessary to meet the emergency. There still remains the fact that a person who broke the law would not receive punishment, but the illegality of her acts and the rationale for pardoning would be public knowledge and therefore subject to public review.⁸³

Theoretical Consistency of Pardoning Torture in the Ticking Time Bomb Situation

The theory of retributivist justice, emphasizing punishment and deterrence, underlies the American system of incarceration.⁸⁴ The retributivist approach applies to pardons in the same way that it applies to incarceration.⁸⁵ The retributivist claim presupposes a principle of equity: like people are treated in like ways, unless some difference exists to warrant different treatment.⁸⁶ A distinction exists, however, between criminal liability and "moral desert."⁸⁷ In retributivist theory, an individual who committed a crime (and therefore has criminal liability) should usually be punished (so a pardon may not be appropriate), whereas an individual who did not commit a crime should not be punished (and so a pardon is appropriate if the individual is convicted without actual liability).⁸⁸ Moral desert, however, also factors into whether the individual should be punished. In the first scenario in which an individual is convicted of a crime that she actually committed, suppose that she is not morally deserving of punishment (i.e. she has not shown herself to be "morally reprehensible" in her commission of the crime).⁸⁹ In that case, it

is permissible under retributivist theory to pardon the individual.⁹⁰ Kathleen Moore sums up the distinction nicely: “retributivism requires pardons when there is no liability to punishment, and it permits pardons when there is liability without moral culpability.”⁹¹

Numerous justifications of pardons fit the retributivist model.⁹² In the Federalist Number 74, Alexander Hamilton explained that pardons should be granted as “exceptions in favor of unfortunate guilt.”⁹³ Similarly, the U.S. Attorney General in 1939 characterized the proper role of pardons to be for “technical violations.”⁹⁴ Drawing on the similarity of these explanations, Moore develops a list of situations in which an individual is technically guilty because she is criminally liable but not morally deserving.⁹⁵

Moral justification, one of the many retributivist grounds for pardon,⁹⁶ applies in the case of an individual who commits torture in a true ticking time bomb incident. A moral justification for committing a crime can be (1) when the crime itself is morally right, or (2) when the crime demonstrates that the individual has good moral character.⁹⁷ The ticking time bomb situation is exactly the type of scenario that utilitarians believe to be morally right, even though torture is normally morally wrong.⁹⁸ Nevertheless, according to most human rights advocates, and under international law, torture is never morally acceptable.⁹⁹ Although the first route to moral justification is tenuous, an individual who commits torture, risking personal liability, in order to save a city¹⁰⁰ can more easily be shown to have good moral character. The actual determination of whether or not the illegal act is morally justified can be made after the torturer is convicted. She can then ask for a pardon and set forth the reasons why her acts were morally justified. The president (perhaps influenced by informal congressional input) can evaluate whether the acts are justified,¹⁰¹ and the public can later appraise the president’s determination.¹⁰²

Other scholars have developed different foundations for the pardon power. P.E. Digeser adds political forgiveness as an explanation for pardon outside the justice model.¹⁰³ Similarly, Margaret Love criticizes Moore in part for excluding pardons for the public good—i.e. general amnesties in post-conflict societies.¹⁰⁴ The political forgiveness model and some forms of amnesty are consistent with the rationale for pardoning ticking time bomb torturers. Digeser’s forgiveness model requires an inquiry into the factual predicates to the criminal charges and recognition that the acts were illegal.¹⁰⁵ As a result, there is public acknowledgement of extra-legality that ultimately strengthens adherence to the rule of law,¹⁰⁶ coupled with, I propose, public justification of the reasons for issuing the pardon. On the other hand, general amnesties for the public good¹⁰⁷ may not recognize the illegality of the acts and there-

fore usually would not fit into the extra-legality model unless the amnesties occurred only after convictions¹⁰⁸ with public justification for their use.¹⁰⁹

Jury Nullification as an Alternative to the Pardon Power

Another possibility for mercy within the official disobedience scheme is jury nullification. Jury nullification has many of the same advantages as the pardon power. It maintains the prohibition on torture, thereby preserving the rule of law.¹¹⁰ The mere possibility of jury nullification has the same quality of uncertainty *ex ante* as the mere possibility of pardon.¹¹¹ As a result, the prospect of punishment can still be a deterrent and the actual incidence of official disobedience will be limited to cases that truly reflect the ticking time bomb scenario.¹¹²

Nevertheless, jury nullification poses several problems that do not exist with the pardon power. First jury nullification does not recognize the guilt of the torturer. Jury nullification occurs when the jury votes based on conscience rather than the law, thereby acquitting a defendant they believe to be legally guilty.¹¹⁴ The verdict entered into the record is “not guilty.”¹¹⁵ Unlike the extra-legality model that recognizes contravention of the law and later ratifies it, jury nullification doesn’t recognize that any contravention occurred.

Second, as a corollary to the first problem, jury nullification does not require a public justification. Juries are not obliged to explain their verdicts.¹¹⁶ As a result, the public cannot judge whether it approves of the *ex-post* ratification of illegal actions. Some might argue that the jury is representative of the public, but only one abstention can hang a jury,¹¹⁷ and the inscrutable decision of twelve does not adequately replace the democratic process.¹¹⁸

Third, jury nullification risks discriminatory implementation.¹¹⁹ The Equal Protection Clause provides a slight safeguard against discriminatory implementation of the pardon power, insofar as the president could not announce a policy of pardons for discriminatory reasons.¹²⁰ This protection is strengthened, in my proposal, if the president, as a matter of custom, publishes reasons for any pardon issued. Though there are safeguards in *voir dire*—e.g., the prohibition on using peremptory challenges based on race¹²¹—it is impossible to identify, and therefore challenge, a verdict based on biases against a protected class.¹²²

Finally, jury nullification is not *per se* legal and therefore less consistent with adherence to a fixed rule of law.¹²³ In *Sparf v. United States*, the Supreme Court upheld the denial of a jury instruction on nullification, stating that nullification amounted to commuting a sentence in a manner not prescribed by law.¹²⁴ Unlike the pardon power, which is explicitly enumerated,¹²⁵

jury nullification, where it is evident, casts doubt on the existing laws and promotes vigilante justice.¹²⁶

Robust Enforcement of the Torture Prohibition as a Pre-Requisite to the Use of the Pardon Power

Lack of enforcement would essentially render any advantages of ex-post pardons null. First, the deterrent effect of having the prohibition on torture in the first place doesn't exist if there is no enforcement.¹²⁷ On the contrary, complete lack of enforcement (as currently exists) may even "condon[e] past violations and thereby encourage[e] similar ones."¹²⁸ This undermines the rule of law insofar as the U.S. has stated its commitment to the prohibition on torture.¹²⁹ The prospective and uncertain relief similarly loses value.¹³⁰ Finally, public justification and scrutiny are greatly reduced as prosecutors employ their discretion behind closed doors.¹³¹ To illustrate the importance of prosecutions, I will examine three case studies: South Africa (involving indemnities, amnesty with a hearing procedure that replaces criminal prosecution, and subsequent prosecutorial weakness), Argentina (involving an abandoned prosecution model, amnesty, and renewed prosecutions), and Israel (involving a very public debate about torture, an ex-post necessity defense, and weak prosecution).

South Africa's Truth and Reconciliation Commission

South Africa's Truth and Reconciliation Commission (TRC), though an unprecedented example of alternative justice in post conflict resolution, demonstrates the need for enforcement of the law before issuing pardons. The TRC lends itself to comparison due to its use of pardons on a mass scale. Moreover, in seeking out the truth, the TRC emphasizes a goal in my iteration of the pardon power: to promote public accountability. Nevertheless, many differences exist. Most obviously, the TRC occurred in a time of transitional government—not merely a time of shifting policies between subsequent administrations. In transitional governments, there often exists a need to compromise when both sides hold equal power.¹³² Transgressors in power are unlikely to cede their positions without assurances such as immunity.¹³³ While political compromise occurs throughout the democratic process, assurances of immunity for legal transgressions cannot be justified in the U.S. as they were in South Africa.

The amnesty process usually includes three, sometimes conflicting, concerns: truth, justice, and reconciliation.¹³⁴ The pursuit of truth acknowledges the illegal acts and human rights abuses, and prevents "collective amnesia."¹³⁵ Promoting justice includes deterrence for future crimes, and signals a shift in policy from the administration that reigned over the transgressions to the new administration.¹³⁶ Seeking reconciliation aims for long-term "conflict

resolution and social rehabilitation.¹³⁷ Inevitably, when these goals conflict, certain aspects of each must be withdrawn.¹³⁸

The pursuit of truth achieves similar objectives as public justification in the extra-legality model. Recognizing that wrongful acts occurred highlights their deviation from the normal scheme.¹³⁹ In the extra-legality model, the justification also serves to let the public determine whether the acts were necessary to achieve a public good.¹⁴⁰ The TRC required perpetrators to divulge their crimes in order to receive amnesty.¹⁴¹ Additionally, the hearings were public and extensively covered by the media, unlike previous truth commissions.¹⁴² This disclosure certainly allowed for public scrutiny, but the purpose was, among other things, to develop a narrative for the future rather than to evaluate whether the acts served the public interest.¹⁴³

Justice, in its deterrence function, is most similar to maintaining the absolute prohibition of torture. In both scenarios, the possibility of adverse action gives pause to would-be human rights abusers.¹⁴⁴ The TRC, however, weakened deterrence in favor of other goals.¹⁴⁵ Prosecution often allows minimal victim participation, and often produces a one-sided narrative.¹⁴⁶ The modified judicial process attempted to rectify these limitations, at the expense of the strong deterrence. Still, the TRC retained the principle of individual accountability through its individual hearings.¹⁴⁷ Moreover, some deterrence still exists because the amnesty granted in the TRC was meant to be a unique process, with prosecutions for those who were not given amnesty.¹⁴⁸ The second justice function, signaling a shift in policies from the administration that oversaw the transgressions to one that abides by the rule of law,¹⁴⁹ is consistent with the promotion of fixed rules under the extra-legality model.

Finally, reconciliation, insofar as it involves legal accommodation, appears to be the most at odds with the extra-legality model. Rather than following fixed rules, reconciliation entails flexible procedures that deal with the exigencies of the transitional society.¹⁵⁰ Adapting the law to meet the existential risks of transitional society more closely resembles a model of accommodation.¹⁵¹ Nevertheless, modified procedures, like the issuance of a pardon, can fit with the extra-legality model so long as the fixed rule of law is acknowledged and the deviation from the standard is conceded and limited.¹⁵²

Indemnity Prior to the Truth and Reconciliation Commission

Prior to the TRC, South Africa had already experienced some forms of amnesty. The National Assembly passed the Indemnity Act in 1990, renewed annually, which allowed the president to issue temporary and permanent indemnities.¹⁵³ This led to the release of large groups of political prisoners.¹⁵⁴ Initially, there was no established procedure for releasing political prisoners, and it was unclear whether the prisoners who were released were discharged

under the Indemnity Act or based on another legal or informal basis.¹⁵⁵ The initial confusion weakened accountability because no rationale was proffered for the prisoners' release.¹⁵⁶ The indemnities could also take place before or after conviction.¹⁵⁷ As a result, it wasn't publicly acknowledged if the prisoners had committed a crime or were merely prisoners of conscience.¹⁵⁸

In November of 1990, the government released Guidelines for Defining Political Offences in South Africa, which established committees and issued flexible guidelines for indemnity determinations.¹⁵⁹ The committee deliberations, however, were held in secret, thereby obstructing the public's and the judiciary's ability to scrutinize the orders.¹⁶⁰

An additional hurdle for accountability during Apartheid was the 1957 Defence Act, which gave immunity to police officers and soldiers if they acted "in good faith to prevent terrorism."¹⁶¹ The police and other government officials relied on this indemnity and tailored their actions to fit within the immunity.¹⁶² The government officials' modified actions show that they feared prosecution without the statute, but that they were not deterred from misconduct overall so long as the statute provided a loophole.¹⁶³ In the end, the indemnity of the Defence Act undermined any deterrence that resulted from existing laws.

The Promotion of National Unity and Reconciliation Act, which established the TRC, repealed the Indemnity Acts, but upheld any indemnity already granted.¹⁶⁴ Through the TRC process, transgressors without indemnity came forward in individual hearings thereby promoting accountability to a much greater extent than previously.¹⁶⁵ Unfortunately, the prior indemnity grants enabled many culpable individuals—including individuals who committed gross human rights violations—to avoid both the amnesty process and prosecution.¹⁶⁶

Lack of Enforcement After the Truth and Reconciliation Commission

The TRC, in promoting truth, justice, and reconciliation, advanced some of the principles that strengthen the rule of law in a more moderate manner appropriate for a transitional society. During the TRC process, simultaneous prosecutions acted as a "stick" to encourage participation in the amnesty process.¹⁶⁷ After the TRC concluded, however, the lack of prosecutions undermined much of the Commission's work.

After the TRC, President Thabo Mbeki issued several pardons for African National Congress (Mbeki's party) and Pan Africanist Congress (another party that opposed Apartheid) transgressions that occurred during Apartheid.¹⁶⁸ Some of those pardoned had sought amnesty through the TRC and had been denied.¹⁶⁹ The public criticized these pardons as political exercises of presidential discretion not targeted for the public interest.¹⁷⁰ Although

the pardons affected more than just the President's party, they only affected those who fought on the same side as Mbeki.¹⁷¹ The one-sided nature of the pardons fueled concern that the pardons for individuals denied amnesty in the TRC served a political purpose rather than the purpose of reconciliation or forgiveness for morally justified actions.¹⁷² The public similarly criticized the lack of transparency and argued that the pardons both undermined the TRC's purpose and opened the door for future unwarranted pardons.¹⁷³ Various civil service organizations filed suit to establish the right to victim participation in the presidential pardon process.¹⁷⁴ The Constitutional Court recognized their right,¹⁷⁵ but victims continue to complain that the consultation process is inadequate.¹⁷⁶ The lack of transparency undercuts the public justification benefit of pardons.

Despite the pardons, the South African government stated its commitment to pursue prosecutions, and to avoid a second amnesty process.¹⁷⁷ In practice, this commitment amounted to little more than lip service.¹⁷⁸ Few prosecutions occurred after the TRC.¹⁷⁹ In 2005, the National Directorate of Public Prosecutions (NDPP) published prosecutorial guidelines.¹⁸⁰ While the guidelines offer more transparency and opportunities for public scrutiny, they also include limitations that impede the prosecution's progress.¹⁸¹ The guidelines give discretion to NDPP to not bring a case after evaluating the following factors: the suspect's prior full disclosure, the political nature of the crime, the victims' wish to proceed and the likelihood that prosecution would re-traumatize victims.¹⁸² Though the NDPP filed six criminal cases in 2006,¹⁸³ the number of total prosecutions is staggeringly low.¹⁸⁴ There hasn't been an official second amnesty, but some argue that the prosecutorial discretion has amounted to a "back-door" de facto second amnesty.¹⁸⁵

Argentina's Accountability for Crimes Committed during the "Dirty War"

The aftermath of Argentina's "Dirty War" has a mixed record of pardons and prosecutions. After eight years of mass incarceration, torture, disappearances, and overall fear-inducing totalitarian rule, the military junta in power in 1983 relinquished power.¹⁸⁶ The end of the Dirty War was initially met with a few trials of military officials,¹⁸⁷ followed by large-scale indemnities,¹⁸⁸ and eventually meaningful prosecution.¹⁸⁹ Like South Africa, the Argentine case involves compromises in accountability to deal with the political instabilities of the state.¹⁹⁰ Eventually, renewed prosecutions provide hope for entrenching the rule of law and an ethic of human rights into society.

In 1983, the President Alfonsín issued Decree No. 158/83 calling for the prosecution of several top military commanders for their roles in the torture and extrajudicial killings of the Dirty War.¹⁹¹ During trial, the junta members argued that their actions were necessary for national security because the

Montoneros employed unconventional tactics of warfare that were not anticipated by the current laws.¹⁹² The Federal Appeals Court rejected this argument and convicted the officers in 1985.¹⁹³ The initial move to prosecute signaled a shift in the policies from the military junta to the democratic government and indicated President Alfonsín's commitment to the rule of law and human rights.¹⁹⁴ Alfonsín, however, planned to only prosecute commanding officers who had given orders for human rights violations, but federal judges widened the scope to include subordinates directly involved in the human rights violations.¹⁹⁵ Mark Osiel highlights some problems with the initial zealous prosecutions—namely their penchant to uncover an incomplete narrative, and the difficulties of delineating responsibility in a regime where human rights violations were so ubiquitous.¹⁹⁶ In contrast, the government sponsored a non-partisan commission, concurrent with the prosecutions, to investigate the atrocities that occurred during the Dirty War.¹⁹⁷ The commission documented and contributed to the public understanding of the human rights violations through its report, *Nunca Mas* (Never Again).¹⁹⁸ Ironically, the horrors revealed in *Nunca Mas* provided the impetus for the zealous prosecutions.¹⁹⁹

Initially the government planned to continue the prosecutions of nearly 1,000 military members.²⁰⁰ The military, however, exerted pressure in a series of threatened coups d'état.²⁰¹ In response, Congress first passed the Punto Final ("Full Stop Law"), which set a 60-day deadline for filing all subsequent charges.²⁰² The Due Obedience Law followed several months later, indemnifying all military members below the rank of Brigadier General by presuming that they were following orders.²⁰³ When Carlos Menem came to power in 1989, he pardoned the convicted and indicted military officers, citing the need to look forward rather than backward.²⁰⁴ The public reacted vociferously to the pardons, but their criticism was initially ignored.²⁰⁵ The Due Obedience Law countered any benefits in public accountability, stopping the flow of new testimonial information. Similarly, it undermined the deterrent effect of the prosecutions by essentially promoting impunity, and signaled a shift away from commitment to the rule of law.²⁰⁶ In contrast to using pardons to ratify extra-legal actions that were necessary to meet existential circumstances,²⁰⁷ President Menem's pardons operated as a political tool to appease the military.²⁰⁸ Furthermore, Menem's pardons conflict with the model of retributive justice because they pardon individuals who are both legally and morally liable.

In 2002, prosecutions resumed after Judge Gabriel Cavallo held the Punto Final and Due Obedience Laws unconstitutional.²⁰⁹ The prosecutions resulted in more public information, from trials and from investigative cooperation with other states.²¹⁰ The renewed prosecutions led to convictions of 110 people and indictment of 820 by 2010.²¹¹ Moreover, the prosecutions have

been coupled with resurgent efforts to support human rights, such as the ratification of the Optional Protocol to the Convention Against Torture.²¹² Standards developed in the new Dirty War prosecutions have begun shaping other international human rights norms, transforming Argentina from a society that harbors human rights violators to one that sets standards.²¹³ The initial prosecutions failed, partly due to military pressure coinciding with transitional society.²¹⁴ Political pressures have since changed: the military has a greatly reduced role,²¹⁵ and even the Supreme Court judges—all of whom had a personal interest in overturning the judgment—upheld the Cavallo judgment.²¹⁶ The eventual success of the prosecutions in Argentina encourages strong prosecution in the U.S., a country that is not plagued by post-conflict transitional insecurities.

Israel's Flexible Approach to Torture and National Security

Israel, similar to the United States, has exhibited weak prosecutorial enforcement of the prohibition of torture. Israel's General Security Service engaged in torture and other cruel, unusual and degrading treatment,²¹⁷ but, like the United States and other countries, the state argued that first the practices didn't amount to torture, and second that if they did, they were justified.²¹⁸ At the same time, there are several unique aspects of the Israeli case: first, Israel faces a more extreme existential threat than the U.S., Argentina, and arguably South Africa;²¹⁹ second, *ab initio* allowances for torture were initially publicly recommended;²²⁰ third, these same allowances were reviewed by the Supreme Court of Israel and held illegal;²²¹ and finally, the necessity defense for torture has been upheld, *in dicta*, as an ex-post justification.²²² These events provide instructive parallels to the proposed scheme of prohibiting torture and allowing for ex-post pardons as a rare safeguard. However, associated problems with Israel's torture scheme highlight the need for judicial review and robust enforcement of the prohibition of torture.

Israel's use of harsh interrogation methods has been publicly acknowledged and debated generally.²²³ In 1987, the Landau Commission published a report allowing Israel's General Security Service (GSS, now named the Israeli Security Agency, ISA) to employ various coercive measures—many that arguably amount to torture²²⁴—in order to protect Israel's national security.²²⁵ Although the actual list of appropriate “coercive measures” was classified, the use of these methods was documented by domestic and international human rights NGOs.²²⁶ In 1999, the Israeli High Court held that the Landau Commission's prior authorization was illegal.²²⁷ Since then the legal prohibition on torture has remained, but its *de facto* practice has also endured.²²⁸ It is worth noting, however, that Israel has not engaged in some of the drastic torture methods that scandalized the U.S., such as waterboarding and sexualized humiliation.²²⁹

Israel employs some methods of judicial review of interrogational torture, though not enough to actually stop its occurrence.²³⁰ The 1999 decision of the Israeli High Court affirming the illegality of torture and condemning GSS interrogation methods as violations of the prohibition was unprecedented.²³¹ The Court unequivocally endorsed the longstanding prohibition on torture and “brutal or inhuman means” and also rejected the argument that the necessity defense implied that the GSS could establish guidelines in advance that allowed torture if necessary for national security.²³² The decision drastically decreased the number of complaints of torture.²³³ Still, practices continue that amount to torture, and violations of the PCATI judgment.²³⁴

Israel is also unique because it explicitly recognizes necessity as a defense after torture has been committed.²³⁵ The PCATI judgment, *in dicta*, affirmed necessity as a justification after the fact in the case of a ticking time bomb scenario.²³⁶ It is important to note that the necessity justification is characterized as a defense rather than an exception.²³⁷ This characterization indicates that the prohibition on torture remains intact, and rather than allowing torture in certain instances, the law excuses torture if it meets certain criteria of necessity and proportionality.²³⁸ Necessity as a defense entails some of the same advantages as the pardon power. For example, the uncertainty of the defense means that individual agents must determine whether their illegal actions are justified by necessity before proceeding.²³⁹

Nevertheless, Israel endures enforcement problems that undermine its prohibition and necessity defense scheme.²⁴⁰ As stated above, Israel has a better torture record than it previously did, but complaints of torture still arise.²⁴¹ No ISA member has been prosecuted for torture.²⁴² The ISA does not recognize the applicability of the standards set forth in the PCATI judgment to itself.²⁴³ Moreover, the Inspector of Complaints is an ISA employee, which surely undermines the prosecution’s impartiality.²⁴⁴ There have been minimal indictments of police officers (four percent of complaints from 2001 to 2008 resulted in indictments) and military police (six percent of complaints from 2001 to 2008 resulted in indictments).²⁴⁵ The continued prevalence of torture coupled with the low prosecution rate undermines the prohibition on torture. Any gains that result from maintaining the prohibition on torture are undermined when the government doesn’t recognize its extra-legality when it does occur.²⁴⁶

The Lack of Enforcement of the Bush Administration’s Use of Torture

The above examples show the necessity of zealous enforcement of torture laws in a scheme that allows pardons. The current prosecutorial approach in the U.S. is not sufficient for a pardon in the ticking time bomb situation to have any real meaning. President Obama has announced his administration’s policy to end the torture practices of the Bush Administration.²⁴⁷ Neverthe-

less, no prosecutions of Bush Administration torturers have occurred since Obama took office.²⁴⁸ In 2005, eight soldiers were prosecuted and convicted for their role in the Abu Ghraib torture scandal.²⁴⁹ This prosecution represents an anomaly rather than the rule.²⁵⁰ In August 2012, Attorney General Eric Holder announced the closing of the investigation into the deaths of two prisoners held in CIA custody in Iraq and Afghanistan, the last pending cases related to CIA mistreatment.²⁵¹

President Obama's decision to move on rather than address the torture legacy of the Bush Administration has resulted in de facto indemnity similar to the lack of prosecutions in South Africa after Apartheid and in Israel regarding the ISA. The advantages of pardons, mentioned *supra* in the section called "Advantages of the Possibility of Pardon," simply do not operate in this scenario. The prohibition of torture itself cannot deter investigators because the would-be torturer could rely on lack of enforcement as the rule,²⁵² with a slight possibility of prosecution in the unlikely event that photos of the torture make it to the media.²⁵³ Without zealous enforcement of the prohibition of torture, an individual would-be torturer would not be deterred from resorting to torture, apart from her own morals.²⁵⁴ She would never have to make the individual determination about how likely the illegal act would lead to the information to stop the catastrophe.²⁵⁵ Additionally, with prosecutorial discretion, the decisions about whom not to prosecute are not made public. Similarly, with de facto pardons, there is no public justification for the illegal acts—there is no public acknowledgement that illegal acts even occurred.²⁵⁶ As a result, the lack of prosecution leaves the door open for later administrations to condone torture. For example, in the 2012 presidential election, candidate Mitt Romney's advisers privately circulated a memorandum recommending a revitalization of "enhanced interrogation techniques."²⁵⁷ Because of the illegality of the Bush Administration's acts were not publicly acknowledged, later administrations will require less backpedaling to resume "enhanced interrogation techniques."²⁵⁸

On the other hand, if President Obama had issued pardons for torture that occurred during the Bush Administration, there would have to be some public declaration that torture actually occurred. The public acknowledgement, although admitting torture, would actually reinforce the prohibition on torture by highlighting its departure from the law.²⁵⁹ Nevertheless, there still would not be any adequate system of deterrence, apart from the Administration's recommitment to its international treaty obligations,²⁶⁰ because almost no prosecutions have occurred.²⁶¹ Moreover, the pardons themselves would be troublesome because they would excuse torture on a broad scale generally aimed, and often not succeeding, at extracting national security intelligence²⁶² (situations which arguably have both liability and moral culpability), rather

than individual instances restrained to the ticking time bomb hypothetical (which arguably have liability but not moral culpability.)²⁶³ Additionally, unlike in South Africa and Argentina, the pardons would not be necessary to survive the turmoil of a transitional government. As a result, in pardoning the Bush Administration, President Obama would likely have encountered strong criticism and the pardons might not be seen as legitimate.²⁶⁴ Like simply moving on, a publicly-deemed illegitimate pardon would undercut the advantages to the rule of law that came from the public acknowledgment of torture.²⁶⁵

President Obama's best option to strengthen the prohibition of torture, then, would have been to move forward with prosecutions and reap all of the benefits of a scheme that steadfastly prohibits torture but has room for mercy after the fact. Prosecution of torture generates deterrence of torture.²⁶⁶ The possibility of pardon with strict prosecution, affords a would-be torturer only uncertain and prospective relief, thereby limiting transgressions to extremely rare occasions.²⁶⁷ Moreover, if President Obama had chosen the prosecution route, any subsequent pardon decision would necessarily be public. The person seeking pardon would already be convicted and would ask for a pardon, setting out the justifications for her actions. On top of that, the pardon itself, as a ratification of the torturer's actions, would be open to public scrutiny.

Conclusion

In sum, despite fears that modern terrorists create unpredictable threats, the U.S. should reinforce its commitment to prohibit torture rather than provide legal accommodations or justifications for executive action that contravenes the law. Although President Obama chose to ignore the human rights abuses of the prior administration, it is not too late to create an enforcement scheme that provides accountability for torture but allows for ex-post justification. The pardon power can operate as a safeguard in the extremely unlikely event that a public official is legally liable for torture but not morally liable because she disobeyed the law in a true ticking time bomb situation.²⁶⁸ Following the extra-legality model, the executive pardon is optimal because it is prospective and uncertain, it recognizes the illegal action, calls for public justification, and provides a legal method for ratification.²⁶⁹ Jury nullification, as an alternative, only involves some of those benefits.²⁷⁰

However, the pardon power cannot function effectively as a ratification of extra-legal action if there is no prosecution in the first place. The above case studies highlight the importance of prosecution. First, South Africa's TRC successfully replaced prosecution, but the prior indemnities and the later prosecutorial lethargy undercut that success.²⁷¹ Second, Argentina's renewed prosecutions restore public confidence in its commitment to human rights and the rule of law.²⁷² Finally, Israel, much like the U.S., practices torture despite

its prohibition and with mere gestures of accountability.²⁷³ Prosecutorial abstinence removes the legal deterrence that the universal prohibition of torture imparts, avoids public accountability, and creates dangerous precedent that is absent from the extra-legality model.²⁷⁴

NOTES

1. Human Rights USA, *Indefensible: A Reference for Prosecuting Torture and other Felonies Committed by U.S. Officials Following September 11th*, 82 (Jan. 2012) available at http://www.humanrightsausa.org/index.php?option=com_docman&task=doc_download&gid=111&Itemid=80 (*last visited* May 1, 2012) [hereinafter “Indefensible”].
2. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009) available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations (*last visited* May 2, 2012); Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Security Policies*, N.Y. TIMES (Jan. 22, 2009) available at <http://www.nytimes.com/2009/01/23/us/politics/23obama.html?pagewanted=all>; Kenneth Roth, *The books aren't closed on Bush's torture policy*, WASH. POST (Jul. 11, 2011) available at http://www.washingtonpost.com/opinions/the-books-arent-closed-on-bushs-torture-policy/2011/07/11/gIQA3v0e9H_story.html.
3. HENRY FRANK CAREY, *REAPING WHAT YOU SOW: A COMPARATIVE EXAMINATION OF TORTURE REFORM IN THE UNITED STATES, FRANCE, ARGENTINA, AND ISRAEL* 3 (2012).
4. Alex Bellamy, *No Pain, No Gain? Torture and Ethics in the War on Terror*, INT’L AFF., Jan. 2006, at 132.
5. See e.g. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003) [hereinafter “Yoo Memorandum”] available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf (*last visited* Apr. 9, 2012).
6. Exec. Order No. 13491, *supra* note 2.
7. This paper does not address the legal distinction between torture and cruel, inhuman, and degrading treatment because international law prohibits both. As a result, the forthcoming proposal does not make room for an exception to the prohibition on either torture or cruel, inhuman, and degrading treatment in times of emergency. For an in-depth analysis of the legal distinction between torture and cruel, inhuman, and degrading treatment and potential deviations in cases of emergency see generally Yuval Shany, *The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?* 56 CATH. U. L. REV. 837 (2007).
8. Bellamy, *supra* note 4, at 126; See also e.g. International Covenant on Civil and Political Rights art. 4(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted* in 6 I.L.M. 368 (1967) [hereinafter “ICCPR”]; American Convention on Human Rights art. 27(2), *adopted* Jan. 7, 1970, O.A.S. Official Records, OEA/ser.K./XVI/1.1, doc. 65 rev. 1, corr. 1 (1970), *reprinted* in 9 I.L.M. 673 (1970) [hereinafter “American Convention”]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(2), *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S.No. 5 (*entered into force* Sept. 3, 1953) [hereinafter “European Convention”].
9. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364.
10. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.
11. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1(1), *opened for signature* Oct. 12, 1984, 1465 U.N.T.S. 85, *reprinted* in 23 I.L.M. 1027 (1984) (*entered into force* Jun 26, 1987) The U.S. ratification contains a reservation that limits the definition of cruel, inhuman, or degrading treatment to only

that which is already prohibited by the fifth eighth and fourteenth amendments to the U.S. Constitution.

12. *Id.* at art. 2.
13. ICCPR, *supra* note 8, Art. 7. While some scholars note that the non-derogation provision in CAT refers specifically to torture and not cruel, inhuman, or degrading treatment, the ICCPR provides that both torture and cruel, inhuman, and degrading treatment are non-derogable prohibitions. *Id.* at Art. 4. Office of the High Commissioner of Human Rights, CCPR General Comment 20, Mar. 10 1992.
14. *E.g.*, American Convention, *supra* note 8, Art. 5; European Convention, *supra* note 8, Art. 3.
15. *E.g.*, 18 U.S.C §2340. Where states do not already have domestic laws prohibiting torture, most international treaties that prohibit torture include a domestic implementation requirement that compels such legislation. *E.g.* ICCPR, *supra* note 8, art. 2(2) (“each State Party to the present Covenant undertakes to take the necessary steps...to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”)
16. U.S. CONST. amend VIII.
17. *Id.*
18. 18 U.S.C §2340. (Defining torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”)
19. *Id.*
20. 18 U.S.C. § 2441(c)(3) (2009). The War Crimes Act prohibits both torture and cruel or inhuman treatment. *Id.* Prior to 2006 it defined cruel or inhuman treatment as serious physical pain or suffering, or prolonged mental pain. *Id.* After 2006, as amended by the Military Commission’s Act, it prohibits serious and non-transitory mental pain or suffering rather than only prolonged mental pain or suffering. 18 U.S.C. § 2441(d)(2)(E)(ii) (2009); Indefensible, *supra* note 1 at 123.
21. CAREY, *supra* note 3, at 3.
22. U.S. S. Armed Servs. Comm., *Inquiry into the Treatment of Detainees in U.S. Custody*, at 54-56, Nov. 20, 2008 available at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf (last visited Apr. 9, 2012)
23. *Id.*
24. Int’l Comm. of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* (Feb. 2007) [hereinafter “ICRC Report”] available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.
25. Indefensible, *supra* note 1, at 17, n. 42; *E.g.* Memorandum for William J. Haynes II, General Counsel of the Department of Defense, *Re: The President’s power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations* (Mar. 13, 2002) available at <http://www.justice.gov/opa/documents/memorandum-presidentpower03132002.pdf> (last visited Apr. 9, 2012)
26. CAREY, *supra* note 3, at 3.
27. *Id.*; See also, *e.g.* ICRC Report, *supra* note 24. (Detailing the CIA’s use of “black sites.”)
28. Bellamy, *supra* note 4, at 127; *E.g.* Memorandum from Jay Bybee, Assistant Att’y Gen., *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), available at <http://www.uchastings.edu/faculty-administration/faculty/paul/classwebsite/docs/BybeeTortureMemo.pdf> (last visited Apr. 9, 2012)
29. Yoo Memorandum, *supra* note 5.
30. See PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY*, *Passim* (2008).

31. See LEVINSON (ED.), TORTURE: A COLLECTION, *Passim* (2004).
32. E.g. Oren Gross, *The Prohibition on Torture and the Limits of the Law*, IN TORTURE: A COLLECTION 229, 233 (Sanford Levinson ed., 2004).
33. Bellamy, *supra* note 4, at 132. Scholars also use the utilitarian argument to show that torture is not permissible because it is ineffectual and has larger damaging effects on society and the rule of law. *Id.* at 130-131.
34. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 141-142 (1978).
35. Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE: A COLLECTION 281, 282 (Sanford Levinson, ed., 2004); Shue, *supra* note 34, at 124, 141-142 (1978).
36. Bellamy, *supra* note 4, at 125; Shue, *supra* note 34, at 142.
37. Note that the acceptance of torture in the ticking time bomb scenario encourages the professionalization of torture. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1145 (2005).
38. Shue, *supra* note 34, at 142; Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights* 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 102-103 (2001).
39. *Id.* at 131-135.
40. *Id.* at 131.
41. *Id.* at 134-135, 141.
42. *Id.* at 142.
43. Oren Gross, *supra* note 32, at 229.
44. *Id.*
45. *Id.* at 239-240.
46. OREN GROSS & FIONNUALA NI AOLAIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 111-12 (2006).
47. Shue, *supra* note 34 at 143; Oren Gross, *supra* note 32, at 240; RICHARD A. POSNER, NOT A SUICIDE PACT 85-86, 152-53 (2006).
48. Oren Gross, *supra* note 32, at 240. (emphasis in original).
49. Scarry, *supra* note 35, at 282.
50. *Id.*
51. GROSS & NI AOLAIN, *supra* note 46, at 111-12. John Locke theorized executive prerogative in times of emergency to be “the people’s permitting their rulers, to do several things of their own free choice, where the law was silent and sometimes too against the direct letter of the law, for the public good; and their acquiescing in it when so done.” JOHN LOCKE, OF PREROGATIVE, TWO TREATISES OF GOVERNMENT, §164 (Mark Goldie ed. 1994) (1690).
52. GROSS & NI AOLAIN, *supra* note 46, at 110.
53. *Id.* at 137.
54. Oren Gross, *supra* note 32, at 240; See also GROSS & NI AOLAIN, *supra* note 4844, at 161.
55. Richard Posner, *Torture Terrorism, and Interrogation*, in TORTURE: A COLLECTION 291, 296 (Sanford Levinson ed., 2004).
56. Exec. Order No. 13491, *supra* note 2, at 4894.
57. *Id.*
58. See Yoo Memorandum, *supra* note 5; Alan Clarke, *Book Review: The Torture Memos: Rationalizing the Unthinkable*, NLG REV. 66-1, 60 (2009) (“Thoughtful legal scholars vigorously condemned the “torture memos” issued by the “torture lawyers” of the Office of Legal Counsel (OLC) during the Bush administration. These legal opinions, informed critics argued, were manifestly erroneous, and in bad faith, by out-of-control, rogue operators.”).

59. See e.g. GROSS & NI AOLAIN, *supra* note 46, at 147.
60. Scarry, *supra* note 35, at 283.
61. *Id.*
62. GROSS & NI AOLAIN, *supra* note 46, at 147.
63. *Id.* at 147-148.
64. *Id.* at 155.
65. Scarry, *supra* note 35, at 288.
66. *Id.*
67. LOCKE, *supra* note 51, at §166.
68. Section Robust Enforcement of the Torture Prohibition as a Pre-Requisite to the Use of the Pardon Power, *infra*, however, demonstrates that the best approach (to maintain the prohibition on torture and the rule of law) at the time would have been prosecution since many advantages of pardons only materialize after the executive commits to prosecutions.
69. The pardon power was vested in the president partly for the purpose of public accountability. THE FEDERALIST NO. 74 at 376 (Alexander Hamilton) (Ian Shapiro ed., 2009)
70. See GROSS & NI AOLAIN, *supra* note 46, at 156. Jeffrey Crouch notes that recently presidents have used the pardon power for self-interested political motives and evaluates several proposals for reform. Regardless of potential obstacles in accountability, the ex ante deterrent effect of uncertainty remains in tact. JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 22 (2009)
71. See GROSS & NI AOLAIN, *supra* note 47, at 156-57.
72. CROUCH, *supra* note 70, at 22.
73. *Id.* at 25; See also, *In re Garland*, 71 U.S. 333, 380 (1866)
74. CROUCH, *supra* note 70 at 25-26.
75. *Id.* at 26.
76. See e.g., *id.* at 73-85. (Describing the effects of Ford's pardoning Nixon for the Watergate scandal on Ford's popularity with the public.)
77. U.S. CONST. Art II, §2, cl. 1.
78. THE FEDERALIST NO. 74, *supra* note 69, at 377.
79. *Id.*
80. *Schick v. Reed*, 419 U.S. 256, 267 (1974).
81. Mark Strasser, *Some Reflections on the Pardon Power*, 31 CAP. U. L. REV. 143, 153-157 (2003). Although pardon decisions "are rarely, if ever, appropriate subjects for judicial review," rare occasions might exist that implicate the due process clause such as "a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (O'Connor, J., concurring in part and concurring in the judgment) *quoted in id.* at 157-158.
82. See CROUCH, *supra* note 70, at 8.
83. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST, 72 (1989)(explaining the resurgence of a retributive theory of justice in the 1960s.) Although the U.S. has had a significant history using a rehabilitative model in prisons, this theory has not survived as the majority approach. *Id.*
84. *Id.* at 94-95.
85. *Id.* at 95.
86. *Id.*
87. *Id.*
88. *Id.*
89. MOORE, *supra* note 83, at 95.

90. *Id.*
91. *Id.* at 96-98.
92. THE FEDERALIST No. 74, *supra* note 69, at 376.
93. U.S. Attorney General *Survey of Release Procedures*, v. III (1939).
94. MOORE, *supra* note 83, at 96-98.
95. *Id.* at 155.
96. *Id.*
97. Bellamy, *supra* note 4, at 132-33.
98. *Id.* at 129-31.
99. Of course the question arises: What if it's not a whole city at risk, but a block? At what point is it morally justified? These questions are to be considered individually during the pardon process.
100. *See, supra*, Section, Advantages of the Possibility of Pardon
101. *Id.*
102. P.E. Digeser, *Justice, Forgiveness, Mercy, and Forgetting the Complex Meaning of Executive Pardon*, 31 CAP. U. L. REV. 161, 165 (2003).
103. Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDAM URB. L. J. 1483, 1487, 1502-1503 (2000); *See also*, Strasser, *supra* note 8379, at 149; Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 403 (1993) ("Pardons can put national traumas to rest. The technique is especially effective when victors pardon the vanquished, or when those with standing to take offense offer forgiveness instead. The Lincoln/Johnson pardons of Confederate soldiers and the Truman/Carter pardons of those who violated selective service laws illustrate this point.")
104. Some scholars also criticize Moore's formulation for not allowing discretion in whether or not to issue a pardon. *See id.* This allegation is patently false. Moore's scheme requires clemency when a person in cases of actual innocence, but gives discretion in cases of moral justification. MOORE, *supra* note 83, at 95.
105. Digeser, *supra* note 102, at 165-66.
106. GROSS & NI AOLAIN, *supra* note 46, at 159.
107. This type of pardon is legal under the U.S. Constitution as the framers rejected proposals to require pardons to be "after conviction" and to exclude treason from the president's pardonable offenses. U.S. CONST. Art II, §2 cl. 1; MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 426, 563-564 (1966). THE FEDERALIST NO. 74, *supra* note 69, at 377 ("in seasons of insurrection or rebellion, there are often critical moments, when a welltimed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth...") As a result, a broad amnesty for torturers before conviction would be legal, though ill-advised under my scheme. If such amnesties were granted, the public could react through the political process.
108. Amnesty after conviction would presumably undercut any benefit to having the amnesty in a transitional society, such as the political bargaining before one side relinquishes power, or the need for society to move on rather than engage in lengthy court proceedings. *See* JEREMY SARKIN, CARROTS AND STICKS: THE TRC AND THE SOUTH AFRICAN AMNESTY PROCESS 32-33 (2004).
109. *See* GROSS & NI AOLAIN, *supra* note 46, at 155.
110. *See id.* at 159.
111. *See id.* at 147.
112. *See id.*

113. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1340 (2008).
114. Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 150 (1998).
115. *Id.*
116. *Id.* at 147.
117. *Id.* at 150 (“If we do not like the laws enacted by the legislature, we can at least vote the rascals out. But jurors come and go, free to acquit against the law without fear of punishment, without even having to state in writing the reasons for nullifying the law or that they did nullify the law.”) Like the legislature enacting an unpopular law, the president is electorally accountable for his pardon, unless it is his last term. Thus, the president is more accountable, or in the case of a lame-duck, equally accountable as a jury.
118. *Id.* at 147 (“What [pluralists] like about the doctrine—the power it gives juries to reflect community norms and values—is what they fear about it, knowing full well that those community norms can themselves be discriminatory or undemocratic.”)
119. Strasser, *supra* note 81, at 153-156. Note that the political repercussion of declaring a discriminatory pardon policy renders the application of the equal protection clause rare in this area. *Id.* at 153.
120. *Batson v Kentucky*, 476 U.S. 79 (1986).
121. *See Abramson, supra* note 114, at 150.
122. Darryl K. Brown, *Jury Nullification within the Rule of Law*, 81 MINN. L. REV. 1149, 1150-51 (1997).
123. *Sparf v. United States*, 156 U.S. 51, 64 (1895). *See also, United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988) (allowing a judge’s statement that “[t]here is no such thing as valid jury nullification. . . . You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case.”).
124. U.S. CONST. Art II, §2 cl. 1.
125. Darryl K. Brown, *Jury Nullification within the Rule of Law*, 81 MINN. L. REV. 1149, 1150-51 (1997) (“When jurors enter a verdict in contravention of what the law authorizes and requires, they subvert the rule of law and subject citizens—defendants, witnesses, victims, and everyone affected by criminal justice administration—to power based on the subjective predilections of twelve individuals. They affect the rule of men, not law.”)
126. DAVID CHUTNER, *WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD* 271 (2003)
127. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (1987) (“A government may be presumed to have encouraged or condoned acts prohibited by this section if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators.”); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2601 (1991).
128. *See supra* Section , The General Prohibition of Torture, State Practices, and the Moralistic/Consequentialist Debate
129. *See GROSS & NI AOLAIN, supra* note 46, at 147.
130. *See id.* at 155.
131. SARKIN, *supra* note 108, at 33.
132. *Id.*
133. *Id.* at 33; Albie Sachs, *Truth and Reconciliation*, 52 S.M.U. L. REV. 1563, 1571-76 (1999).
134. SARKIN, *supra* note 108, at 33.
135. *Id.*
136. *Id.* at 34-35.

137. *Id.*
138. BENJAMIN A. KLEINERMAN, THE DISCRETIONARY PRESIDENT: THE PROMISE AND PERIL OF EXECUTIVE POWER 169 (2009).
139. *See* LOCKE, *supra* note 51, at §166.
140. Promotion of National Unity and Reconciliation Act, 34 of 1995, §20(1) available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (*last visited* Apr.10, 2012).
141. ELIZABETH KISS, REFLECTIONS ON RESTORATIVE JUSTICE, IN TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, 68, 76 (Robert I. Rotberg & Dennis Thompson eds. 2000).
142. RUSSEL DAYE, POLITICAL FORGIVENESS: LESSONS FROM SOUTH AFRICA 107 (2004). (explaining the role of truth-seeking in avoiding institutionalizing political lies and denials into the new regime.) Other scholars have cited the therapeutic nature for victims of public confrontation. *See, e.g.* Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, 243-45 (Robert I. Rotberg & Dennis Thompson eds. 2000).
143. SARKIN, *supra* note 108, at 33.
144. *See id.* at 35, 49-51.
145. *Id.* at 34.
146. KISS, *supra* note 141, at 76.
147. Final TRC report, Volume 5, 309 (1999) available at <http://www.justice.gov.za/trc/report/index.htm> (*Last visited* Apr. 10, 2012).
148. SARKIN, *supra* note 108, at 33.
149. *Id.*
150. *Id.*
151. GROSS & NI AOLAIN, *supra* note 46, at 155,159.
152. Indemnity Act 35 of 1990. *See also*, SARKIN, *supra* note 108, at 39.
153. Ken Oh & Theresa Edlmann, *Reconciliatory Justice: Amnesties, Indemnities and Prosecutions in South Africa's Transition*, THE CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION 9 (Carnita Ernest ed.) available at <http://www.csvr.org.za/wits/papers/papernst.pdf> (*last visited* Apr. 10, 2012)(“By March 1991 4,804 individuals had been granted indemnity.”).
154. SARKIN, *supra* note 108, at 39; Raylene Keightley, *Political Offences and Indemnity in South Africa* 9 S. AFR. J. ON HUM. RTS. 334, 348-350 (1993).
155. SARKIN, *supra* note 108, at 39.
156. Indemnity Act No 35 of 1990, preamble (“[I]t has now become necessary ... to grant temporary immunity or permanent indemnity against arrest, prosecution, detention and legal process”) (emphasis added).
157. *See id.*
158. SARKIN, *supra* note 108, at 39.
159. *Id.*
160. SARKIN, *supra* note 108, at 47.
161. *Id.* at 48.
162. *Id.*
163. Promotion of National Unity and Reconciliation Act, 34 of 1995, §48(1-2) available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (*Last visited* Apr.10, 2012); SARKIN, *supra* note 108, at 55.
164. KISS, *supra* note 141, at 76.
165. SARKIN, *supra* note 108, at 60.
166. Oh & Edlmann, *supra* note 153, at 11.

167. ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA 55 (2007).
168. *Id.*
169. Oh & Edlmann, *supra* note 153, at 13.
170. *Id.*; See also, *Row brews after Mbeki pardons prisoners*, INDEPENDENT ONLINE NEWS (May 13, 2002) <http://www.iol.co.za/news/politics/row-brews-after-mbeki-pardons-prisoners-1.86507>.
171. Oh & Edlmann, *supra* note 153, at 13; See also, *Row brews after Mbeki pardons prisoners*, *supra* note 170.
172. See Oh & Edlmann, *supra* note 153, at 13.
173. *South Africa*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, at <http://ictj.org/our-work/regions-and-countries/south-africa> (last visited May 2, 2012)
174. *Albutt v. The Center for the Study of Violence and Reconciliation and Others* 2010 CCT 54/09 at 29, 37 (S.Afr.) available at <http://www.constitutionalcourt.org.za/Archimages/14896.PDF> (last visited May 2, 2012)
175. *South Africa*, *supra* note 173; see also, Rorisang Lekalake, *Of Pardons and the Legacy of the TRC*, *Reconciliation Barometer Blog*, <http://reconciliationbarometer.org/volume-eight-2010/of-pardons-and-the-legacy-of-the-trc/> (last visited May 2, 2012).
176. DU BOIS-PEDAIN, *supra* note 167, at 55.
177. *Id.*
178. *Id.*
179. *Id.* at 56-57.
180. International Human Rights Clinic, Harvard Law School, *Prosecuting Apartheid-Era Crimes? A South African Dialogue on Justice* 41 (“The policy has therefore engendered strong criticism from civil society, on the grounds that the amended guidelines so closely mirror the amnesty provisions of the TRC Act as to amount to a re-run of the truth-for-amnesty process.”).
181. DU BOIS-PEDAIN, *supra* note 167, at 57.
182. *Id.* at 58.
183. International Human Rights Clinic, *supra* note 180, at 143.
184. DU BOIS-PEDAIN, *supra* note 167, at 58.
185. CAREY, *supra* note 3, at 153-56.
186. MARK J. OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT : CRIMINAL CONSCIOUSNESS IN ARGENTINA’S DIRTY WAR 20 (2001).
187. *Id.*
188. CAREY, *supra* note 3, at 174.
189. In this case, the military gave up power voluntarily after defeat in the Malvinas/Falklands War but exerted pressure after-the-fact to curb prosecutions for torture and mass killings during the Dirty War. CAREY, *supra* note 3, at 153-56.
190. Mark Gibney, *The Implementation of Human Rights as an International Concern: The Case of Argentine General Suarez-Mason and Lessons for the World Community*, 24 CASE W. RES. J. INT’L L. 165, 172 (1992).
191. OSIEL, *supra* note 186, at 16.
192. Gibney, *supra* note 190, at 173.
193. David Pion-Berlin, *To prosecute or to pardon? Human rights decisions in the Latin American Southern Cone*, 16 HUM. RTS. Q. 105, 116 (1994).
194. *Id.* at 119.
195. Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118, 125-27 (2000) [Hereinafter “Why Prosecute?”].
196. CAREY, *supra* note 3, at 163.

197. *See generally* ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED, *NUNCA MAS: REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED* (1986).
198. Why Prosecute?, *supra* note 195, at 135. Osiel is similarly critical of truth commissions noting their lack of focus on institutional issues, the absence of cross examination that challenges dominant accusations, and their inability to compel perpetrator testimony. *Id.* at 136. In response, the combination of prosecutions and investigative reports seems to make up for such deficiencies.
199. CAREY, *supra* note 3, at 156.
200. OSIEL, *supra* note 186, 18-19.
201. Gibney, *supra* note 190, at 173.
202. *Id.* at 174.
203. OSIEL, *supra* note 186, at 20; CAREY, *supra* note 3, at 156.
204. OSIEL, *supra* note 186, at 20.
205. *See* Gibney, *supra* note 190, at 174.
206. *See supra*, Introduction
207. OSIEL, *supra* note 186, at 20-21.
208. CAREY, *supra* note 3, at 174-75.
209. *See id.* at 178.
210. *Id.*
211. *Id.* at 178.
212. *Id.* at 182. This is not meant to say that Argentina now has a clean human rights record. Argentina still copes with issues of corruption, prison conditions, and torture, to name a few. *Id.*
213. Gibney, *supra* note 190, at 173.
214. Andrew S. Brown, *Adios Amnesty: Prosecutorial Discretion and Military Trials in Argentina* 37 TEX. INT'L L.J. 203, 216 (2002).
215. OSIEL, *supra* note 186, at 23-24. (Explaining that the Supreme Court judges were either Menem-appointees or had publicly endorsed the Due Obedience and Full Stop laws.)
216. HCJ 5100/94 Public Committee Against Torture v. Israel, 38 I.L.M. 1471, ¶¶9-13 [1999] [hereinafter PCATI Judgment] *available at* http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf (*last visited* Apr. 9, 2012) (detailing excessive interrogation measures including shaking, forcing the suspect to wait in the “Shabach” position—an uncomfortable tethering of the arms on opposite sides of the back of a tilted chair coupled with hooding and loud music—excessive tightening of handcuffs, and sleep deprivation.)
217. *Id.* at ¶14.
218. *See e.g.* CAREY, *supra* note 3, at 100.
219. Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, Part One, ¶2.20, excerpts translated in 23 ISR. L. REV. 146 (1989) [hereinafter Landau Report].
220. PCATI Judgment, *supra* note 216, at ¶¶36.
221. *Id.* at ¶¶33-35.
222. *See e.g.* PCATI Judgment, *supra* note 216 at ¶¶9-13. The Judgment does not explicitly say whether the excessive interrogation methods, such as the Shabach position, are torture but the Court states that they are not valid interrogation methods, that they cause pain and suffering, and are degrading. *Id.* at ¶¶24-30. Some scholars have interpreted the named acts to constitute torture. *E.g.* CAREY, *supra* note 3, at 105. Additionally, human rights organizations have publicly alleged other instances of torture. B’Tselem, The Israeli Information Center for Human Rights in the Occupied Territories and HaMoked Center for the Defence of the Individual, *Supplemental Information for the Consideration of*

- Israel. Submitted to the UN Committee Against Torture (April 2009) available at http://www2.ohchr.org/english/bodies/cat/docs/ngos/BTselemHaMoked_Israel42.pdf (last visited April 11, 2012).*
223. PCATI Judgment, *supra* note 216, at ¶¶9-13
224. Landau Report, *supra* note 219, at ¶2.20; Amnesty International, *Israel and the Occupied Territories The military justice system in the Occupied Territories: detention, interrogation and trial procedures* 50 (July 1991) *available at* <http://www.amnesty.org/en/library/asset/MDE15/034/1991/en/e349c08b-f93f-11dd-92e7-c59f81373cf2/mde150341991en.pdf> (last visited April 11, 2012); *See also* CAREY, *supra* note 3, at 100.
225. *Id.*
226. PCATI Judgment, *supra* note 216, at ¶¶36.
227. CAREY, *supra* note 3, at 107.
228. *Id.* at 103.
229. *Id.* at 107.
230. *Id.*
231. PCATI Judgment, *supra* note 216, at ¶¶ 23, 36.
232. CAREY, *supra* note 3, at 115.
233. For example, a 2007 report from B'Tslem, an Israeli human rights NGO, documented a list of ISA–authorized “special procedures” for ticking time bomb scenarios, and found that 38 percent of all detainees between July 2005 and January 2006 had been subjected to at least one method and 18 percent had endured two or more methods. B'Tselem, *supra* note 222.
234. PCATI Judgment, *supra* note 216, at ¶35; CAREY, *supra* note 3, at 106.
235. PCATI Judgment, *supra* note 216, at ¶33-35.
236. *Id.*
237. *Id.*; *See also* CAREY, *supra* note 3, at 112; Penal Code, 5737-1977, 317 LSI Special Vol. art. 34(11) (1977) (Isr.).
238. *See* Scarry, *supra* note 35, at 283.
239. CAREY, *supra* note 3, at 106, 119 (“NGOs have alleged that the GSS/ISA has de facto immunity”).
240. *E.g.* Committee Against Torture, *Consideration Of Reports Submitted by States Parties Under Article 19 of the Convention, Fourth Periodic Reports Of States Parties Due In 2004 Addendum: Israel UN Doc. CAT/C/ISR/4 (Dec. 12, 2004) available at* http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.ISR.4_en.pdf.
241. CAREY, *supra* note 3, at 106.
242. *Id.* at 118.
243. *Id.* at 119.
244. *Id.*
245. *See* GROSS & NI AOLAIN, *supra* note 46 at 159.
246. Exec. Order No. 13491, *supra* note 2.
247. Roth, *supra* note 2.
248. Liz Halloran, *CIA Exempt On Torture, But Not Lynndie England*, NPR (April 20, 2009) *available at* <http://www.npr.org/templates/story/story.php?storyId=103281803> (last visited April 11, 2012).
249. *Id.*
250. Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES (Aug. 30, 2012) *available at* <http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?pagewanted=all>.

251. See Orentlicher, *supra* note 127, at 2542 (“The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression.”)
252. See Halloran, *supra* note 248.
253. See Orentlicher, *supra* note 127, at 2542.
254. See Scarry, *supra* note 35, at 283. Explained *supra* section: Advantages of the Possibility of Pardon “Advantages of the Possibility of Pardon.”
255. See Roth, *supra* note 2.
256. Charlie Savage, *Election to Decide Future Interrogation Methods in Terrorism Cases*, N.Y. TIMES (Sep. 27, 2012) available at http://www.nytimes.com/2012/09/28/us/politics/election-will-decide-future-of-interrogation-methods-for-terrorism-suspects.html?_r=0.
257. See Peter Foster, *US Election: Mitt Romney aides propose return of waterboarding*, THE TELEGRAPH (UK) (Sep. 28, 2012) available at <http://www.telegraph.co.uk/news/worldnews/us-election/9574724/US-Election-Mitt-Romney-aides-propose-return-of-waterboarding.html> (“Amrit Singh, a lawyer with the New York-based Open Society Justice Initiative and the author of *Administration of Torture*...added that Mr Obama, by failing to prosecute those responsible for authorizing torture during the Bush era, was responsible for leaving open the door to the possible return of ‘enhanced interrogation techniques’.”).
258. See Oren Gross, *supra* note 32, at 240; See also GROSS & NI AOLAIN, *supra* note 46, at 161.
259. Exec. Order No. 13491, *supra* note 2.
260. Roth, *supra* note 2.
261. E.g. Office of the Inspector General, U.S. Dep’t of Justice, *A Review of the FBI’s Involvement in and Observation of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq*, 67-73 (Oct. 2009) (redacted version originally published May 2008) available at http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-the-department-of-justice/fbi_review_2008.pdf (last visited May 2, 2012)
262. See MOORE, *supra* note 83, at 95.
263. Compare CROUCH, *supra* note 70 at 73, 105-107 (Describing the public outcry in response to President Ford’s pardon of President Nixon, and the similar, though less impassioned, public disapproval of President H.W. Bush’s pardons in the Iran-Contra scandal.)
264. See Oren Gross, *supra* note 32, at 240; See also GROSS & NI AOLAIN, *supra* note 46, at 161.
265. Orentlicher, *supra* note 127, at 2542.
266. See GROSS & NI AOLAIN, *supra* note 46, at 147.
267. See MOORE, *supra* note 83, at 95.
268. GROSS & NI AOLAIN, *supra* note 47, at 147-159.
269. Abramson, *supra* note 114, at 147-150.
270. See SARKIN, *supra* note 108, at 33; see also DU BOIS-PEDAIN, *supra* note 169165, at 55.
271. CAREY, *supra* note 3, at 182.
272. See *id.* at 106, 119.
273. See GROSS & NI AOLAIN, *supra* note 46, at 159.



Nick J. Sciullo

**SOCIAL JUSTICE IN TURBULENT
TIMES: CRITICAL RACE THEORY
& OCCUPY WALL STREET**

Introduction¹

These are precarious times—a moment that demands our full attention as critical scholars, practitioners, activists, and students. While some political commentators say that leftist criticism and direct action are steadily becoming more common and visible, especially as it relates to law, critical thought and action remain strongly condemned by an ever conservative American public. We do not have to look any further than the nightly news where skepticism about and anxiety of leftist “radicals” is often welcomed, which then infiltrates discussions with our friends, family, and colleagues.

Occupy Wall Street and other Occupy movements have coalesced around feelings of powerlessness, contempt, and anger in the face of corporate violence—a violence that is all too real for not only wage laborers and the working poor, but also for the growing numbers of middle class workers. Indeed, as the National Lawyers Guild’s past President David Gesspass has written:

This is the season to support the growing resistance to the rule of monopoly capital. It is not for us to decide the form that resistance should take, nor to dictate the direction it will go. Our obligation is to give that resistance room to breathe, expand and grow.²

But this must be tempered by the solemn words of French psychoanalyst, Elisabeth Roudinesco,³ who writes:

We are certainly living in strange times. The commemoration of great events, great men, great intellectual achievements, and great virtues never stops... And yet never have revisionist attacks on the foundations of every discipline, every doctrine, every emancipatory adventure enjoyed such prestige. Feminism, socialism, and psychoanalysis are violently rejected, and Freud, Marx, and Nietzsche are pronounced dead, along with every critique of the norm.⁵

These strange times feel strange for most of us on the left, wherever we may fall on this constantly shifting terrain. Our success may seem more apparent or even more frequent, but the path is long and the struggle hard.

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For people of color, however, there are fewer signs of success than in mainstream leftist battles. Today, people of color are fighting on new fronts of institutionalized racism: mass incarceration,⁶ so-called colorblindness,⁷ and post-racialism.⁸ These conditions add to the already near-lethal weight of slavery and colonialist histories, re-segregation, job discrimination, and broken education systems. The picture is bleak.

In this brief article, I want to address the unique moment in which progressive movements find themselves, as well as the ways in which the progressive community can more effectively engage a broader range of people, including communities of color and white working-class communities. It is finally time for progressives to move beyond litigation reformist strategies and embrace leftist activism on all fronts. I argue that the Occupy movements represent a positive politics of struggle from which activists can learn. Specifically, they provide an opportunity for leftists to come to grips with, and intentionally correct, the mistreatment of people of color in anti-capitalist leftist struggle.

Social justice in turbulent times? Yes. A future of possibility? Absolutely.

Race And Occupy Wall Street

Race is one of the least explored facets of the Occupy movements. That it is so seldom mentioned is telling, because the omission speaks to the often colorblind criticism of capital from most socialist and Marxist activists. Omission of race is problematic, especially when critiquing capitalism and its central tenets. Racism and capitalism are intimately tied together and mutually reinforcing. A new movement that ignores one or the other is worth a closer look. For instance, would historians consider slavery without looking at the economics of the plantation?⁹ Or, would a discussion of Northern racism during World War II make much sense without examining the economics that led to the Great (Black) Migration?¹⁰ These examples show how rejecting capitalism without explicitly rejecting racism is a shallow critique at best. During this shifting political moment the question becomes whether the Occupy movements will fall into this same trap of privileging class at the exclusion of race or will they manage to popularly link the logic of oppression that shape both capitalism and racism?

At first blush, the Occupy movements appear to have avoided the trap of privileging class over and exclusive of race, at least according to the nightly news and newspaper photos. It appears that people of all races are involved and interested in critiquing capitalism's excesses. My own observations of Occupy Atlanta at Woodruff Park are that the movement was diverse not only in racial make-up, but also in age, socioeconomic background, ethnicity, family life, employment, and education.

That being said, I do not know to what degree people of color really were integrated into Occupy Atlanta. Simply occupying the same space in a public park seems to be a poor way to consider whether a movement is diverse. The occupants of Woodruff Park were largely people of color *before* Occupy Atlanta. To claim diversity by overshadowing people who already occupied the park is dishonest (unless they intentionally opted to participate in some way). If Occupy Atlanta lacked a diverse racial presence without park occupants it is more than a stretch to describe it as a “diverse social movement.”

A revealing story, which suggests that Occupy Atlanta struggled with racial integration, is the participants’ failure to let Representative John Lewis participate as a speaker.¹¹ Of course, John Lewis is an ardent civil rights leader¹² who is deservedly counted amongst people like Rev. Dr. Martin Luther King, Jr.¹³ and Ralph Abernathy.¹⁴ The failure to include Representative Lewis among speakers reeks of a loss of history and the continuation of a racially discriminatory past. It is possible that Representative Lewis was denied the opportunity to address the crowd not because of racism, but because Occupy Atlanta sought to keep the movement free of the influence of celebrities or government figures or because participants failed to recognize who Rep. Lewis was (unsettling for a number of reasons, but also because John Lewis is the member of Congress who represents the district in which Woodruff Park, the site of Occupy Atlanta) and the list could go on. Nonetheless, the incident represents a low point in Occupy Atlanta’s history.

My observation about the marked absence of people of color at Occupy Atlanta echoes criticisms made by others of the Occupy movements across the country. Fordham University found 68 percent of Occupy Wall Street protestors were white compared with only 10 percent Black participants and 10 percent Latino participants.¹⁵ Indeed, many of the people of color seem to be coming from the middle class, which is also not truly representative of those impacted by capitalism’s excesses.¹⁶

There must be inclusion of people of color in the Occupy movements. It is not sufficient (although certainly helpful and no doubt appreciated) for white college students and young professionals to rail against a system from which many of them have benefited. Without including people of color who have suffered a continuous deluge of oppression from their families’ first forced steps into this country the movement’s credibility rings hollow. To be sure, credit cards and college loans, car loans, sub-prime mortgages, and the like have weighed heavily on the middle class but these instruments of capital slavery pale in comparison to the legacy of racial oppression in this country.

At the same time to suggest that the growing numbers of voices that are critical of capitalism are primarily comprised of a narrow group of people

would be incorrect. Anti-capitalism critique is popular, although the kind and tone of such critiques take many different forms.¹⁷ Therefore, while we may be inclined to think the Occupy movements are composed largely of whites, largely students or young people because media indulges these convenient stereotypes, to do so would gloss over the diversity of those who have historically, and continue to reject capitalism. Even conservatives, many of whom are libertarians or Tea Party members, became involved in the Occupy movements for the same reasons as others—to reject corporate greed and the destructive overlapping interests of the United States government and the private national economy.

For example, at Occupy Oakland, Angela Davis argued that the Occupy movement implicitly rejects capitalism because capitalism is a racist set of relationships.¹⁸ Davis and many other activists and thinkers of color have long-argued this point. The United States, after all, was literally built on slaves' and immigrants' backs at their expense—an expense paid by blood. History shows us that early European imperialism was concerned not only with economic domination, but also racial domination.¹⁹ Imperialism was not simply about economic greed; it was also about destroying the dark Other. Ricky Lee Allen describes the danger of “Class-First” movements:

By focusing on the identity politics between the bourgeoisie and the proletariat, the class-focus of class-first analysis misses much of the racialized identity politics that are just as global but arguably more significant in magnitude.²⁰

A focus on class can blind us to the pernicious effects of racialization, which often works in tandem to perpetuate the capitalist machine. Progressives must embrace diverse identities to truly challenge capitalism *and* racism. A progressive movement succeeds not when it is myopic, but when it is broad-based. For example, Bronx organizers making the trip to Zuccotti Park in Lower Manhattan were unsettled by the largely white, young, and middle-class participants.²¹ Why? Because the 99 percent are largely of color and poor, at least in terms of percentages. This reality should call many white and middle-class Occupy movement leaders to evaluate what it means to be the now famous “99 percent.” In an encouraging sign, many Occupy movement participants and outsiders called this representation issue to question. They are asking this: why do the most visible parts of capitalism critiques continue not to embrace at best, or actively exclude at worst, people of color who are worst affected by arguably the most racist set of relationships—capitalism—in the United States?

Some Occupy leaders pointed out the movements' singular focus on capitalism. While critiquing capital is certainly important, racism is often the most pressing concern for people of color.²² Occupy participant, Frank Diamond, a Haitian-American simplifies the issue: “It takes a wave to realize that the

boat you have been riding is too small. We need to be represented here too. This is about us, too.”²³ Similarly, activists like Malik Rhassan and Ife Johari Uhuru, Occupy the Hood and Occupy Harlem founders,²⁴ sought to elevate the experiences of people of color within the growing national economic justice conversation.²⁵ The struggles to continue to integrate the different strands of the movement—one that is white-dominated and others created by people of color who experienced Occupy as hostile or exclusionary.

We ought to recognize that aside from lauding these sister movements as advances for revolutionary people of color, they are also strong critiques of the mainstream fringe that represents many of the Occupy movements. They critique the protests already going on and seek to establish a space that has been excluded from what might be generally seen by progressives as a “good movement.” The reality is that Occupy Wall Street did not begin as a movement about race. To read a racial justice agenda into the movement at its origins would be to rewrite history. That being said, a focus on race was eventually brought into the fold by including people of color, particularly in the smaller Occupy movements.²⁶ Inclusion helps. It is the proverbial step in the right direction, but self-correction should not absolve the sins of history, which should be a lesson to other Occupy movements across the country.

More work must be done to include a racial analysis of and integrate people of color into the Occupy movements and frankly most other visible “progressive” movements. It has become clear that diversity is a problem, and also clear that some in the Occupy movements have at least acknowledged this issue. While the Occupy movements are a protest in favor of social justice, more attention should be paid to the lack of the movement’s diversity on its longevity, success, and impact on issues. Critical race theorists have begun such a political project, playing a vital role in developing sharp critiques about various movements’ and communities’ failures to center race, yet questions remain about the future of such projects in a political climate that demands bold action alongside bold analysis.

The Future of Critical Race Theory

What we need is a future of, and for, critical race theory. Although critical race scholars have seen much in critical race theory’s evolution and application across disciplines in the literature, we have done little to articulate a future for critical race theory. The progressive community has done well to articulate where critical race theory has been,²⁷ but not where it is going. This is expected because, as National Lawyers Guild National Vice President Mumia Abu-Jamal has written: “[T]he law looks backward for its precedents. I think we are in a new era of social movements where the precedents will fall short of where society needs to go.”²⁸ Abu-Jamal’s insight is an imperative—progressives must answer this call.

Why is a future so important? To advance a theory we must have a notion of where it will go—not necessarily in terms of a final destination but in terms of a condition of possibility. The goal of any theoretical project must be to advance the understanding of not only the past and present, but also the future. To think without an eye to the future is to think without a future.

Critical race theory has made tremendous strides in articulating a deeper understanding of social justice;²⁹ in articulating an evolving understanding of slavery,³⁰ colonialism,³¹ Jim Crow,³² the Civil Rights movement,³³ criminal law,³⁴ post-racialism,³⁵ identity politics,³⁶ etc. Derrick Bell writes: “Despite our best efforts to control or eliminate it, oppression on the basis of race returns time after time—in different guises, but it always returns. That all the formal or aspirational structure in the world can’t mask the racial reality of the last three centuries.”³⁷ His words are a reminder that we must articulate a theoretical future to cultivate this risk into of the possibility for success.

What does this look like? An instance of the critical race theory’s future occurred when French President Nicolas Sarkozy dedicated a statue commemorating victims of slavery in spring 2012. In doing so President Sarkozy dedicated a monument that gave a future to the past. Its inscription reads, “By their struggles and their strong desire for dignity and liberty, the slaves of the French colonies contributed to the universality of human rights and to the ideal of liberty, equality and fraternity that is the foundation of our republic.” The Paris monument represents an important acknowledgement of history’s evils coupled with a striking public commemoration. There is some success in this recognition and representation. Of course monuments do not make a movement nor solidify the relevance of struggles long past, but the Paris monument represents the beginning of an important future—a future that is aware of its sordid past. The United States has no such monument.

Critical race theorists should find the crisis from which the Occupy movements emerged as an important time to advance their goals, to look forward, to move beyond the politics of the present. When critical race theorists are able to engage the present with an eye toward the future, then and only then will we see critical race theory embracing social justice. The Occupy movements have been correct in their politics in this respect. White supremacy sees a future and is invested in it, so why not invest in racial justice’s future? Reiland Rabaka argues:

Even in its mildest and most unconscious forms, white supremacy is one of the extremist and most vicious human rights violations in history because it plants false seeds of white superiority and black inferiority in the fertile ground of the future.³⁸

Critical race theory must combat the world in the present as well as the future to truly challenge white supremacy and offer real solutions for our racialized world.

The focus of the Occupiers is not necessarily on the immediate destruction of the capitalist order, but is instead on constant struggle both for the present and the future for a capitalism alternative. Capitalism did not arise in a day and it will not fall in a day, but the best strategy for transforming our economic system is to focus on immediate goals with an eye for long-term success. The Occupy movements are, at once, strong in their political present and many of the protesters are strong in the belief that their project has futurity (although more of their ranks certainly could be). Critical race theorists better known in the academy as “crits” ought to take heed of this example, putting theory to work, and focusing on the long road ahead.

Critical Race Theory as Social Justice Practice

Now can you feel it?
 Nothing can save you
 For this is the season of our self savior
 Like Che Guevara, this young urban guerilla
 Sparks the revolution, black tactics, whatever
 —Digable Planets³⁹

Although critical race theory is what it purports to be—a theory—it is also an important inquiry that offers a set of guiding social justice principles. In this sense it is potentially more praxis than theory.⁴⁰ Frances Lee Ansley argues:

[L]egal doctrine has important social power, that it shapes people’s consciousness of themselves and their world, enlarging or restricting their vision of how things are, could be and should be. Historians also have pointed out the important role of law as mediator and unifier for Americans in particular, and the intense and intricate involvement of law and legal doctrine in the history of African-American people in this country.

Race law doctrine has an effect, for example, on those of us considering Professor Bell’s questions, and on others, in and out of the legal profession, who perhaps want no part of the questions, or have not yet dreamed of them. If the ideology of civil rights law itself, its spoken and unspoken message, is an active agent in our social reality, then a real understanding and analysis of race and law in our system would be an important contribution toward change, not simply an academic exercise.⁴¹

As such, critical race theory promises to shape and indeed has shaped social reality in profound ways. It is instrumental in the movement for social justice. If this is true, then we ought to articulate critical race theory in the same breath that we articulate opposition to corporate greed,⁴² rampant speculation,⁴³ workplace discrimination,⁴⁴ and other corporate ills. I argue that the Occupy movements should serve as a new point of departure for critical race theory.

Activism changes society. Progressives, through action, can and must change the world to make it a better place. Historically, critical race theory has challenged stolid racial apathy in the academy, and today, presents a radical

alternative of change and equality. This alternative ought to be foremost in our minds as we navigate the complex terrain of global capitalism, ethnocentrism, and gender and sexual orientation exclusion. If we engage in serious activism we can facilitate not only change, but also lay the foundation, by example, of a revolutionary way of being—which is change in itself.

The character of this revolutionary way of being, which is directly linked to anti-capitalist movements, has been the subject of much discussion among critical race practitioners, many of whom are musical artists. Some (comprised of those in and outside of the academy) have encouraged armed resistance in the face of pervasive social ills. For example, hip-hop duo dead prez argued, “I say we all rush the Pentagon. Pull out guns and grab the intercom.”⁴⁵ This indictment of the military industrial complex is brutally direct. To take down the Pentagon, the bastion of security, with guns is ironic and persuasive.⁴⁶ dead prez also have critiqued the police state: “I’ll throw a Molotov cocktail at the precinct, you know how we think.”⁴⁷ These *criticisms* (not necessarily actions) are powerful examples of the way in which critical race theory can be applied outside the academy.

The important point is that the call for armed resistance recognizes the desolation and anger borne by many poor communities of color in response to United States’ institutions’ failure to acknowledge its basic ethical obligations of compassionate living. In the same way revolutionaries’ critical race visions have expressed violent resistance to protect America’s dispossessed, the Occupy movements have offered a glimpse into growing unrest around a type of economic violence that many more people are experiencing for the first time.

Critical race visionaries not only reveal survival stories among less powerful communities of color, they animate urgent calls for action. In other words, critical race theory may help invigorate our lack of civic engagement.⁴⁸ We often assume activism exists where we are but when we look closely we are anything but active.⁴⁹ While we may be able to point to some very active progressive voices and organizations there is no expectation that those who claim to be ideological progressives also be *active* in progressive struggles. Progressives may become bored, worn out, and tired like everyone else. It is in these moments of weakness, however, that other progressives must take up the charge and invest in movements, injecting new and exciting ideas into the fissures of enduring struggles. Therefore, critical race responses to the Occupy movements, like Occupy the Hood, should strengthen the Occupy message that we are the 99 percent suffering from capitalism’s excesses—the time to act is now. Such responses should not be dismissed as “divisive” by white or middle-class progressives. We have a long way to go, together.

The Utility of Elevating Critical Race Theory within the Occupy Movements

Why should we want to elevate critical race theory within the Occupy movements? This is a logical question because while the Occupy movements are associated with the rejection of many forms of oppression, they have not coalesced around race or ethnicity issues. Critical race practitioners ought to focus on the room that the Occupy movements opened up for national conversations about racial justice.

The Occupy movements provide an opportunity to distract those deeply invested in white supremacy from their steadfast opposition to racial equality to begin appreciating the toxic impact of racism on us all. The role of critical race theorists may be to articulate racial justice messages in the broader context of corporate greed, which may create an inroad to critique racism, albeit indirectly. The reason for this indirect approach is that corporate greed's relationship to race may be a critique that some in the largely white corporate community can hear and understand.⁵⁰ Ansley reminds us:

[T]his is the reason white people resist an end to white supremacy. They have a real stake in the system and, with the exception of a few idiosyncratic and often not very reliable defectors, they will fight to defend it. The explanation, then, for the halt of the civil rights movement is simply the entrenched power of resistant whites who refuse to give up further privileges.⁵¹

While white people often have a significant interest in capitalist success, an assault on capitalism may not be seen as an assault on white supremacy. In this way critiques of capital may function as a necessary subversive attack on white supremacy under the veil of a more benign critical agenda. After all, we should not confuse racial supremacy for capitalist supremacy, no matter how closely they are related or how closely they resemble each other. As a result, the Occupy movements unwittingly opened up doors for progressives to advance critical race theory arguments under the guise of capitalism critiques. Direct challenges to white supremacy are wrought with difficulty, particularly because of the reactionary forces they draw, and although progressives may feel they are being disingenuous to their own principles, the potential effectiveness of this approach cannot be denied. There is nothing wrong with covert action.

This approach may be successful. At the very least we should not *not* do it, given the current state of racial justice politics, and in the spirit of political innovation inspired by racial justice movements. Richard Delgado writes:

[L]egal reforms that grew out of the civil rights movement were severely limited by the ideological constraints embedded within the law and dictated by 'needs basic to the preservation of the class structure.' These ideological pillars supporting the class structure were simultaneously repositories of racial domination and

obstacles to the fundamental reordering of society... A legal strategy that does not include redistribution of wealth cannot remedy one of the most significant aspects of racial domination.⁵²

Delgado reminds us that the Occupy movements may be seen as addressing an issue that is central to the progressive quest to promote racial equality, in which a battle against poverty and against accumulation is *not* a battle against race simply because it fails to exclusively focus on race. It is possible, while the Occupy movement's impression is still tender, that racial justice can still enter America's inequality discussion. Ultimately, the insidious economic violence of the status quo has rendered people of color,⁵³ in many instances, no better off than when economic violence was less well-hidden.⁵⁴

In fact, critical race founders have argued that a narrow focus on equality or more appropriately—on the explicit signs of inequality—may be antithetical to their goals because a narrow focus may deny the complex manifestations and realities of racism. As Kimberle Crenshaw notes:

The narrow focus of racial exclusion—that is, the belief that racial exclusion is illegitimate only where the 'White Only' signs are explicit—coupled with strong assumptions about equal opportunity, makes it difficult to move the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion.⁵⁵

If progressives limit racial justice conversations to the standard repertoire of racial discrimination, within this "post-racial" period, then they are bound to tread the same colorblind waters that deny racism's power today. Joining forces with the Occupy movements would be an opportunity to move the cause of racial equality and social justice forward.

Conclusion

Decolonization never goes unnoticed, for it focuses on and fundamentally alters being, and transforms the spectator crushed to a nonessential state into a privileged actor, captures in a virtually grandiose fashion by the spotlight of History

—Frantz Fanon⁵⁶

Progressives must embrace the complementary energies of critical race theory and the Occupy movements to enrich critical race theory. Working within and amongst the current progressive activist energies, critical race theory may be able to garner a much needed boost for its waning critical power.⁵⁷ Progressives must unite to fulfill the promises of those who inspire us whether those inspirations are Derrick Bell, Vladimir Lenin, Martin Luther King, Jr., or Mahatma Gandhi. Together progressives can draw on the divergent success of our various paths and energize other progressives to advance their fronts of struggle. Movements need not be in opposition to each other, they can draw from each other. And, social movements are integral to a better understanding of law.⁵⁸ The path to successful activism

is in branching out, joining forces, and moving together toward a future that is more just and more livable.

NOTES

1. I have borrowed the title of this article from Elisabeth Roudinesco. See ELISABETH ROUDINESCO, *PHILOSOPHY IN TURBULENT TIMES: CANGUILHEM, SARTE, FOUCAULT, ALTHUSSER, DELEUZE, DERRIDA* (William McCuaig trans., 2008).
2. David Gespass, *Occupying Together—No Room For Old Differences in the New Movement*, 35 GUILD NOTES 1, at 1 (2011).
3. Elisabeth Roudinesco is a French psychoanalyst and director of research at the University of Paris. She is also director of studies at the École Pratique des Hautes Études, Sorbonne.
4. *Id.*
5. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023-73 (2010); Bruce Western & Christopher Wildeman, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades: The Black Family and Mass Incarceration*, 621 ANNALS 221-42 (2009).
6. See LESLIE G. CARR, “COLOR-BLIND” RACISM (1997); EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (3RD ED.) (2009); Reva B. Siegel, *1998-99 Brennan Center Symposium Lecture: Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77-118 (2000); Donald E. Lively, *Color-Blindness and Social Blindness: Echoes from an Infamous Past*, 33 HOW. L.J. 267-86 (1990).
7. See, *Race, Gender, and Class at a Crossroads: A Survey of Their Intersection in Employment, Economics, and the Law: Symposium Article: Post-Racialism?*, 14 J. GENDER RACE & JUST. 601-32 (2011); *Commentary: The Associated Dangers of “Brilliant Disguises,” Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 IND. L.J. 1277-91 (2010); Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election ‘08, and the Myth of Post-Racial America*, 37 FLA. ST. U.L. REV. 659-715 (2010).
9. See generally MARK M. SMITH, *DEBATING SLAVERY: ECONOMY AND SOCIETY IN THE ANTEBELLUM AMERICAN SOUTH* (1999) (analyzing the economics of slavery in the South); S. MAX EDELSON, *PLANTATION ENTERPRISE IN COLONIAL SOUTH CAROLINA* (2011) (analyzing plantation economics in South Carolina); LLOYD BEST & KARI POLANYI LEVITT, *ESSAYS ON THE THEORY OF PLANTATION ECONOMY* (2009) (analyzing the economics of plantation life in the Caribbean).
10. See generally JAMES N. GREGORY, *THE SOUTHERN DIASPORA: HOW THE GREAT MIGRATIONS OF BLACK AND WHITE SOUTHERNERS TRANSFORMED AMERICA* (2007) (discussing Black and white migration to the North and West from 1900 to the 1970s); ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2010) (analyzing black migration from 1915 to 1970); NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1992) (analyzing the movement of Black people from the South to the North from 1940 to 1970).
11. Rinku Sen, *A Racial Justice Agenda*, THE NATION, Nov. 14, 2011, at 20.
12. JOHN LEWIS & MICHAEL D’ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* (1999).
13. CORETTA SCOTT KING, *MY LIFE WITH MARTIN LUTHER KING, JR.* (1969); THOMAS F. JACKSON, *FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE* (2004).

14. RALPH ABERNATHY, AND THE WALLS CAME TUMBLING DOWN (1989).
15. *See supra* note 11.
16. *Id.*
17. *See, e.g.*, note 8.
18. Brid Higgins Ni Chinneide, *Occupy activists evoke city's protest past*, IRISH TIMES, Dec. 14, 2011, at 10.
19. Ricky Lee Allen, *The Globalization of White Supremacy: Toward a Critical Discourse on the Racialization of the World*, 51 EDU. THEORY 467, 478 (2001).
20. *Id.* at 482.
21. Alice Speri, *Struggling to Make the '99%' More Representative of Reality*, N. Y. TIMES, Oct. 29, 2011, at 22.
22. *Id.*
23. *Id.*
24. *See* <http://www.OfficialOccupytheHood.org>.
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Richael Faithful

TOWARD THE HEART OF JUSTICE

Introduction

Power is at the center of all spheres of life. It is a force that I constantly investigate at all levels of my own life. And it is a quality that I experiment with, to learn my abilities and to transform them toward the heart of justice. In my experience with powerful institutions, the test is to learn who and what can change the most toward the heart of justice, or in many more cases, how we can become less distant from it. If we cannot permanently reside in the heart of justice, we live and strive in between where we presently are and where we dream of being. It is my experience occupying the “in between” space—of living between but striving toward justice—that I know very well, and that I wish to share in my brief remarks.

I have organized my reflections in three parts. First, I want to share some formative experiences in my life that have led me to this point speaking with all of you. Second, I want share my current experience as a community lawyer working in Virginia with disenfranchised people, as it relates to engaging powerful institutions—law and politics. Third, I want to share three foundational values that have sustained me while living “in between” but striving toward the heart of justice: embracing vulnerability, experiencing wholeness, and cultivating radical imagination.

Part 1: Formative Experiences

Like many of us I learned about power early in my life. I was born in Washington D.C. but lived with my great grandmother, great aunts, and second cousins in Columbus, Georgia for my first six months. Though it broke my mom’s heart to separate from her first born, she had little choice, as I would later learn. She had left an abusive home, lived in her car, worked three jobs, and had two babysitters who threatened to take me from her. Before I was a year old I had witnessed at least four expressions of power: (1) my mother’s tenacity to survive, (2) her deep instinct to protect her child, (3) various social and economic conditions that diminished her choices, and (4) the reenactment of a devastating history of forced separation between Black mothers and their children.

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I was directly confronted with racism for the first time soon after returning to my mom's care. She had met my father and was pregnant with my little brother. Our D.C. family uprooted to Billings, Montana for my father's new work assignment. It was still Klan country during the late 1980s and early 1990s.

A couple of months into kindergarten I gathered the courage to ask another little girl why she always moved when I sat next to her for story time. Her explanation was surprisingly simple: she didn't want to sit next to me because I was a "nigger." I was stunned and horrified. I immediately understood the power contained in this word because I felt the contempt in her voice, which sprang from her lips like venom from a snake. At the same time, as a pensive five-year old I was confused—what did this have to do with story time? Where did she learn that word? Did other children feel that way? What I understood the least was why this girl—a Latina—harbored such strong feelings about me.

Of course, after my mom heard about my day at school she fulfilled every angry Black woman stereotype. My parents re-activated the town's NAACP, wrote in local newspapers about our experience with racism in Billings, and organized a diversity parade with indigenous, Latino, and other Black families. As many resistance stories go, my parents fought hard but were forced back to D.C. We moved cross-country to Centreville, Virginia, an affluent suburb outside of D.C., where my parents felt that if their children had to deal with racism, my brother and I could at least earn a good education in one of the most well-regarded school districts in the country.

My beginnings in Centreville were more similar to Billings than not. While I had fewer overt encounters with racism, I quickly detected the serious contradictions in privileged suburban life for an outsider.

There were also profound contradictions between my life at school and away from school. For example, in second grade, I waged a playground campaign so that I could play basketball with the boys who didn't want me to play for no other reason than that I was a girl. I eventually won, beat many of them, and gained enough respect that they were disappointed when I didn't play, but it would become one of many battles to gain visibility.

Away from school, I was aware that I was really drawn to girls, especially ones in flower dresses, in ways that most other girls apparently were not. More present with me, however, was being responsible for myself, my brother, and other little children on our block. I grappled with anxiety and shame as my parents struggled with addiction, despite our best efforts to maintain a nothing-wrong, middle class front. At the same time, I remember similar plights of other neighborhood children who were dealing with adult problems—from severe physical, sexual and emotional abuse to economic

insecurity. I came to appreciate who we are as humans—sympathetic, complex, and resilient.

My high school years were awkward. I transitioned from being a serious, multi-sport athlete to a card-carrying geek. I had loved sports because while playing I learned how to healthily exist within a team. However, I quit my primary sport, soccer, just before junior Olympic qualification trials, to protest the team's hyper-competitive culture. With much more time on my hands I accidentally found politics.

A few other geeky friends and I founded our school's Gay-Straight Alliance with the naïve hope that we could have a space to identify with other gay students and essentially talk about gay television shows. Apparently, according to numerous angry parents, we started the club to talk about our sexual fetishes and convert other confused teenagers into our sex cult. That would have been more fun. A handful of us stood up against fierce parental opposition, threats of violence, vicious rumors about inappropriate relationships with faculty members, and a Fellowship of Christian Athletes campaign to end our club. In the end, the GSA survived, and still exists, but I was tired of Centreville.

I left as soon as I could to attend the College of William & Mary in Williamsburg, Virginia. Once I left, I understood both the attractive and ugly sides of privilege. On one hand, Centreville instilled an upper middle-class culture in me that has proved invaluable in giving me access to powerful institutions, and the ability to navigate through them. On the other, acquiring these qualities came at a high cost because I felt throughout my life that I was deeply misunderstood, harshly judged, and violently reacted to, not merely because I was an outsider, but because I was a non-conformist. I learned that genuine non-conformity is dangerous to dominant culture and institutions because it contains the power to uncover their fragility. Importantly, I found language to describe these experiences in college. There were even entire disciplines dedicated to studying these social forces that had shaped my life for eighteen years. Classes in sociology, history, women and black studies, anthropology, and other programs impressed on me a memorable theme: institutions exhibit as much power as we, as individuals, invest in them.

I also discovered my own intellect in college. It was not affirmative action that made me feel inferior to my rich, white peers—it was the consistent, subtly biased message that I was smart, but never the smartest; that I wrote well but never the best; and that I was thoughtful but never the sharpest. At William & Mary, I found incredible female mentors who affirmed my abilities to read, write, and think. Not only did they reinforce that my abilities were among the best, but they challenged me to shed the lie that I should be afraid of my own power, which I had been imperceptibly taught. Their confidence in me fostered an understanding that I was simply seeing things and speaking in

ways that were unfamiliar in my old environment. I finally developed a trust that my future could be driven by my own power, and not merely depend on others' shortcomings.

At the same time that I was experiencing my own quiet transformation at school, I was introduced to community organizing as a means of collective transformation. I connected with a multi-issue organizing group, the Virginia Organizing Project, during my second year. I joined a statewide racial profiling campaign and a local affordable housing campaign, and spent a summer organizing a new chapter for the group before I graduated. The model of using a strategic group process to expose what is hurting a community, find what will help, and create a long-term plan to address the harm is undeniably powerful. Issue campaign organizing transformed my beliefs about the origins of political change and scale of movement-building. I went on to become a staff organizer with Virginia Organizing Project (now Virginia Organizing) for a year after college.

My transition out of college was a seminal period. My politics evolved as I came to know different styles of organizing—community-building organizing and healing justice organizing—through a group called Southerners on New Ground (SONG), a queer liberationist group based in Atlanta, Georgia. I love SONG because they were the first organization to tell me that queers and other outsiders should stay and claim their homes in the south. And in this group, I found a home, where I did not have to privilege parts of myself to participate or compete for precious political space and resources. A place where laughing, eating, and forming deep relationships was the political work.

Discovering SONG and its sister organizations inspired an inner-revolution within myself, leading me to loudly resign from a board position at Virginia's lesbian, gay, bisexual, and transgender advocacy group after a protracted battle over racism, trans-phobia, and wealth elitism within the organization. Interestingly, the board from which I separated myself was full of rich lawyers. I can partially credit them with my decision to attend law school, because I saw no reason why people like me should not share the same levels of power as these other board members. I spent months emotionally and intellectually preparing to attend law school, and entered American University Washington College of Law in 2008.

Before describing my experience working to reverse felon disenfranchisement as an Equal Justice Works Fellow, I want to briefly mention two non-political events that transformed me before law school. First, I came to know Terrell Jackson through a pen-pal program. He was an amazing young man who was on death-row. We eventually called each other "brother" and "sister" after four years of being in each other's lives. He was murdered by the state of Virginia in August 2011. Second, I discovered meditation, then

Buddhism, which is teaching me about impermanence—the inevitability of separation; compassion—that which gives us the capacity to transform; and selflessness—revealing the self-imposition and self-censorship that reinforce the illusion that our interconnectedness is not real. These developments, and my law school experience, led to my political radicalization and current practice as a radical lawyer.

I share all of these experiences to demonstrate that they are not wholly personal. I also intend them to demonstrate our intricate, simultaneous relationships with power. Power is not a foreign force that controls us—it is a pervasive site of struggle that we control as people.

Part 2: Engaging Law & Politics

So, what is it like to be a young, queer, Black, southern female lawyer working in Virginia on felon disenfranchisement? Well, it's slow-moving, stressful, and humbling. It requires me to constantly adapt to my environment, navigate internal and external politics, and take well-calculated risks. Most of all it forces me to deal with broader questions, like whether and how engaging with power helps the people with whom I work, and systems which we need to collectively dismantle and re-build.

I want to address this fundamental question about strategically approaching powerful institutions in two parts to provide context to my current work. The first part dissects a myth prevalent in social justice circles. Often, it is posed this way—is it better to work on the “inside” or “outside” of the system? I don't think that this framing is complete. The reality is that each of us exists within powerful institutions—we buy food within a capitalist economy, we make consumer decisions manipulated by the advertisement industry, we receive news generated by corporate media sources, and, most important, we know and love people who not only wholeheartedly embrace these institutions, but we are closely connected to other humans who are integral to the perpetuation of these institutions—decision-makers and power-brokers.

We are influenced by and exist within powerful institutions, even if we are actively resisting their forces. Some of us are re-shaping our relationships with these institutions by intentionally making choices to tip the balance of power. Therefore, the real issues that we encounter are not whether to work “within” or “outside” the system. The real issues are how we should we exist “inside” powerful institutions. To what degree should these institutions affect us? In my view, the existential problem for those who want to strive toward the heart of justice is how to engage with powerful institutions without being crushed.

The second part is how we can positively build alternative institutions, commonly described as “working outside the system.” Often this part is posed this way, lobbed as a grenade against those seeking justice: “If you don't like

the current system and don't have ideas about how to change it, shut up." First, this rationale is nothing more than a silencing tactic that is designed to stifle critique and is not productive in addressing problems that we face. Second, I want to defend speaking out, because expressing rage, sadness, grief, and excitement is important in itself, serving as a mirror to the institutions that we create, and bringing healing to those who are airing their reactions.

Nonetheless, it is critical that we work to build alternative institutions that more responsibly deal with power. And we have to remember that these alternatives are inspired and informed by existing institutions of power. Here is where the most creative, fun, imaginative, and powerful work lives. We see people in the U.S. doing this work all of the time—the Highlander Folk School that taught literacy and provided civil disobedience training during the popular Civil Rights Movement; the South Central Farm of the late 1990s, which was at one time the largest community garden and urban farm in the country, promoting greater and better food access; the explosion of Ithaca Hours and other local currencies in the last twenty years created to encourage neighborhood economies; and even the Occupy Wall Street Movement, which put democratic consensus governance, an alternative to majority-rule governance, on the national map. This form of resistance is the site of many interesting cultural, social, economic, and political experiments, equal in importance to resisting powerful institutions.

One of my favorite radical thinkers, Robin D.G. Kelley, Professor of American Studies and Ethnicity at the University of Southern California, writes extensively about transformative possibility. In a 2010 interview, he explained why he has so much optimism about the future:

It doesn't come from any abstract sense of hope. Nor does it come from any sense of denial about the political realities that confront us and the extent of power and how it works. It comes out of being a historian. There are so many historical examples of seemingly impossible circumstances in which we had these revolutionary transformations.²¹

Without vivid imagination, no positive future would ever exist.

I outline these frameworks because, like many other people, I try to work on both levels—intentionally engaging with powerful institutions, and affirmatively building alternative institutions that maintain healthier relationships with power. Likewise, my fellowship project tries to engage and build on these levels, creating possibilities beyond the law and electoral politics:

Virginia is one of four states that forever strip citizens' civil rights, including their right to vote, after a felony conviction. This type of law is commonly referred to as "felon disenfranchisement." In 2004, at least 377,000 people were estimated to be disenfranchised, or in other words, alienated from their natural civic and political rights as U.S. citizens. Most notably,

the disenfranchised are disproportionately people of color, working-class and poor, disabled, and likely queer/transgender-identified. For example, about 55 percent of disenfranchised citizens in Virginia are African-Americans, who make up less than 20 percent of the state population.

In Virginia, the only way for disenfranchised citizens to restore their civil rights is through individual petitions to the governor. On average, only 1,000 people each year restore their rights. There are ten eligibility criteria that eliminate or discourage many people from accessing the system. In the end, after jumping every hoop and climbing every ladder, the governor may deny an application for any reason or no reason at all, with no appeal process.

Some criticize the system as being fundamentally broken, unfair, and inhumane. Others, like brilliant legal scholar, Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, argue that systems such as these are relics of bygone eras that expressly intended to deny full Black citizenship. I go further to say that Virginia's disenfranchisement system remains because powerful interests (that cut across race and class lines) cannot maintain their democratic stranglehold if it is changed. I believe that it is designed to silently kill the democratic dream.

My Equal Justice Works fellowship, the Virginia Rights Restoration Project (VRRP), is an initiative aimed at building long-term infrastructure to dismantle the existing system. VRRP's specific goal is to engineer new, creative strategies toward the alternative of automatic restoration upon sentence completion, which was necessary after two hard-fought but losing campaigns to pressure previous governors into changing the law.

The overarching strategy of the project is to "open the system up." We predict that the more people who access the civil rights restoration system, the more it will be forced to properly function, which will expose the insidious and discriminatory purpose of felon disenfranchisement. It will change because it was never intended to re-enfranchise. The uncertainty is merely when and how.

Specifically, VRRP has a three "micro-strategies" designed to add pressure to the system. They consist of direct service and direct-action strategies, disabling strategies, and dismantling strategies. However, in actuality, it is only the accumulation of these approaches that can lead to change. At nearly the six-month mark, community members and I have distributed over a 1,000 rights restoration guides, set up rights restoration clinics and clinic programs across the state including at five colleges, begun building a grassroots strategy with state organizers, forced the state government to surrender data revealing the law's significant impact, facilitated greater access through document translation, and challenged long-standing beliefs through legal research that

the only avenues to change is by the governor's executive order or Constitutional amendment. There is much more to do, particularly as we are in the midst of forming a litigation strategy to better position grassroots forces. Nevertheless, VRRP's intention is to form praxis on which to aggressively engage the law and politics in our favor.

In a more concrete sense these strategies mean that I receive a lot of phone calls from people who need help, which I happily answer. I end up in various law libraries throughout the Commonwealth, digging through microfiche, which is fascinating. I find myself facilitating webinar trainings on Saturdays, which I gladly do. And I come up with a dozen ideas about things to try each week, of which one might be worth looking into.

Sometimes I find myself doing unexpected things. For example, I've been assisting a person named Tony Suggs with a pardon application for several months. A pardon is a request to the governor to officially "forgive" a person for a crime or criminal history. Tony had his rights restored in 2006, and helped my organization during our previous campaign. Now he hopes to work in the local school system as a coach to fulfill his passion to mentor young people headed toward the criminal system. Though a pardon far from guarantees that he can overcome the school system's rigid rules about hiring people with felony convictions, it will greatly increase his chances.

Tony's story is unique and the kind that should receive "official forgiveness" from the state. He suffered from severe physical and sexual abuse as a young child. At age ten, his parents abandoned him and his younger brother in the family home, forcing them to go hungry. His father eventually put him to work packaging his dope, and soon he founded himself in the street life. But rather than being an anonymous addict, he was a boxing prodigy. He became the top ranked boxer in the world in his weight class and was favored to win Gold at the 1988 Seoul Olympics.

Throughout his ascent, he struggled to fight his addiction and lost control upon losing his first child to Sudden Infant Death Syndrome. He was a qualifying match away when he was re-arrested for probation violation after he failed the mandatory drug test. In Tony's mind, he lost everything. He voluntarily entered rehab after his jail stint, got clean, addressed his emotional pain with support groups and therapy, and now lives very differently. For over twenty years he has been a devoted father of Little Anthony, surrogate father to his brother's six children, an active church member, and community mentor. It has been important for me to learn Tony's story, and work with him on his petition. Although I never intended to complete pardon petitions through VRRP, its personal meaning to Tony is a radically political act.

But let's take a step back for a moment to examine law as a powerful institution. Can the law really help disenfranchised citizens? An underlying

assumption of my fellowship project is that it can, yet it is an assumption that I question every day. Ultimately I believe, as many radical lawyers do, that the law can only play a limited role in its own self-correction.

Law as an institution is a difficult place to engage with power for numerous reasons. Legal scholar and activist Dean Spade, Assistant Professor at Seattle University School of Law, explains how social movements are affected by their over-reliance on legal institutions in his essay “For Those Considering Law School”:

Most legal work maintains systems of maldistribution, it does not transform them. Very often, legal change that emerges in these moments heavily compromises the demands of grassroots movements in ways that end up providing symbolic victory and possibly a small amount of material change to the least vulnerable of the group who the demands were about, but leave most people the same or worse off. U.S. law is fundamentally structured to establish and uphold settler colonialism, white supremacy and capitalism—the legal system will not dismantle these things. The idea that people who want to make change will make the biggest impact by becoming lawyers and bringing precedent-setting lawsuits needs to be released in the face of what movement history reveals. Once you let go of that idea, you can start to think about what role lawyers should or could have in social movements and evaluate whether you see yourself in those roles.²

Dean Spade is largely responding to decades of landmark civil right victories for LGBT people. For example, even as laws like the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 are enacted, LGBT and queer violence continues to be as ruthless as ever, particularly for queer/trans, working class, and poor people of color who are already systemic targets of institutional abuse by police, courts, and prisons. Law doesn’t solve these problems but can bolster the positions of broad-based movements that make demands that exceed the law, as Dean Spade believes is historically effective. His advice to understand our roles as people engaging with law-making institutions extends not only to prospective law students but to any person wishing to enter electoral politics.

Within the institution of law lies perhaps the most controversial institution at the moment: electoral politics. The optics of electoral politics may seem counterintuitive to justice-seekers because it is about maintaining power with and over others, without full acknowledgement that it is the very purpose of electoral politics. It can also be among the more challenging institutions to engage with as a person committed to collective justice because it is about individual self-preservation of that power. It can prove difficult to align collective values with a desire to maintain a powerful position, from which a person can wield influence on the local, state, or national levels. I admire women and anyone else carefully trying to achieve this balance.

These tensions come up in VRRP. This year, for the first time, a white Republican lawmaker introduced an automatic rights restoration bill. I was excited because his interest in the issue changed the politics around a proposal that historically starts out each year dead in the water. This lawmaker introduced a narrow proposal that would automatically restore voting rights for so-called non-violent offenders because, based on his calculations, it was the most politically palpable. Before I learned about his bill I had shopped around the idea to other lawmakers about separating the two civil rights stripped by state law into separate bills. My rationale is if voting rights is the hot-button issue that stalled proposals year after year, then why not sever the issues so disenfranchised people could at least restore some of their rights, if passed. Sound reasonable? This was apparently an exceptionally bad idea. I was told that separating the issues would exhaust the limited political capital that existed for lawmakers to consider this issue. In other words, lawmakers would grow tired of making laws. The worst part was that it was good advice, even though the bill died in subcommittee.

As a long-time legislative observer and one-time state lobbyist, I've seen legislators wishing to maintain a delicate balance between their self-preservation to maintain power and forceful advocacy to represent their beliefs. The entrenched political challenge of our time may be this: how do you peacefully and effectively govern diverse communities, states, and nations with others who hold fundamentally different values?

On one hand, there is the Barack Obama philosophy, which consists of forging consensus by finding common ground. On the other hand, there is the Tea Party philosophy, which consists of abandoning all sense of self-preservation to govern according to rigid but sincerely-held principles. These philosophies are not left versus right—they are not even purely ideological. I think that neither philosophy reflects the true nature of the problem because it is distorted by choices within a “winner-take-all” two-party system.

The main source of our present-day political tensions is between those who want to invest and nurture public institutions and those who want to demolish and undermine them. Developing a political agenda around protecting public institutions and organizing electoral support around this guiding principle has the potential to disrupt the prevailing status quo.

My other insight comes from popular education teacher and theorist Paulo Freire, who explained in his leftist classic, *Pedagogy of the Oppressed*, that the cure to oppression is our own humanity. The heart of justice resides within our institutions: people. If we humanize our politics, we have hope for better government. Let me be clear. Humanizing politics is more than civil discourse. We see, after all, how collegial lawmakers respectfully cooperate to pass devastating laws that hurt other people and our natural environment,

often in the name of economic prosperity. These politics are a false choice. The choice to humanize politics, in my mind, means measuring your actions against your values to sustain our collective well-being. These are moral struggles, which are entirely burdensome to take on for public scrutiny, but are essential.

People who enter into electoral politics must be vigilant about the degree to which they are being changed by politics and politics is changing them. What are my values? Do these values promote collective well-being? Do I feel as if I have some control? Is this the most meaningful contribution to the world that I can make? These are questions that I ordinarily ask as a lawyer and political player, working in one of the most conservative states in the country. I think any person intentionally engaging in law and politics must worry about the direction in which she is moving—toward her heart of justice, or more distant.

Part Three: Three Values

In January of this year, I joined 125 people in attending an event hosted by Project South and Southerners On New Ground called the Queer Peoples Movement Assembly. Here, a working definition for queer liberation was presented:

Queer liberation seeks liberation for all peoples through working for the recognition of our whole selves; the integrity of the relationships and families we embrace; self-determination in choices for our bodies in sexuality, gender, eroticism, disability, safety, and privacy; the dignity of our spiritual practices; fairness in our economic systems, our work and its compensation; full access to participating in and benefiting from society's institutions; human rights for all; and justice as a birthright for all.³

This statement is powerful to me because it relates an affirmation—what a free world for queer and all people would feel like. Importantly, this definition is powerful alone because it was communicated at the Assembly. Even if you and I will never experience liberation, as defined here, we will know that this possibility exists, which I suggest is enough. Imaginative politics is the seed for our inspiration and a roadmap for our work.

But, if we have opportunities to embody our visions then we should be courageous enough to do so. Queer Liberation, along with Hip Hop and Buddhism has yet again transformed my relationship with power in recent years. Queer leftists have shown me that it is possible to build a community based on the politics around love. Hip Hop introduced me the politicized poetry of critique and possibility. And Buddhism has given me a pathway through which to practice healing and shatter conditioned myths in my life. I am certain that each of you has or will bond with a freedom tradition, whether political, spiritual, artistic, or most likely the fusion of all of these things. In

it you may discover that the power we already possess is tremendous, and that the unification of our collective power is but a multiplier.

I briefly want to touch on three specific values from these traditions that have sustained me over time: embracing vulnerability, experiencing wholeness, and cultivating radical imagination.

Embracing vulnerability to me is living freely to recognize unrealized power. The politics of control and domination are interrupted when we embrace our own fears and anxieties to transcend them. It requires intention, honesty, support, and above all, gentleness. In the VRRP work, this means that I openly explain to every group I train that there is a great deal that I don't know, but through sharing information I hope not only to learn, I want to serve as a repository so that I can share with others with whom I come in contact. I try not to worry about being perceived as inexperienced, lacking confidence, or ceding "authority." In the end, I think that I am striving toward justice when I can shed my ego for the benefit of the work.

By identifying my fears and routinely practicing to overcome them, I find that I am creating an opening for experiencing wholeness. I try to be aware in my life when I am internally separated—when I am feeling "small" because parts of me are ignored, repressed or neglected. In the day-to-day grind that means remembering to live in my body, as I can get stuck living in my head as an intellectual person. With political work this often means avoiding spaces where all of my identities or experiences—happy or sad, neat or messy, known or unknown—are not welcomed. Whether I am in a Black Baptist Church in the state capital of Richmond or at a rural county fair at the far southwestern tip of Galax, Virginia, I will have on gender ambiguous clothing and will publicly name *Golden Girls* as my favorite TV show of all time, if asked. Experiencing wholeness is a barometer of the balance of power around me. The more free I feel, the closer I am to the heart of justice.

And the more we are able to shake away from our own ego-driven desires, burdensome expectations, pernicious myths, and senseless conventions, inside and outside of ourselves, the easier it is to live in the world that we imagine, the world that we are striving toward. Some dismiss radical imagination as the stuff idealistic kids chase vainly after. On the contrary, iconic feminist thinker and progressive Buddhist bell hooks explained in a 1996 interview:

My mother in Kentucky always used to say, 'Life is not promised,' in the sense that boredom is a luxury in this world. Where life is always fleeting, each moment has to be seized. For us children, that was a lesson in imagination, because she was always urging us to think of the imagination as that which allows you to crack through that space of ennui and get back going.⁴

bell hooks' memory is not about childhood naivety or escapism. Rather, it is recalling a survival strategy against complacency, a way to remain steeped

in realities that are exhausting and harsh. Possibility can be the present if we are willing to call upon our hope to thrive as people. After all, in a traditional place like Virginia, there will be no reason to do the work for a freer democracy, absent a daring—audacious—imagination. For without the unthinkable there is no thought, and without the unattainable there is no spirit to endeavor.

Conclusion

Regardless of how we engage with powerful institutions, we maintain our capacity to interact with people who make up these institutions, and to re-shape our relationships to their power. For all of us, fleeting moments of choice, feeling, and imagination will define our course toward or away from the heart of justice.

Fully experiencing the “in between-ness” of living within but striving toward the heart of justice resonates with our present struggles and our manifested dreams. Power drapes our everyday outlooks, is sensed in our bodies, and resides in the recesses of our mind, which, upon acknowledgment, is an opportunity to transform. We are much more than parts of a whole. We are power and we choose to either share it generously or hoard it selfishly. I hope by sharing my own formative experiences with power, explaining the ways in which my current work engages with law and electoral politics, and offering values that have sustained me to live more freely so that I can resist and build, that you too can envision and embody a world where we practice supreme bigheartedness and love. Because while there is an infinite supply of power, our experiences as humans during our lifetimes are remarkably finite.

NOTES

1. Interview by AK Press Blog with Robin D. G. Kelley, Historian of black culture and politics, in New York City, New York (Apr. 21, 2008), (*transcript available at* <http://www.revolutionbythebook.akpress.org/challenging-power-and-creating-newsplaces-for-possibility-a-discussion-with-robin-dg-kelley/>).
2. Posting of Dean Spade to deanspade.net, *For Those Considering Law School*, [deanspade.net](http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School-Nov-2010.pdf), *available at* <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School-Nov-2010.pdf> (Oct. 26, 2010).
3. Queer Peoples’ Movement Assembly, Creating Change Conference, Nat’l Gay & Lesbian Task Force, Jan. 28, 2012.
4. Interview by Shambhala Sun with Bell Hooks, Feminist and progressive Buddhist, (Sept. 1995), (*transcript available at* http://www.shambhalasun.com/index.php?option=com_content&task=view&id=2089&Itemid=0).



Anne O'Berry

**BOOK REVIEW:
RENDITION TO TORTURE**

***Rendition to Torture*, by Alan W. Clarke, New Brunswick, New Jersey and London, U.K: Rutgers University Press, 2012. 248 pages. \$42.95.**

Immediately following the tragic events of September 11, 2001, the United States embarked on a campaign of “extraordinary rendition,” whereby suspected terrorists were rounded up from all over the world and transported to countries that subjected them to brutal and medieval torture. As the author of *Rendition to Torture*, Alan W. Clarke, explains: “Bones and lives were shattered as U.S. agents, using private corporate jets, carried the innocent and guilty alike to Morocco, Syria, and Egypt [among other nations]. The prohibition against torture fell away without appreciable resistance.” Clarke’s book seeks to examine and understand how and why the legal and moral proscriptions against torture, upon which democracies profess to pride themselves, were so readily cast aside in the aftermath of 9/11, and serves as a cautionary tale of how even self-proclaimed democracies that tout the rule of law will resort to torture, disappearance and death—as well as cruel, inhuman and degrading treatment—when it suits their purposes.

The book’s title, *Rendition to Torture*, is intended to differentiate extraordinary rendition from the earlier practice of “rendition to justice,” under which notorious fugitives who had managed to escape extradition – such as Nazi war criminal Adolf Eichmann and Carlos “the Jackal”—were captured, tried, convicted and sentenced in a court of law. “Extraordinary rendition,” in contrast, involves abducting suspected terrorists, and rendering them to a third country where they were interrogated, tortured and in some cases “disappeared” or murdered rather than tried and sentenced in a court of law. Clarke’s book discusses how many of the suspected terrorists subjected to these tactics turned out to be wholly innocent. Clarke goes into detail discussing the cases of Maher Arar, Binyam Mohamed, and Khalid El Masri. The author explains that the first renditions to torture occurred during the Clinton administration, when suspected Islamic militants were rendered to Egypt and tortured and/or executed. Extraordinary renditions thereafter proceeded full-bore under President George W. Bush in the wake of 9/11.

Anne O’Berry, the Southern Regional Vice President of the National Lawyers Guild, is a former death row lawyer currently engaged in civil rights and class action litigation in Florida.

Despite President Bush's famous assertion that "the United States does not torture," the book *Rendition to Torture* comprehensively documents how the United States did indeed adopt torture as a matter of official policy. The U.S. government engaged in torture both directly—by capturing thousands of people in the so-called "War on Terror" and employing interrogation techniques that undeniably constituted torture in U.S. black site prisons and places such as Guantanamo Bay and Abu Ghraib—and by proxy, by outsourcing the more brutal and extreme forms of torture to countries long considered the worst human rights violators. The author convincingly documents how, despite U.S. denials that it tortured or rendered people to torture, the evidence irrefutably establishes that it did this knowingly and intentionally, and asserts that some of these practices continue under the current administration of President Barack Obama.

Clarke details the fallout from these practices, including the fact that torture produced false confessions with grave consequences, such as the launching of the illegal war in Iraq based in part on the torture-induced, and false, confession of Ibn al-shaykh al-Libi that Iraq was training members of al-Qaeda in the use of weapons of mass destruction. Clarke also discusses how the torture, rendition and killing of innocents has in all likelihood created enemies that did not previously exist and has served as a recruiting tool for those who now consider the United States their enemy.

Clarke also documents the complicity of other nations, including the United Kingdom, Canada, Germany, Scotland, Spain, Italy and Sweden, which either participated in the interrogations of suspected terrorists or allowed CIA-chartered jets carrying hooded and shackled prisoners to use their airspace and to land and refuel in their countries. Other nations such as Poland, Romania and Lithuania provided black sites for secret prisons that were used for harsh interrogations and as transit points for rendition.

Perhaps most chillingly, the book recounts in detail how the American legal system was distorted and in some cases simply disregarded in an attempt to justify and legalize that which most international law and human rights experts agree was clearly illegal under the Geneva Conventions and other treaties and laws to which the U.S. is subject. Clarke discusses the approval of so-called "harsh interrogation techniques" by the U.S. Department of Justice's Office of Legal Counsel, as evidenced by the infamous "torture memos" authored by Jay Bybee—now a judge on the U.S. Court of Appeals for the Ninth Circuit—and John Yoo—a law professor at the University of California at Berkeley. The use of the terms "enhanced interrogation" and "torture lite" were euphemisms intended to downplay the full horrors of these techniques, which were designed to "enhance human suffering without leaving a visible trace" of injury or maiming. Such techniques, implemented "for days upon days, without end and without hope" upon hundreds or perhaps

thousands of prisoners, included waterboarding, the use of stress positions, sleep deprivation, wall slamming, extreme heat and cold, eardrum-piercing loud music, “Palestinian hanging” (where one is suspended by one’s arms manacled behind one’s back), and being chained hand and foot to the floor, among other tactics.

The author vividly describes waterboarding and persuasively makes the case that waterboarding is not merely “simulated” drowning but is, in fact, drowning. He describes how one famous skeptic, the now-deceased writer and Iraq War advocate Christopher Hitchens, initially refused to call waterboarding torture, but after agreeing to submit to the procedure, recanted and called it torture after experiencing it for just a few seconds. Hitchens wrote:

You feel that you are drowning because you are drowning—or, rather, being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure. . . . ‘Any time is a long time when you’re breathing water.’ . . . [I]f waterboarding does not constitute torture, then there is no such thing as torture.

The United States, with the cooperation of Canada and Europe, turned to extraordinary rendition as a way to extract confessions using even more sadistic and barbaric forms of torture that went beyond “enhanced interrogation,” such as false burial, being stuffed in a box measuring 20 inches by 20 inches, bone breaking, mutilation, such as the slicing of one’s penis, all the way up to disappearance and death.

Rendition to Torture is an important book, as it sets the historical record straight, by comprehensively documenting how not only CIA interrogators and low-level members of the U.S. government and military, but also senior members of the Bush Administration—including Donald Rumsfeld, Condoleezza Rice, Colin Powell, George Tenet, John Ashcroft, Dick Cheney and President Bush himself—committed war crimes by approving the use of torture, cruel, inhuman and degrading treatment, and extraordinary rendition in the elusive “War on Terror.” Clarke observes that while those who sanctioned and approved these practices are at risk of prosecution whenever they travel outside the United States, the political reality is that they likely will never be prosecuted for their war crimes.

The author injects a measure of hopefulness by surveying the decisions handed down by the United States Supreme Court in *Rumsfeld v. Padilla*, which ruled that an American citizen arrested on U.S. soil for alleged terrorist acts is entitled to petition for a writ of habeas corpus; *Hamdi v. Rumsfeld*, which held that a citizen, even if captured on a foreign battlefield, cannot be held indefinitely without charge, but is entitled to notice of the charges and a hearing; *Rasul v. Rumsfeld*, which provided that the statutory writ of habeas corpus applies to noncitizens detained at Guantanamo Bay; *Hamdan v. Rums-*

feld, which ruled that the procedures set forth in the Detainee Treatment Act of 2005 violated the Uniform Code of Military Justice (which incorporates the Geneva Conventions); and *Boumediene v. Bush*, which held that the constitutional writ of habeas corpus applies to foreigners captured abroad and held at Guantanamo and that the Military Commissions Act of 2006—which attempted to cut off all civilian court review for Guantanamo detainees—was an unconstitutional suspension of the great writ.

Clarke asserts that these decisions “return[] the United States to potentially full compliance with international law.” He does not discuss—because it is beyond the scope of the book—the current administration’s use of predator drones and “kill lists” to assassinate suspected terrorists, which clearly are not in compliance with international law.

Despite these Supreme Court rulings, the author details how the United States has aggressively blocked any hope of judicial redress for victims of torture and rendition by invoking the “state secrets privilege,” whereby evidence is severely circumscribed or cases are dismissed outright based on the government’s unsubstantiated claim that a trial would expose state secrets and thus pose a risk to national security. Whereas other countries such as Canada and the United Kingdom have more willingly embraced redress for such victims, paying out millions of dollars in settlement, the U.S. government has “completely closed the courthouse doors to such plaintiffs.” Also deeply troubling is the Supreme Court’s refusal since its 2008 decision in *Boumediene* to review lower court decisions that have reversed the granting of habeas corpus relief in several cases.¹ At the conclusion of the book, Clarke reports that CIA black sites were not closed until a full year into Obama’s presidency, in January 2009, by executive order. He further notes that the Obama administration claims the right to continue renditions, and there are reports that the United States still operates a secret prison at Bagram Air Base in Afghanistan. This prompts the question: are renditions and torture continuing under the Obama Administration? Earlier in the book, the author argues that because of *Boumediene*, any president will be less likely to provide aggressive interpretations of the Geneva Conventions. However, the Obama administration has just recently asserted that due process does not require judicial review of the administration’s decisions to assassinate suspected terrorists, including U.S. citizens such as Anwar al-Awlaki, killed by a U.S. drone in Yemen. The President also just signed into law the National Defense Authorization Act, which authorizes the indefinite military detention of suspected al-Qaeda members, “associated forces,” and those lending “substantial” support, potentially including U.S. citizens.


Given that the administration claims the right to assassinate, without charges, trial or any semblance of due process, those it deems to be “terrorists,”

as well as the right to detain such individuals indefinitely and also to engage in “signature” drone strikes against people whose identity is unknown, it seems clear that the U.S. government’s aggressive misinterpretation of the Geneva Conventions not only continues apace but has graduated from claiming the right to torture to claiming the right to kill.

NOTES

1. See, Posting by Marjorie Cohn to the *Jurist* Forum, *Hope Dies at Guantanamo*, JURIST.ORG, available at <http://jurist.org/forum/2012/06/marjorie-cohn-latif-scotus.php> (June 20, 2012) (asserting that the Supreme Court’s refusal to review these decisions has rendered Boumediene a dead letter).





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of the Bush-Cheney torture regime are going to be prosecuted for violations of U.S. law, it will be by the appointees and employees of this president.

Never in the history of American law enforcement have we regarded the prosecutor as satisfying his duty by merely renouncing and promising not to repeat the crimes of his predecessor. If Barack Obama fails to prosecute, or even meaningfully investigate, these crimes, not only does he risk sully his second term by perpetuating the faults of his first, he also risks making the Bush-Cheney era's sad lapse into sadism officially bi-partisan and thus, one fears, recurring. Obama's policy of multi-national assassination by drone—secretly killing thousands with neither congressional nor judicial oversight, and thus substituting one form of extra-constitutional executive power for another—has helped ensure that torture now lies like a loaded gun, barrel still smoking, for emboldened future presidents to pick up and fire during their own moments of fear and pugnacity.

Stacy Cammarano's "I Beg Your Pardon: Maintaining the Absolute Ban on Torture Through the Presidential Pardon" compares our current torture problem with those recently addressed by South Africa, Argentina, and Israel and provides a plan of action for Obama's second term. Her article calls for immediate investigations and prosecutions while seeking to assuage concerns expressed by the Obama administration that government agents caught in the fog of war or in an insuperable moral dilemma might be unfairly punished. These agents, if any of them truly exist, may petition Obama for mercy and, as the Constitution permits, he may extend them a presidential pardon. Considering what psychologists and our common powers of observation tell us about the effects of torture on the psyche of the torturer, a plea for mercy doesn't seem altogether unfitting. However, the harm done to torture victims—and our national reputation—is as harrowing as it is self-evident, which might make granting such a plea a different story.

Nick J. Sciuлло's "Social Justice in Turbulent Times: Critical Race Theory & Occupy Wall Street" describes the racial dynamics existing within the occupy movements and argues, emphatically and persuasively, that critical race theory should be integrated into their anti-capitalist critiques.

In "Toward the Heart of Justice" *NLGR* Articles Editor Richael Faithful tells her own story as a "young, queer, Black southern female lawyer" working against the anti-democratic indignities of felon disenfranchisement. The essay originated as the keynote address delivered at the 2012 Women's Diversity Conference at Adrian College in Adrian, Michigan. I was fortunate enough to be in attendance when it was delivered. I am incapable of dissociating the text in my own mind from the confident, resolute, and precociously wise tones which greeted the faculty and students that day. I suspect that these qualities will shine through plainly to readers, as well.

We close with a review of *NLGR* Contributing Editor Alan W. Clarke's compelling new chronicle of the Bush-Cheney Torture Era, *Rendition to Torture*, by civil rights attorney and NLG Southern Regional Vice President Anne O'Berry.

—Nathan Goetting, *editor in chief*

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