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# Portraits of Resistance: Lawyer Responses to Unjust Proceedings

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PORTRAITS OF RESISTANCE: LAWYER RESPONSES TO  
 UNJUST PROCEEDINGS

Alexandra D. Lahav<sup>\*</sup>

This Article considers a question rarely addressed: What is the role of the lawyer in a manifestly unjust procedural regime? Many excellent studies have considered the role of the judge in unjust regimes, but the lawyer’s role has been largely ignored. The analysis in this Article draws on two case studies: that of lawyers representing civil rights leaders during protests in Alabama in the 1950s and 1960s, and that of lawyers representing detainees facing proceedings before the military commissions in Guantánamo Bay, Cuba. These portraits illuminate the strategies available to lawyers who face procedurally unjust tribunals operating within a larger liberal legal regime such as our own.

The purpose of the Article is to paint a landscape of U.S. lawyer resistance to procedural injustice that can be used as a basis for further inquiry. The Article considers hard questions about lawyer participation in unjust tribunals, such as whether lawyers who participate are complicit in injustice, and the consequences to the client and to society of lawyer resistance to injustice. It demonstrates the dualistic interplay between acts of resistance and complicity: Acts of resistance may be coopted and perpetuate injustice, and acts that appear to be complicit can result in powerful forms of resistance. It analyzes the forms and expressions of resistance, and presents an original schema of the acts of resistance. The Article also explores some questions raised by this analysis, such as what are the lawyer’s responsibilities to society and to the client, and whether lawyers can know when a tribunal is so unjust as to merit resistance. The Article concludes by considering avenues for further research.

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## INTRODUCTION

On March 26, 2007, Joshua Dratel, a prominent New York criminal defense attorney, stood before the military commission in Guantánamo Bay, Cuba, for the last time.<sup>1</sup> His client David Hicks, a diminutive Australian accused of providing material support for terrorism, was set to go to trial shortly. Dratel had refused to sign a notice of appearance required by the judge in order to continue appearing on his client's behalf. This notice included a statement waiving the lawyer's right to contest any rules promulgated by the commission in the future, including rules promulgated for the first time during trial. Before the courtroom packed with government officials, human rights monitors, and journalists, Dratel told the court: "I cannot sign a document that provides a blank check on my ethical obligations as a lawyer . . . ."<sup>2</sup> The judge then disqualified him, and Dratel left the

1. Dratel's story is told in greater detail in Part I.B.1, *infra*.

2. Transcript of Record at 27, *United States v. Hicks*, I.S.N. 0002 (Office of Military Commissions, Mar. 30, 2007), available at [http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20\(Redacted\).pdf](http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20(Redacted).pdf) [hereinafter Transcript of Record].

room. A few days later Hicks pled guilty, and was returned to Australia to serve a nine-month sentence.<sup>3</sup>

Dratel faced the possibility that the system in which he was working was a sham. The military commission system was not organized by a set of rules known in advance, but instead by a set of seemingly ad hoc and ever-changing regulations. The resulting unpredictability was further compounded by a bias against the accused that was structured into the system. William Haynes, Chief Counsel to the Department of Defense and legal advisor to the military commissions, reportedly told Chief Prosecutor Morris Davis, the man who prosecuted the Hicks case: "We can't have acquittals! We've got to have convictions! If we've been holding these guys for so long, how can we explain letting them get off?"<sup>4</sup> Dratel was asked to choose between signing a statement agreeing to a system that he believed violated basic prerequisites of the rule of law and abandoning his client to face the tribunal without his help.

Dratel's moral crisis reflects the competing claims on a lawyer: the duty to zealously advocate for one's client and fidelity to the rule of law. Here, where Dratel was faced with a tribunal that he believed to be unjust, the crisis was more complex. This story offers us an opportunity to ask questions that we often ignore—questions about the limits of lawyers' duties to clients and to the rule of law, and about the lawyer's role in maintaining or undermining the legal system.

Guantánamo is likely closing.<sup>5</sup> As the Obama administration decides how to try detainees, the issues raised by the military commissions are more relevant than ever. The military commissions system has been considered by many to be an extreme example of injustice, a literal outlier based not only on its geographic location outside the United States but also on the U.S. government's avowed refusal to permit application of constitutional principles to the trials conducted there.

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3. Sarah Wood, *Judge Accepts Australian Detainee's Guilty Plea*, AM. FORCES PRESS SERVICE, Mar. 30, 2007, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=32642>.

4. See Jane Mayer, *The Battle for a Country's Soul*, N.Y. REV. BOOKS, Aug. 14, 2008, at 41–42. The comment is attributed to Mr. Haynes by Colonel Morris Davis, the former chief prosecutor of the military commissions, in response to Colonel Davis's statement that some acquittals would prove that the tribunals were fair.

5. An executive order issued on January 22, 2009, temporarily halted prosecutions by military commission and ordered closure of the Guantánamo detention center within one year. Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009). However, the Obama Administration has did not meet this deadline. See Charlie Savage, *Plan to Move Guantánamo Detainees Faces New Delay*, N.Y. TIMES, Dec. 23, 2009, at A1. While the president has not ruled out trying some cases by military commission, the administration has transferred some cases to federal court. See Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in NY*, N.Y. TIMES, Nov. 14, 2009, at A1.

Extreme examples such as Guantánamo are important to study because our history has been marked by legal regimes now universally recognized as unjust, such as tribunals constituted under the Fugitive Slave Act<sup>6</sup> and de jure segregation. Moreover, such extreme examples may enable us to consider questions lawyers face when using the strategies described here to resist injustice in ordinary practice. What is the lawyer's responsibility when confronted with injustice in the system? What is the significance of using one strategy of resistance rather than another?

We do not know how often lawyers face the reality that the system they are working in is a sham. As members of the legal profession, we tend not to entertain or openly discuss the illegitimacy of legal processes. Lawyers may complain that a particular judge was biased or the results of a particular trial unfair, but these are understood as isolated problems, fundamentally different from the allegation that an entire legal system is corrupt. Even so, such accusations raise the specter of fundamental injustice and only appear isolated because we believe that on a systemic basis, the system is just. But this evaluation, too, is a question of judgment and a subject of dispute.<sup>7</sup>

Surprisingly, the question of lawyer resistance to and complicity in unjust tribunals has not been the subject of sustained study.<sup>8</sup> This Article is the first

6. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

7. For example, the civilian criminal justice system in the United States today can be accused of harboring fundamental injustice. In 2007, the head of the Capital Defender Service of the state of Georgia resigned to protest budget cuts that he said made it impossible to fairly represent his clients. "The old adage 'you get what you pay for' is particularly true with regard to the defense of capital cases," he told the press, "which involve the greatest responsibility and most difficult assignment that any lawyer is asked to undertake." Associated Press, *Top State Defender Quits: Death Penalty Lawyer Calls Cases' Funding "Grossly Inadequate,"* AUGUSTA CHRON., Sept. 1, 2007, at B6; see also Brenda Goodman, *Official Quits in Georgia Public Defender Budget Dispute*, N.Y. TIMES, Sept. 7, 2007, at A18. For a scholarly argument about the effects of resource inequality on procedural fairness, see Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303 (1988). The problems of how lawyers are to distinguish between isolated and systemic injustice, and what type of resistance is appropriate to what level of injustice, are beyond the scope of this Article.

8. Thoughtful recent scholarship on lawyer participation in the military commission process has considered lawyer resistance only as a local phenomenon, and largely ignored the question of complicity. See, e.g., Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009) (discussing and critiquing rights-based strategies of internal resistance adopted by the author in his own work); Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SECURITY L. & POL'Y 375 (2005) (advocating a lawyer boycott of the military commissions as then constituted); David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 (2008) (arguing that, in the context of the military commissions, the lawyer's role as zealous advocate is necessary to uphold human dignity of those imprisoned in Guantánamo Bay); Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347 (2009) (describing out-of-court advocacy strategies). Lawyer resistance has been given some consideration in the international context. See, e.g., RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994*, at 549 (1995) (arguing in favor of lawyer resistance to the Apartheid regime

analysis of lawyer responses to unjust tribunals focusing on the American historical experience. It draws on two episodes from our history to examine the difficulties lawyers face when asked to participate in procedurally unjust tribunals. It further presents a map that will help the reader understand the options available to lawyers in these situations and the consequences of particular choices. Although the Article focuses on the lawyer's dilemma as experienced by defense counsel, the analysis applies equally to lawyers on both sides of the "v."—both when injustice furthers the client's goals and when it harms the client.<sup>9</sup>

The goal of the Article is to make room for the possibility of various answers to the problem of the unjust tribunal. I proceed from the position that if there were a right answer to the lawyer's dilemma of what to do in the face of unjust proceedings, it would not be a true dilemma.<sup>10</sup> Nonetheless, the identification of available choices and of factors that influence their consequences may aid lawyers in their decisionmaking.

My main contribution is to provide the first systematic look at types of attorney resistance to manifest procedural injustice, an undertaking that can form the basis of further inquiry. In the process, the Article makes two normative claims. First, it is possible for the lawyer to be degraded by participation in an unjust tribunal. Lawyers may be complicit in the conduct of unjust tribunals because their participation makes an adversarial proceeding possible. Second, recourse to the lawyer's professional role does not resolve the dilemma of the lawyer facing an unjust tribunal. Even if the lawyer concludes that the

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in South Africa through litigation); DEMOCRACY AND THE JUDICIARY (Hugh Corder ed., 1989) (providing an intriguing series of articles written by practicing lawyers in Apartheid South Africa); Stephen Ellman, *Law and Legitimacy in South Africa*, 20 L. & SOC. INQUIRY 407 (1995) (discussing lawyers in the South African legal system); John Leubsdorf, *Gandhi's Legal Ethics*, 51 RUTGERS L. REV. 923 (1999) (discussing Gandhi's approach to lawyering in the South African and Indian legal systems). Lawyer complicity in Vichy France is also the subject of an excellent study. See RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996). Lawyer complicity in unjust tribunals inside the United States has been completely ignored in scholarship, although the legal implications of lawyer complicity have been considered in the context of the torture debate. See Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in *THE TORTURE DEBATE IN AMERICA* 241 (Karen J. Greenberg ed., 2006); PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

9. The dilemma was similar for prosecutors and defense attorneys in the military commissions system, for example. For another example of a case where the lawyer for the state ought to have considered the effects of his participation in an unjust tribunal, see *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1980) (holding that denial of counsel in parental rights-termination hearing does not violate due process).

10. The nature of a moral dilemma is that it forces a person to choose between two courses of action, both of which are wrong. If it were resolvable by recourse to a higher principle, it would not be a moral dilemma. See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 161–62 (1973).

regime is unjust and resistance is required, acts of resistance still may leave the lawyer open to allegations of complicity.

Part I sets the stage with two portraits of resistance. The first portrait is of lawyers and leaders in the civil rights movement during two critical trials of Dr. Martin Luther King Jr.: one for criminal contempt before a moderate segregationist judge in Birmingham, Alabama, in 1963, and another for participation in the Montgomery Bus Boycott in 1955. The second portrait is of lawyers representing Guantánamo detainees facing trial before military commissions in 2007 and 2008. In these instances, lawyers faced tribunals they believed to be unjust within an otherwise liberal legal regime. The lawyers' stories provide the foundation for the discussion in the remainder of the Article.

Part II interrogates understandings of lawyer complicity and resistance to injustice and demonstrates the dualistic interplay between these two responses. Acts of apparent resistance can be understood as complicit in the unjust tribunal, and acts appearing to be complicit can result in powerful forms of resistance. I also describe in detail the forms of resistance (exit and voice) and the expressions of resistance (internal and external). I then present a new schema of acts of lawyer resistance to procedural injustice: (1) collective boycott; (2) individual refusal to participate; (3) using legal argument within the tribunal (or "using the master's tools to dismantle the master's house"<sup>11</sup>); (4) making a record for a higher tribunal; and (5) appealing to public opinion. None of these is a perfect solution to the lawyer's dilemma; each risks upholding the procedural status quo, and each leaves potential clients in jeopardy.

Part III considers some questions raised by this analysis. First, to what extent does recourse to the lawyer's professional role help in resolving the lawyer's crisis before the unjust tribunal? I argue that our current understanding of the lawyer's role does not dictate a particular approach to the question of what lawyers should do when facing what they perceive to be unjust systems. Yet this uncertainty does not make their choices any less important to the amelioration of injustice. Second, how is the lawyer to know when a tribunal is sufficiently unjust to merit resistance? Here, I recognize that procedural justice is a contested concept and, while not attempting in this short space to provide a complete theory of procedural justice, make the pragmatic argument that lawyers must make their own determinations about when resistance is required. Complicating things further, because law is dynamic, the lawyer's own actions may alter the legal landscape, contributing to injustice or preventing

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11. See AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110, 110–13 (1984).



it. As a result, lawyers' choices of the form that their resistance will take are critical to shaping the law. At the same time, lawyers' choices are also constrained by the context in which they are working: lawyers must make hard choices without knowing in advance whether they are on the side of history.

The Article concludes by explaining that the issue of lawyer resistance to unjust tribunals is an important one for lawyers and future lawyers to consider more deeply because unjust tribunals are certain to reappear. It lays the groundwork for further research on lawyer responses to unjust proceedings, shedding light not only on the extreme situation of the manifestly unjust tribunal, but also on the role of the lawyer in our legal system more generally.

## I. TWO PORTRAITS OF RESISTANCE

American history is full of stories of lawyers resisting injustice. The lawyers who defended alleged slaves facing return to slavery under the Fugitive Slave Act<sup>12</sup> and who tried to prevent their exportation to the South resisted an unjust procedural regime (as well as the substantive injustice of slavery).<sup>13</sup> Similarly, lawyers who represented socialists and anarchists in the early decades of the twentieth century, and communists in the middle of the century, represented their clients in tribunals they believed were unjust.<sup>14</sup>

This Article tells two such stories. The first is the story of the lawyers who represented Martin Luther King Jr. in a criminal contempt trial in Birmingham, Alabama, in 1963, and in his 1955 trial arising out of the Montgomery Bus Boycott—both during the height of protests against segregation. The second is the account of some of the lawyers who represented persons detained as part of the “War on Terror” and tried before military commissions in Guantánamo Bay, Cuba. The clients are different and the historical and legal contexts distinct, but both raise the same question: What can lawyers do when asked to participate in adversarial proceedings they believe to be a sham?

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12. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

13. That regime permitted an ex parte determination of the individual's status by a commissioner, explicitly excluded the accused's testimony from the proceeding, and entitled the commissioner to a ten-dollar fee if he issued a certificate of removal, but only a five-dollar fee if he denied the certificate. See *id.*; see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 175 (1975).

14. See, e.g., ERNEST FREEBERG, *DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT* (2008); Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916–1939*, 77 *FORDHAM L. REV.* 1731 (2009).

## A. The Trials of Dr. King

Martin Luther King Jr. was tried at least twice as a result of his participation in protests against segregation in Alabama. This subpart tells the story of two trials. The first is Dr. King's trial for criminal contempt for protesting segregation in Birmingham, Alabama, in April, 1963, in defiance of an injunction. The second is his trial for violating an Alabama state law prohibiting boycotts on account of his leadership in the Montgomery Bus Boycott of 1955. Both trials arose from among the most famous protests of the civil rights movement.

### 1. *Walker v. City of Birmingham*

Dr. Martin Luther King Jr. came to Birmingham, Alabama, in April, 1963, to march against segregation.<sup>15</sup> The Southern Christian Leadership Conference (SCLC) had planned a significant protest in Birmingham for April and intended to march on Good Friday for symbolic reasons. The SCLC sought a permit to march, but was summarily denied by Eugene "Bull" Connor, a militant segregationist and member of the Birmingham City Council.<sup>16</sup> Aware of the SCLC's plans, lawyers for the City of Birmingham sought and received an ex parte injunction barring any such demonstration. The Alabama rules of procedure did not require that the demonstrators receive notice in advance of the hearing.<sup>17</sup>

When the leaders of the SCLC were served with the injunction, they had to decide their next step. Their decision was complicated by the movement's insistence that governments in Jim Crow states comply with the federal court injunction in *Brown v. Board of Education*.<sup>18</sup> This position, some felt, required obedience to the rulings of state courts as well. Others thought that there was no reason to fight the injunction in the Alabama court, because they could never prevail before a Southern state court judge. Martin Luther King, by contrast, was more conflicted. As Bayard Rustin recalled some time later:

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15. The source of the facts below (unless otherwise noted) is ALAN F. WESTIN & BARRY MAHONEY, *THE TRIAL OF MARTIN LUTHER KING* (1974). See also David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989).

16. Connor told Lola Hendricks, who applied for a permit on behalf of the movement: "No, you will not get a permit in Birmingham, Alabama, to picket. I will picket you over to the City Jail." WESTIN & MAHONEY, *supra* note 15, at 122; see also *Walker v. City of Birmingham*, 388 U.S. 307, 317 n.9 (1967) (quoting Hendricks's testimony).

17. 7 ALA. CODE § 1054 (LexisNexis 1960).

18. 347 U.S. 483 (1954); see WESTIN & MAHONEY, *supra* note 15, at 74-75.

[King] agreed in the planning session that the courts would be against us, as they always had been in the South. But he would say, "Not every judge will issue an injunction; we can't assume that." And Fred Shuttlesworth answered him, "Where are those converted judges? Where did niggers ever move and law was not used to beat our heads, with judges helping?" "Well," King would repeat, "we can't take that for granted." He really believed sacrifice and cheerful acceptance might lead some judges to be moral.<sup>19</sup>

Norman Amaker, the NAACP lawyer sent from New York to attend to the situation, reviewed the injunction and concluded that the only legal avenue was to challenge the injunction in Alabama state court, where the civil rights leaders were unlikely to obtain a fair hearing. The SCLC and its lawyers never seriously discussed seeking relief before the Good Friday march, because both considered it a practical impossibility. Moreover, postponing the week-end marches was seen as politically unacceptable.<sup>20</sup> Instead, Amaker briefed his clients on the legal situation:

I tried to make clear to them what the situation was: if they did march, they would probably be in violation of the injunction . . . . Even though [the injunction] might be unconstitutional, though, the leaders might be convicted for violating it . . . . I said that whatever they decided to do—and that was their decision—we would try to find the best possible way of supporting their actions in the courts.<sup>21</sup>

Amaker's view was similar to King's: the process might not yield results, but still they would proceed through the courts. Amaker assumed that the SCLC's lawyers would act solely through the courts.<sup>22</sup> As the analysis below will show, this was not the only option. The lawyers might have refused to participate in the state court proceedings, for example, or they might have harnessed the press to try the Alabama judiciary in the court of public opinion.

Dr. King was among those arrested at the march for violating the injunction, and the Alabama judge who had issued it tried him for contempt. The lawyers, King, and the SCLC considered a variety of tactics, but not participating in the trial was not one of them. This was not because they believed that they would receive a fair hearing. Rather, they hoped to reach the more neutral federal courts on appeal. But to get there, they had to defend the

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19. WESTIN & MAHONEY, *supra* note 15, at 62.

20. *Id.* at 80.

21. *Id.* at 81.

22. *See id.*

contempt charges in state court, where most believed they would lose regardless of the merits, in order to make a record for the federal court to review.<sup>23</sup>

The lawyers and their clients faced another difficult choice: whether to try the Southern state courts in the court of public opinion—that is, whether to draw popular attention to the injustice in the Southern state courts at the contempt hearing. They decided not to do this for strategic reasons. The contempt hearing was held while protests in Birmingham were ongoing. To turn the hearing, unfair as it was, into a public spectacle would distract from the purpose of the protests. The SCLC wanted the focus to be on the injustices of segregation in the City of Birmingham, not on the injustices wrought by Southern state courts.<sup>24</sup> The civil rights leaders sought to focus energies on protesting the substantively unjust laws, rather than the procedurally unjust tribunal. But that meant that the SCLC's lawyers were required to litigate the case before a biased court as though their client could receive a fair hearing, despite knowing the case was lost before it began. The lawyers participated in a proceeding they believed to be a sham to help their client achieve his larger goals.

After trial, the Alabama state court judge convicted King of criminal contempt for violating the injunction. King served his five-day sentence in Birmingham city jail, during which time he wrote one of his most memorable works, "Letter from a Birmingham Jail."<sup>25</sup> The U.S. Supreme Court affirmed King's conviction, although in a separate case it found that the ordinance authorizing the injunction was unconstitutional.<sup>26</sup> In *Walker v. City of Birmingham*,<sup>27</sup> the Court upheld King's conviction for contempt on the grounds that the Alabama court had jurisdiction to issue the injunction, and that the place to dispute its constitutionality was in a suit to lift the injunction, not after its violation (a rule known as the collateral bar rule).<sup>28</sup> The Court offered one olive branch to the petitioners. It noted that "[t]his case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims."<sup>29</sup> The Court's decision ignored the injustice that resulted both from the procedural rules

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23. *Id.* at 94.

24. *Id.*

25. Luban, *supra* note 15, at 2163–64.

26. See *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967) (affirming the conviction); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159 (1969) (holding the ordinance on which the injunction was based to be unconstitutional).

27. 388 U.S. 307.

28. *Id.* at 318–21.

29. *Id.* at 318.

that permitted ex parte hearings without requiring notice to the other side, and from the fact that the judge overseeing the case, a moderate segregationist, was likely not a neutral arbiter. Had the petitioners sought to challenge the injunction in the Alabama courts prior to the marches, they almost certainly would have lost the case, as well as precious time and momentum. Thus, although the Alabama court had jurisdiction to issue the injunction as a formal matter, everything about its order betrayed a fundamental injustice that could have served as justification for an exception to the collateral bar rule without diminishing the power of the courts as a general matter.<sup>30</sup>

## 2. The Montgomery Bus Boycott Trial

King had faced a similar trial in March, 1955, during the Montgomery Bus Boycott. He was indicted under a state law that prohibited "conspiring 'without just cause or legal excuse' to hinder a business."<sup>31</sup> The case was tried before a segregationist judge and, to no one's surprise, King was convicted. In his legal history of this trial, Randall Kennedy explains that, nevertheless, the conduct of the trial was a victory. Black lawyers were able to confront White lawyers directly in an adversarial environment, were treated with (some) respect, and matched, or even outshined, their White counterparts.<sup>32</sup> Furthermore, the trial aired Black grievances about racially motivated mistreatment on buses, including insults and incidents of degrading treatment, that were otherwise hidden from the view of the White population.<sup>33</sup> Thus, Kennedy argues, trial testimony by Black citizens "eroded the myth of symmetry that had long sustained the separate but equal doctrine."<sup>34</sup> This testimony was part of a strategy to try the bus company in the court of public opinion. However, as in the contempt trial in Birmingham seven years later, the lawyers in Montgomery did not put the injustices of the court itself on trial.

Kennedy describes another strategy employed at the trial that raises more troubling questions. King's lawyers argued that the boycott was not a concerted action, but rather a series of simultaneous individual decisions.<sup>35</sup> This representation was simply not true. The boycott was in fact an orchestrated

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30. See Martha Minow, *Politics and Procedure*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 79, 83–84 (David Kairys ed., 1998).

31. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1029 (1989) (quoting ALA. CODE § 54, tit. 14 (1940) (presently codified as ALA. CODE § 13A-11-122 (LexisNexis 1975))).

32. *Id.* at 1034.

33. *Id.* at 1032–33.

34. *Id.* at 1034.

35. *Id.* at 1035.

action. The problem with this strategy, then, was that it required lying to the tribunal. Kennedy explains:

This raises the thorny question whether, or to what extent, King and his allies owed a moral obligation of truthfulness to institutions that oppressed them. Lying would seem to pose something of a quandary for a protest that derived much of its inner and outer strength from its sense of moral purity. Furthermore, given that King's conviction was virtually certain no matter how he portrayed his role in the protest, the question arises why he adopted a position at trial so at odds with the candid defiance and plain-spoken eloquence that had helped to make the boycott the extraordinary event it had become. Perhaps he deemed evasion necessary to protect participants in the protest; to have been open and forthright on the witness stand might have risked exposing vulnerable people to extra-legal retribution. Perhaps, if pressed, King would also have noted that he was being tried, after all, in a court that lacked basic elements of justice.<sup>36</sup>

The knowing introduction of perjured testimony at a trial is a violation of the ethical rules governing lawyers' conduct.<sup>37</sup> But beyond that clear prohibition lurk more troubling questions. Kennedy frames the issue as the extent of an individual's moral duty to follow otherwise legitimate rules when faced with gross injustice. This is an important question, and it raises another: To what extent does the act of participating in an unjust adversarial proceeding invite immoral or unethical conduct by participants?

## B. The U.S. Military Commissions in Guantánamo Bay, Cuba

The U.S. government's use of military commissions to try detainees held in Guantánamo Bay, Cuba, spurred substantial resistance from members of the U.S. legal community who believed the commissions to be deeply flawed.<sup>38</sup>

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36. *Id.* at 1035–36.

37. For the modern version of the ethical violation, see MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002) (stating that a lawyer "shall not knowingly . . . offer evidence that the lawyer knows to be false"). Subornation of perjury is also a crime. See, e.g., 18 U.S.C. § 1622 (West 2009) ("Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.").

38. Numerous useful academic studies and popular books have described the flaws of these commissions. See, e.g., JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (2007); MICHAEL RATNER & ELLEN RAY, GUANTANAMO: WHAT THE WORLD SHOULD KNOW (2004); CLIVE STAFFORD SMITH, EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: FIGHTING THE LAWLESS WORLD OF GUANTÁNAMO BAY (2007); BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE WAR ON TERROR (2008); David W. Glazier, *Kangaroo Court or Competent Tribunal: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003); David W. Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the*

This subpart provides a brief overview to set the stage for understanding the difficult issues that lawyers representing the accused before these commissions have faced, followed by the stories of two trials of detainees under the military commission system.

The military commissions were created by a Presidential Military Order issued in November, 2001.<sup>39</sup> Both civilian and military lawyers participated in the system. From the beginning, the Department of Defense faced accusations that the military commissions failed to meet fundamental rule-of-law requirements: the decisionmakers were not neutral; rules were created ad hoc rather than set in advance; ex post facto laws were permitted; defense lawyers were unable to adequately represent their clients; access to evidence was limited; and evidence tainted by coercion (even torture) could be introduced at trial.<sup>40</sup> After the Supreme Court invalidated the commissions in *Hamdan v. Rumsfeld*,<sup>41</sup> Congress reinstated them with the Military Commissions Act of 2006.<sup>42</sup> The new legislation solved some of the problems, but others remained.<sup>43</sup> For purposes of this discussion, I will assume that lawyers representing the accused were justified in their evaluation that the tribunals continued to be procedurally unjust.

The first two cases tried under the military commissions system were those of David Hicks and Salim Hamdan.<sup>44</sup> Hicks was captured in Afghanistan while fighting with the Taliban and charged with providing material support for terrorism.<sup>45</sup> His case ended in a guilty plea in 2007 that was widely reported

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*Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008) [hereinafter Glazier, *Self-Inflicted Wound*]; Luban, *supra* note 8; Richard J. Wilson, *Military Commissions in Guantánamo Bay: Giving 'Full and Fair Trial' a Bad Name*, 10 GONZ. J. INT'L L. 63 (2006). For defenses of the military commissions, see KYNDRA MILLER ROTUNDA, *HONOR BOUND: INSIDE THE GUANTANAMO TRIALS* (2008) (providing a defense of the system written by a participating JAG lawyer); Frederic L. Borch III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 10 (providing a defense of the system written by the Chief Prosecutor).

39. Military Order of November 13, 2001: *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

40. Glazier, *Self-Inflicted Wound*, *supra* note 38, at 185–94.

41. 548 U.S. 557 (2006).

42. Military Commissions Act of 2006, 10 U.S.C.A. §§ 948–950 (West 2008).

43. See Glazier, *Self-Inflicted Wound*, *supra* note 38 (evaluating changes in military commissions).

44. A third case, that of Ali Hamza al-Bahlul, was tried in October 2008, and a verdict was rendered on November 3, 2008. See William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A17.

45. See Raymond Bonner, *Australian Detainee's Life of Wandering Ends With Plea Deal*, N.Y. TIMES, Mar. 28, 2007, at A17.

to have been reached in response to pressure from the Australian government.<sup>46</sup> Hicks served a nine-month sentence in confinement; the remainder of his seven-year sentence was suspended. He served his sentence in his native Australia.<sup>47</sup> As part of the plea agreement, he agreed not to speak publicly about his experiences at Guantánamo for a period of one year.<sup>48</sup>

Hamdan had been Osama bin Laden's driver and, like Hicks, was captured in Afghanistan.<sup>49</sup> He was tried and convicted of providing material support for a terrorist organization and was sentenced to five-and-a-half years in prison, the majority of which he had already served.<sup>50</sup> Initially, the Department of Defense did not commit to releasing Hamdan at the end of his sentence.<sup>51</sup> However, several months after his conviction he was released to the Yemeni government.<sup>52</sup>

### 1. The Case of David Hicks

In August of 2003, the National Association of Criminal Defense Lawyers (NACDL) issued an advisory ethics opinion stating: "[I]t is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation."<sup>53</sup> The terms imposed on defense counsel as a condition of appearing before the commissions included government monitoring of attorney-client communications; a prohibition on requests for adjournments; limited access to information; a prohibition on sharing even unclassified information with experts; and waiver of counsel's right to protest closed proceedings.<sup>54</sup>

46. See, e.g., Scott Horton, *The Plea Bargain of David Hicks*, HARPER'S MAG., Apr. 4, 2007, available at <http://www.harpers.org/archive/2007/04/horton-plea-bargain-hicks>; Paul Maley, *Cheney 'Struck Hicks Deal' With PM*, AUSTRALIAN, Oct. 24, 2007.

47. Sara Wood, *Australian Detainee Sentenced to Nine Months*, AM. FOREIGN PRESS SERVICE, Mar. 30, 2007, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=32657>.

48. See Ben Wizner, *Tribunals of the Absurd*, L.A. TIMES, Apr. 5, 2007, at A23.

49. See William Glaberson, *Two Sides at Guantánamo Paint Starkly Different Pictures of Defendant*, N.Y. TIMES, July 23, 2008, at A17.

50. See William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1.

51. See William Glaberson, *A Conviction, but a System Still on Trial*, N.Y. TIMES, Aug. 10, 2008, at A27.

52. Robert F. Worth, *Bin Laden Driver to Be Sent to Yemen*, N.Y. TIMES, Nov. 25, 2008, <http://www.nytimes.com/2008/11/26/washington/26gitmo.htm>.

53. NACDL Ethics Advisory Comm., Opinion 03-04 (2003).

54. See Dep't of Def. Military Comm'n Instruction No. 5 on the Quality of Civilian Defense Counsel, Annex B (April 30, 2003) (on file with author) (setting forth limitations on civilian counsel as a condition of representation).



Joshua Dratel, the civilian criminal defense attorney described at the beginning of this Article, used the NACDL ethics opinion to negotiate better conditions for his representation of David Hicks. He relied on the opinion to convince Brigadier General Thomas Hemingway, Legal Adviser to the Convening Authority in the Department of Defense Office of Military Commissions, to permit Dratel to converse with his client free from monitoring; to leave Guantánamo while the case was ongoing; to seek discretionary adjournments just as in ordinary courts; to consult with experts outside the defense team on unclassified information; and to contest closed proceedings. With some of his concerns assuaged, Dratel agreed to represent Hicks before the commission.<sup>55</sup>

This success was not to last. In 2007, the presiding officer of Hicks's commission asked Dratel to sign a notice of appearance, in order to participate in the commissions newly convened pursuant to Congress's 2006 Act.<sup>56</sup> This new notice was promulgated by the presiding officer and required Dratel to agree to abide by all the commission's rules.<sup>57</sup> Since many of those rules were not yet written, Dratel was concerned that the government would institute provisions similar to those he had objected to in 2003, and that by signing this notice of appearance, he would waive his right to contest those rules. To solve this problem, Dratel added the words "presently existing" to the notice so that instead of providing that he agreed to "all applicable regulations," it stated only that he agreed to "all *presently existing* applicable regulations."<sup>58</sup> The presiding officer refused to accept the notice of appearance as altered, warning Dratel that he should sign the notice as written or be disqualified. The presiding officer then held a conference before Dratel arrived at the base and without the defendant present to determine whether Dratel should be disqualified for refusing to sign the notice. Hicks and Dratel were represented at the conference by assigned defense counsel Michael "Dan" Mori.<sup>59</sup>

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55. See Ellen Yaroshefsky, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Team for David Hicks at Guantánamo Bay*, 13 ROGER WILLIAMS U. L. REV. 469, 478–79 (2008); see also Transcript of Record, *supra* note 2, at 26.

56. Transcript of Record, *supra* note 2.

57. See *id.* at 30. The Military Commission regulations indicated that the notice was to be promulgated by the Department of Defense, not the officers serving on the military commissions. Dratel's objection on this basis was dismissed by the Presiding Officer. See *id.*

58. U.S. v. David Hicks, Civilian Defense Counsel Notice of Appearance and Agreement (Mar. 21, 2007) (emphasis added).

59. Transcript of Record, *supra* note 2, at 9.

At the public hearing, held after the conference described above, the presiding officer officially disqualified Dratel. Dratel explained to the commission (and to the public) his reasoning for refusing to sign the notice of appearance:

I cannot sign a document that provides a blank check on my ethical obligations as a lawyer, my ethical obligations to my client, my ethical obligations under the rules of professional responsibility for the State of New York to which I am bound.

....

... I cannot again buy a pig-in-a-poke in this process. These are the same problems that plagued the previous commission; that everything is ad hoc, that everything moves in a way where you cannot predict from one day to the next what the rules are.<sup>60</sup>

The presiding officer offered Dratel the opportunity to remain as a counselor but without the ability to advocate before the tribunal on Hicks's behalf. Dratel refused, stating: "[Y]ou don't have to ask Mr. Hicks about whether he wants me here or not, I'm not going to pretend that I'm here functioning when I'm not entitled to do my job."<sup>61</sup> Because his disqualification occurred on the eve of the trial, and because it highlighted the lack of rules in the military commission system, Dratel's actions received substantial media attention.<sup>62</sup>

Hicks's lawyers had been successful in drawing public attention to his case prior to trial as well. Mori, Hicks's detailed defense counsel, gave numerous press conferences between the time Hicks was charged and when he pled guilty. "I think they wanted us to be good little boys and wait for the trial and make our objections so they could just go with the process," Mori told an Australian news program in 2006. "But, you know, in a rigged system . . . all you can do sometimes is just to try to let people know what's going on and why it's unfair."<sup>63</sup> Mori traveled to Australia several times to advocate for Hicks and to put pressure on the Australian government to negotiate his release.<sup>64</sup>

While publicizing Hicks's case, Mori made numerous statements using strong language to describe the unfairness of the tribunals. At one point, the commissions' chief prosecutor accused Mori of violating Article 88 of the

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60. *Id.* at 26–27.

61. *Id.* at 29.

62. See, e.g., William Glaberson, *Plea of Guilty From a Detainee in Guantanamo*, N.Y. TIMES, Mar. 27, 2007, at A1.

63. ENOUGH ROPE With Andrew Denton (ABC1 television broadcast Aug. 14, 2006), available at <http://www.youtube.com/watch?v=Jsw3Dx49NA>.

64. See Yaroshefsky, *supra* note 55, at 482.

Uniform Code of Military Justice,<sup>65</sup> which makes it a crime for a military officer to use “contemptuous words” about the President, Vice President, Secretary of Defense, or other high public officials.<sup>66</sup> When asked about this by reporters, Mori responded in anger, asking, “Are they trying to intimidate me?”<sup>67</sup> In the end, Mori’s efforts spurred the plea deal that achieved his client’s release in the face of what might have been an indefinite detention.

## 2. The Case of Salim Hamdan

Salim Hamdan’s lawyers were also successful in drawing public attention to their client’s case. Their greatest successes, however, came from the numerous appeals they filed in the U.S. federal courts, one of which resulted in the Supreme Court ruling that the military commissions, as constituted by the Presidential Military Order in 2001,<sup>68</sup> were unconstitutional.<sup>69</sup> For Hamdan and his lawyers, the great hope was the federal court system.

Indeed, even before Hamdan had been assigned a lawyer, Neil Katyal, a Georgetown law professor now famous for his representation of Hamdan before the Supreme Court, suggested to military defense counsel—who did not yet have clients—that they file an amicus brief in the Supreme Court case *Rasul v. Bush*.<sup>70</sup> The case was to decide whether the federal courts had habeas jurisdiction over noncitizen detainees held at Guantánamo.<sup>71</sup> Katyal first suggested that the military defense lawyers file a lawsuit on their own behalf, arguing that “you shouldn’t be made to participate in an unconstitutional proceeding[;] . . . doing so contradicts your oath to uphold the Constitution.”<sup>72</sup> The lawyers refused, arguing that without clients they could not file any briefs.<sup>73</sup> One of them explained: “My entire professional career I’ve worked with the understanding that a defense counsel has no stake in any case unless he represents a client with an interest, and I can’t see a way around that now.”<sup>74</sup> In the end, the military defense lawyers agreed to file an amicus

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65. See Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, Mar. 5, 2007, at A10.

66. Uniform Code of Military Justice, 10 U.S.C. § 888 (2006).

67. Bonner, *supra* note 65.

68. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

69. Hamdan v. Rumsfeld, 548 U.S. 557, 634–35 (2006).

70. 542 U.S. 466 (2004).

71. *Id.* at 475.

72. JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 67 (2008).

73. *Id.* at 68–69.

74. *Id.* at 69 (quoting Email from Lt. Cmdr. Philip Sundel to Neil Katyal).

brief that argued that nobody in the litigation was speaking for their future clients—the only detainees that both parties agreed were not entitled to immediate access to habeas corpus.<sup>75</sup> That amicus brief was the first in a long series of appeals to the federal courts filed by Hamdan's defense counsel.

In Hamdan's case, lawyers experienced a tension between loyalty to their client and loyalty to the integrity of the legal system. Like all detainees, Hamdan was required to undergo a hearing before a Combatant Status Review Tribunal (CSRT) to determine whether he was an unlawful combatant who could be held indefinitely.<sup>76</sup> In these hearings, detainees were not permitted to have lawyers, but instead were appointed "personal representatives" by the military to guide them through the hearing.<sup>77</sup> Personal representatives were not to provide legal advice.<sup>78</sup> Charles Swift, another member of Hamdan's legal team, believed the CSRT proceedings to be sham hearings in which the outcome was predetermined. He nevertheless asked to be present as Hamdan's lawyer—a request that was denied. In order to attend the hearing, Swift then asked to be called as a witness to testify about exculpatory information he had gathered while investigating Hamdan's case. Twenty-four hours before the CSRT hearing, Swift was informed that his request had been granted.<sup>79</sup>

For personal reasons, and because he believed the CSRT hearing was a charade, Swift ultimately decided not to attend the hearing. His testimony would probably not have altered the finding that Hamdan was an unlawful enemy combatant. Moreover, identifying himself as a potential witness in Hamdan's trial could have disqualified Swift from serving as trial counsel.<sup>80</sup> Nonetheless, his absence was devastating to his client. Hamdan demanded of Swift: "Where were you? Why did you leave me?"<sup>81</sup> According to one report, "Swift tried to explain that the hearings were a joke, the verdicts a forgone conclusion, that at least the military commissions, with all their flaws, were trying to pass themselves off as legitimate courts. The distinction was meaningless to Hamdan."<sup>82</sup>

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75. *Id.* at 69–71.

76. *Id.* at 153–54.

77. See Kristine A. Huskey, *Standards and Procedures for Classifying "Enemy Combatants": Congress, What Have You Done?*, 43 TEX. INT'L L.J. 41, 47 (2007).

78. *Id.*

79. MAHLER, *supra* note 72, at 153.

80. See MODEL RULES OF PROF'L CONDUCT R. 3.7 (2002) (barring lawyers from acting as advocates in trials where they would be necessary witnesses).

81. MAHLER, *supra* note 72, at 154.

82. *Id.*

## II. LAWYER COMPLICITY AND RESISTANCE

The role of the lawyer in unjust tribunals such as those described above is seldom addressed in the scholarly literature.<sup>83</sup> Meanwhile, the question of judicial participation and complicity in unjust legal regimes has received much more attention.<sup>84</sup> This asymmetry likely results from the perception of judges as protectors of the legal system, while lawyers are relegated to the role of adversarial players within it. Yet lawyers play a critical role in protecting the legal system by choosing when and how to litigate. As a result, lawyer resistance can have powerful effects on legal systems.

Some literature suggests that submission and resistance represent opposite poles of human behavior within organizational systems. As John Rawls explained, "[t]he persistent and deliberate violation of the basic principles of [the public conception of justice] over any extended period of time, especially the infringement of the fundamental equal liberties, invites either submission or resistance."<sup>85</sup> But the relationship between submission, complicity, and resistance is more complex.<sup>86</sup> As the analysis below attempts to demonstrate, acts that appear to resist can be coopted by an unjust regime, such as when the presence of vociferous defense counsel in a rigged system is used as evidence of that system's fairness. At the same time, acts that appear complicit

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83. There have been some attempts to address this issue, but they are either incomplete or do not address the American experience. Most of the scholarship on lawyers before unjust tribunals in the U.S. concerns the military commissions specifically and is straightforwardly laudatory about acts of resistance. See generally sources cited *supra* note 8 (describing studies of the military commissions). There are more nuanced studies of lawyer resistance and complicity outside the U.S. For example, WEISBERG, *supra* note 8, at 386–90, demonstrates that the interpretive approaches of French lawyers under the Vichy regime increased injustices against Jews, and that less unjust interpretations were available. This is a rather different instance of complicity from the incidents I discuss here, because the lawyers did not resist injustice but rather submitted to it wholeheartedly. Weisberg provides a sophisticated, contextually specific theory of why these lawyers chose submission over resistance. I have found two studies addressing the relationship between complicity and resistance, both in the South African context. The first is DEMOCRACY AND THE JUDICIARY, *supra* note 8, a collection of first person essays by lawyers practicing under the Apartheid regime. The second is STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY 253–70 (1992), a refutation of concerns about lawyer complicity.

84. See COVER, *supra* note 13, at 175–91 (analyzing the forms of legal reasoning marshaled by judges who decided cases under the Fugitive Slave Act); DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY 269–70 (1991) (arguing that the application of Ronald Dworkin's theory of law by South African judges enabled them to ameliorate racially restrictive laws, whereas positivist theories did not).

85. JOHN RAWLS, A THEORY OF JUSTICE 365–66 (1971).

86. Several wonderful sociological studies explain the complex phenomenon of resistance. See, e.g., PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 183–87 (1998); JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS (1990).

can become powerful forms of resistance, as when participation produces facts demonstrating injustice to higher authorities. The yin-yang relationship between the concepts of complicity and resistance is critical to understanding and evaluating the lawyer's choices when confronting an unjust tribunal.

This Part discusses the responsibility and moral agency of lawyers facing unjust tribunals. The first subpart develops the concept of lawyer complicity by demonstrating that lawyers may be complicit in unjust tribunals even when they intend to resist injustice. The second subpart analyzes the concept of resistance in the context of lawyer participation or nonparticipation in unjust tribunals, laying out the forms of resistance and their expression within and outside of the tribunal. The third subpart presents a novel schema of acts of resistance available to lawyers, and examines the methods, justifications, and drawbacks of each. This discussion of choices and consequences will set the stage for a discussion of the lawyer's role and procedural justice in Part III.

#### A. Complicity

One intuitively appealing position is that the lawyer—particularly the defense lawyer—bears no responsibility for the conduct of the unjust tribunal. This is because the lawyer did not cause the judge to be biased, to admit coerced testimony, or to do any other thing that resulted in injustice. Instead, the defense lawyer intends to resist injustice and to protect the client's individual rights. Robert Cover explained this position in his study of judicial interpretation of the Fugitive Slave Act: "The attorney's role within a system of law assumed to be immoral is much easier to justify than that of the judge. The practical tasks of freeing alleged slaves and defending those accused of harboring fugitives were not often thought of as inconsistent with antislavery."<sup>87</sup>

The dominant view of complicity is that it requires intent.<sup>88</sup> Under this view, lawyers are complicit in the injustice of the tribunal only if they intended the outcome.<sup>89</sup> However, as I attempt to demonstrate, lawyers may be complicit even though they do not intend to facilitate injustice—when their participation lends the appearance of credibility to the unjust tribunal.

Consider the following story from the South African experience in the late 1960s, recounted by lawyer Jules Browde:

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87. COVER, *supra* note 13, at 159.

88. CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 122 (2000).

89. For example, the philosopher Christopher Kutz defines the "complicity principle" as follows: "I am accountable for what others do when I intentionally participate in the wrong they do or the harm they cause." *Id.*

I acted for two Black communities on the West Rand which had brought an application for an interdict restraining the police from harassing them by various means in their townships. In opening the case, I set out in broad terms the allegations which we intended to prove and I enunciated the evidence that we proposed bringing in order to substantiate those allegations. At the first tea break when I was still addressing the Court in opening, I was approached by one of the spectators, a visitor to South Africa, who introduced himself to me as Mr. Griffin Bell, the Attorney General of the United States during the Carter Administration. He told me that while he was horrified at the allegations that were made against the police, he nevertheless was impressed with the fact that these allegations could be aired in open court. He assured me that South Africa was the only country on this continent—and as he put it, I daresay on some other continents that I could mention—in which this could take place. Unfortunately, that is the last time I saw Mr. Griffin Bell and, consequently, I have been unable to tell him that that case was ended by the declaration of the state of emergency and the arrest and detention without trial of most of the important witnesses for the applicants.<sup>90</sup>

In this example, Browde was unintentionally complicit in the unjust tribunal. His work on behalf of the Black plaintiffs lent credence to the South African court because his participation created the appearance of a balanced adversarial system in which grievances could be aired openly and both sides heard. The adversarial system is central to the common law conception of procedural justice. In our legal culture, adversarialism sends a signal of fairness, particularly among the public that observes the system from afar.<sup>91</sup> The presence of adversaries may hide the fact that the decisionmaker is not neutral and cannot hear the other side. Thus, in this case, Browde lent respectability to an unjust system simply by participating, even though he personally opposed the very system in which he was complicit.<sup>92</sup>

Can lawyers be considered responsible for outcomes that they did not intend, or for processes of which they disapprove? For lawyers who participate in an unjust tribunal, even if they resist the tribunal in the course of participation, the act of participation becomes a formative part of their personal and professional identity. If participation lent credibility to the tribunal, that is, if it made observers believe that the tribunal was fair, then the experience of

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90. Jules Browde, *The Role of Practising Lawyers Within the Present Legal System*, in *DEMOCRACY AND THE JUDICIARY*, *supra* note 8, at 77, 78.

91. See TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 79–80 (1997).

92. But see ELLMANN, *supra* note 83, at 264–65 (arguing that the role of lawyers did not legitimate the South African system in the eyes of foreign observers).

having lent credibility to the tribunal becomes part of who those lawyers are. They become the lawyers who made the tribunal appear to be fair when it was not. Thus, lawyers who attempt to defend their clients against injustice, but in the process create the appearance of fairness, can be held responsible.<sup>93</sup> Good intentions do not absolve lawyers of responsibility. Even a defense lawyer who objects to the tribunal in the course of participation may bear some responsibility for lending credibility to injustice by simply participating.<sup>94</sup>

Furthermore, participation itself, if taken seriously, may sully the moral purity of the participants and may invite them to take positions and to play tactical games against an unfair adversary that will likely, if not inevitably, lead to some shameful conduct. The problem is that refusal to participate has grave consequences as well, both for the lawyer and the client. This is especially true if one holds out hope that reasoned argument may sway the tribunal.

Lawyers worry about lending credibility to unjust tribunals, demonstrating that the question of their responsibility is a live issue. Charles Swift, a member of the team representing Salim Hamdan before the Guantánamo military commissions, explained: "We were concerned, that fighting would serve to validate the system."<sup>95</sup> Another defense lawyer at Guantánamo stated: "[T]here are all these times that you throw up your hands and say that this is impossible, it can never be fair, it's a sham, I'm participating in a charade, I'm only adding to it, I'm only making it look like its real."<sup>96</sup>

Indeed, the work of defense lawyers on behalf of Guantánamo detainees was used to support the proposition that the military commissions were fair. Responding to accusations of unfairness from a defense lawyer, the spokesman for the Pentagon's tribunal office stated: "His job as defense counsel is to zealously defend people who may be tried before military commissions. I expect him to raise issues in his client's interest."<sup>97</sup> By invoking the principle of zealous advocacy to describe the resisting lawyers' conduct, the spokesman communicated that the lawyers' protests were mere hyperbole or grandstanding, a reflection of the lawyer's duty to provide zealous representation rather than

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93. For a philosophical discussion of this idea, see MEIR DAN-COHEN, *Responsibility and the Boundaries of the Self*, in HARMFUL THOUGHTS: ESSAYS ON LAW, SELF AND MORALITY 199, 204-05, 222 (2002).

94. As Dan-Cohen explains, "One bears collective responsibility even with respect to objects and events toward which one has a negative attitude and despite one's efforts to prevent them. Indeed, such efforts may be motivated precisely by the individual's awareness of the responsibility he or she will ineluctably bear if the object or event materializes." *Id.* at 223.

95. William Glaberson, *An Unlikely Antagonist in the Detainees' Corner*, N.Y. TIMES, June 19, 2008, at A1.

96. Interview With Guantánamo Bay Defense Lawyer (Sept. 2007) (transcript on file with author).

97. John Mintz, *Lawyer Criticizes Rules for Tribunals*, WASH. POST, Jan. 22, 2004, at A03.



a considered assessment. Such statements tap into the general perception that adversarial procedures are fair, and elide the other aspects of the tribunal that undo the shield of adversarial representation.<sup>98</sup>

During and in the immediate aftermath of Hamdan's trial, supporters of the military commissions similarly used the presence of defense counsel, and specifically defense-counsel resistance, as proof that the trial was fair. Two prominent Washington attorneys stated: "The real question, of course, is whether Hamdan is getting due process, and whether his trial is fair. The answer is yes. Hamdan has an able team of defense lawyers determined to squeeze from the system every drop of procedural advantage."<sup>99</sup> Even though the presiding authority had held that Fifth Amendment due process did not apply to the military commissions, its supporters pointed to the presence of defense counsel and the implication of adversarialism as evidence that Hamdan was receiving adequate process.<sup>100</sup> In sum, although defense lawyers may intend for their actions to have one effect—resistance—their actions are transformed into signals that the tribunal is credible and fair.

The presence of vociferous defense counsel is one indicia of the type of formal, adversarial court proceedings that lend credibility to injustice. The formal trappings of the courtroom may also lead to the illusion that justice is being done. Consider the majority's refusal in *Walker v. City of Birmingham*<sup>101</sup> to face the reality of the political situation in Alabama. In affirming Martin Luther King Jr.'s conviction for marching in violation of the Alabama state court injunction, the Court considered only whether the state court had jurisdiction to issue the injunction, not whether the injunction itself was constitutional.<sup>102</sup> The existence of formal courtroom proceedings, including arguments presented by both the protestors and the City, was sufficient for a majority of the Court. Moreover, in requiring the civil rights marchers to have challenged the constitutionality of the injunction in Alabama state court, the justices gave no indication that they believed the state court would have offered anything other than "orderly judicial review," despite strong evidence to the contrary.<sup>103</sup>

98. See *In re Yamashita*, 327 U.S. 1, 45 (1946) (Rutledge, J., dissenting) (describing the defense counsel's zealous representation as a shield that was insufficient to render the proceedings just).

99. David B. Rivkin Jr. & Lee A. Casey, *Justice at Gitmo*, WALL ST. J., Aug. 1, 2008, at A13.

100. See Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices and on Motion to Suppress Statements Based on Fifth Amendment, *United States v. Hamdan* (U.S. Military Comm'n, July 20, 2008), available at [http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%209%20and%20D-044%20Ruling%201%20\(2\).pdf](http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%209%20and%20D-044%20Ruling%201%20(2).pdf).

101. 388 U.S. 307 (1967).

102. *Id.* at 315.

103. *Id.* at 320. The majority supported its position by noting that White supremacists had been subject to the same Alabama rule, the idea being that the rules were applied similarly to all groups, notwithstanding the political context. *Id.* at 319–20. The court ignored the distinguishing facts that, in

An equitable result can further diminish the power of the lawyer's argument against the unjust procedure. The result is good for the client, but perhaps less so for the legal institutions that have now entrenched unfair processes by reaching acceptable results in individual cases despite systemic injustice. For example, both David Hicks and Salim Hamdan were represented by defense counsel who strongly resisted injustices. Both defendants received relatively short sentences, arguably without altering the basic injustices of the system. As Morris Davis, the former Chief Prosecutor of the military commissions explained: "[I]n the end losing may equate to winning. . . . If you look at Hicks (9 months) and Hamdan (<6 months) it suggests the best way to win at Gitmo is to lose."<sup>104</sup>

*Walker* presents an interesting variation on this theme. The Supreme Court on the one hand upheld the Alabama court's criminal contempt conviction against Dr. King and his compatriots. At the same time, in *Shuttlesworth v. City of Birmingham*,<sup>105</sup> the Court established that the ordinance authorizing the injunction was unconstitutional.<sup>106</sup> The *Shuttlesworth* decision shored up the Court's decision in *Walker* by demonstrating that the Court was capable of recognizing some substantive injustice, even as it permitted the city of Birmingham to prevail in the contempt action in the name of procedural justice.

So far this subpart has argued that lawyers may be responsible for lending credibility to unjust tribunals. But holding lawyers responsible for unjust tribunals may further undermine justice by discouraging lawyer resistance through participation. This is the reason that the Rules of Professional Conduct absolve lawyers of responsibility for their client's point of view.<sup>107</sup> If we retain the hope that lawyers can bend injustice through the various forms of resistance described in the remainder of this analysis, then we will want to free them of responsibility in order to encourage participation. However, if we want lawyers to resist the tribunal, we must encourage a sense of professional responsibility not solely to clients within the confines of the tribunal, but to the larger ideals of legality. Finally, stressing the lawyers' responsibility for the normalization or acceptance of unjust procedures may encourage lawyers

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*Walker*, the judge was a moderate segregationist and therefore likely biased against the civil rights marchers, and that the marchers had not had an opportunity to be heard before the court issued the injunction.

104. Posting of Morris Davis to *Opinio Juris* (Aug. 7, 2008, 8:19 AM EST), available at <http://opiniojuris.org/2008/08/07/why-hamdans-material-support-convictions-violate-the-ex-post-facto-clause>.

105. 394 U.S. 147 (1969).

106. *Id.* at 158–59 & n.7.

107. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

to withdraw collectively and thereby stop the tribunal. These choices, and the tensions they create, are discussed at greater length below.

## B. Resistance

A lawyer facing an unjust tribunal may naturally consider whether and how to resist injustice. Resistance comes in many forms and expressions. It can involve speech or silence, participation or refusal to participate. It can come from within the system or from outside. The following discussion illuminates these different concepts. Two distinctions are fundamental to understanding the concept of resistance and its manifestations. The first is the distinction between two forms of resistance: voice and exit. This distinction encompasses the decisions between speech and silence, and between participation and refusal to participate. The second distinction is between internal and external resistance. Lawyers resisting injustice can utilize the language and procedures of the legal system that is being resisted (internal) or engage the world beyond that system (external). The following discussion illuminates these concepts.

### 1. The Forms of Resistance: Exit and Voice

The two basic forms of resistance are exit and voice.<sup>108</sup> Exit means refusing to participate or deciding to leave the entity in question. Voice is exercised by the communication of dissatisfaction or resistance. Although the categories of exit and voice are simplistic, they provide a good starting point for understanding resistance. This subpart defines the concepts of exit and voice, and explores ways in which they interact, overlap, and substitute for one another in the context of unfair hearings.

Exit is a strategy for spurring change usually associated with economic rather than political life.<sup>109</sup> The emblematic example of exit is the consumer's decision to buy a product from a different manufacturer.<sup>110</sup> Similarly, the lawyer's right to refuse to represent a client or to withdraw from representation is a function at least in part of the lawyer's autonomy as an economic actor. The exercise of this economic liberty can harm others, such as by making it

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108. Albert Hirschman developed these categories, as well as another concept, "loyalty," initially to apply to firms or organizations in decline, but they are also useful for clarifying types of reactions to injustice in the political sphere, including unjust tribunals. In Hirschman's view, management learns of failure either because of a significant defection of consumers (exit) or expressions of dissatisfaction (voice). Loyalty prevents consumers from leaving the firm and spurs the exercise of voice. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* 4 (1970).

109. See *id.* at 4, 15–17.

110. *Id.* at 15.

difficult to obtain legal representation or forcing clients to start over with a new lawyer. To prevent the latter outcome, the Rules of Professional Conduct set limits on a lawyer's ability to withdraw from representation.<sup>111</sup> Examples of exit include the NACDL's decision to advocate a boycott of the Guantánamo military commissions, and Joshua Dratel's decision to withdraw from representation of David Hicks rather than sign a notice of appearance he felt violated basic precepts of the rule of law.<sup>112</sup>

Voice is the more articulate feedback mechanism. Voice involves an attempt to "change, rather than escape from, an objectionable state of affairs" through petition, appeal to a higher authority, protest, or other act of vocal resistance.<sup>113</sup> The political realm exhibits a bias towards voice as a means of registering discontent. Exit from the state is branded as defection, treason, or desertion.<sup>114</sup> Exercising voice is also consistent with the lawyer's advocacy role. Lawyers for Dr. King exercised voice when they participated in the Montgomery bus boycott trial and when they appealed to the higher authority of the federal courts after King's 1963 state court conviction.<sup>115</sup> Dratel negotiated with the convening authority of the military commissions directly to change certain rules.<sup>116</sup> Similarly, Dan Mori, another of Hicks's lawyers, traveled to Australia in an attempt to reach the court of public opinion and to spur the Australian government to assist his client.<sup>117</sup>

Lawyers stand in complex relationship to the concepts of exit and voice, in part because the lawyer-client relationship is both economic and political. Lawyers provide a service, often for payment, which in turn gives their clients access to justice. Because there is a market for legal representation, lawyers traditionally retain the autonomy of exit, and exit is generally the preferred strategy for lawyers unhappy with their clients' decisions. Yet the lawyer's duty of loyalty to the client sometimes demands that the lawyer remain in the client's employ.<sup>118</sup> Furthermore, a lawyer who does not participate in the unjust tribunal is not an advocate but a bystander.

Moreover, exit and voice are not mutually exclusive. First, they may be used as alternatives to one another, or they may interact and overlap in a single course of action. In situations in which exit is not available, voice becomes

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111. See MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002).

112. See *supra* Part I.B.1.

113. HIRSCHMAN, *supra* note 108, at 30.

114. See *id.* at 17.

115. See *supra* Part I.A.1.

116. See *supra* Part I.B.1.

117. See *supra* Part I.B.1.

118. See MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002) (setting limits on the lawyer's ability to withdraw when withdrawal will harm the client).

the means of registering discontent. Similarly, when voice is limited, exit becomes the primary reaction. For example, lawyers fearing contempt sanctions or even jail in retaliation for active resistance may decide not to participate in unjust tribunals.<sup>119</sup> In the military context, the exercise of voice may result in the threat of substantial discipline, as Dan Mori experienced when the prosecutor accused him of making statements that violated the Uniform Code of Military Conduct during his representation of Hicks.<sup>120</sup> Judge Advocate General lawyers do not have the unencumbered right to withdraw from representation of their clients. Doing so without permission would be to disobey orders. This inability to withdraw arguably spurs their exercise of voice.<sup>121</sup>

Second, sometimes exit and voice interact and overlap in the same course of action. Dratel's refusal to sign the notice of appearance that he found objectionable was a form of protest (voice) which resulted in his disqualification (exit). His further decision to leave the courtroom (exit) rather than remain as a counselor not permitted to address the tribunal increased the attention the press paid to his message.<sup>122</sup>

Similarly, when the NACDL issued the ethics opinion urging civilian criminal defense lawyers to boycott the military commissions, this constituted a form of "exit with the promise of reentry."<sup>123</sup> The collective refusal was a communicative act that bore more weight than exit undertaken on an individual basis. The detail with which the opinion delineated the organization's opposition to the military commission system demonstrated that the boycott was intended to increase the volume of the organization's voice within the larger political debate.

The concept of loyalty helps to elucidate the functioning of exit and voice in legal representation. People who are loyal will seek to make themselves more influential in an organization, and people who hold power in an organization are more likely to be loyal.<sup>124</sup> Having some loyal participants

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119. Lawyers can be sanctioned for their courtroom conduct. See *In re Dellinger*, 502 F.2d 813, 821 (7th Cir. 1974) (upholding a contempt charge against trial counsel). See generally Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 LAW & LIT. 381, 389-90 (2005).

120. See *supra* notes 63-67 and accompanying text (describing Mori's publicity campaign in Australia and its repercussions).

121. See Luban, *supra* note 8, at 2011 (describing the potential consequences of a JAG defense lawyer's decision to disobey a judge's order in a military commission proceeding).

122. For Dratel, withdrawing meant abandoning his client to face the tribunal without him. The fact that Hicks had already reached a plea deal mitigates the wrong that Dratel committed towards his client, but one can imagine a situation in which a lawyer would follow the same course of action even though the trial was set to go forward.

123. See HIRSCHMAN, *supra* note 108, at 86; see NACDL Ethics Advisory Comm., *supra* note 53.

124. HIRSCHMAN, *supra* note 108, at 78.

prevents “deterioration from becoming cumulative” so that the organization has an opportunity to improve its functioning.<sup>125</sup> Loyalists may use the threat of exit as a means of increasing the power of their voices.<sup>126</sup> Ease of exit can affect the development of loyalty, by making it more difficult for members to gain power within the organization. This is because it is simpler to evade or postpone change when exit is free and easy.<sup>127</sup>

Attorney loyalty can operate on several levels. It can include loyalty to the individual client, loyalty to a particular conception of the professional role, and loyalty to legal institutions and to the liberal legal regime. For example, the lawyers representing King were arguably loyal both to the client, who wanted to participate in the contempt proceeding, and to the ideal of the pursuit of justice in the federal courts, which they hoped would be able to fairly resolve the case. Military lawyers appearing before the military commissions were arguably loyal to the United States, the Armed Forces, the role of the defense lawyer as zealous advocate, and their client.

Thus, exit and voice can either reinforce the legitimacy of the tribunal or oppose it, and may alternate, interact, or overlap. Part II.C will explore the impact of these relationships on lawyer choices. First, however, it is necessary to consider the different forums for the exercise of voice.

## 2. The Expressions of Resistance: Internal and External

As a form of resistance, voice can find expression internally or externally. Voice can be exercised internally within the confines of the particular unjust tribunal or within the larger legal system. Internal resistance is shaped by the faith articulated by Lon Fuller that, “when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are.”<sup>128</sup> When advocates appear at unfair hearings and use the legal tools available, including reasoned arguments based on procedural or substantive legal rules, motions, briefs, presentation of evidence, and appeals, they engage in internal resistance.

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125. *Id.* at 79.

126. *Id.* at 82–83.

127. *Id.* at 84 (noting that “the greater the opportunities for exit, the easier it appears to be for organizations to resist, evade, and postpone the introduction of internal democracy even though they function in a democratic environment”).

128. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

Lawyers might engage in internal resistance for several reasons. First, they may believe legal argument will lead to greater procedural justice, on a large or small scale, in the short or long term. Second, they may believe that they are building a record of injustice to use in an appeal to a higher authority. Each of these strategies is discussed at greater length in the next subpart, which schematizes acts of resistance. What is important to note here is that these are both forms of internal resistance.

When lawyers appeal to another court or court system, they express resistance through voice outside the particular unjust tribunal. But they are still acting within the broader liberal legal system. When lawyers for Guantánamo detainees filed habeas corpus petitions in federal court, they were seeking review outside of the military commission system, but inside the U.S. justice system.<sup>129</sup> Similarly, when the lawyers for the SCLC appealed Dr. King's conviction to the federal courts, their resistance was external to the Alabama state court system, but internal to the broader U.S. legal system.<sup>130</sup> Appeals to another court or court system may be filed in part to engage the public at large, and thus also act as an external expression of voice.

External resistance communicates with the world outside of the unjust tribunal. The external resistance, either through exit or voice, is shaped by an assumption that legal change is best achieved in the realm of politics, in which moral arguments ought to hold more sway.<sup>131</sup> Lawyers may engage in external resistance whether they participate in the tribunal or refuse to participate. They may draw on legal language or on broad political or moral principles. When exercising voice externally, lawyers call upon outsiders to recognize injustice. For example, when Mori traveled to Australia to bring attention to his client's plight, he was engaging in external resistance.<sup>132</sup> He hoped that his actions would spur the Australian government to pressure the United States to liberate Hicks, overriding the legal structure established by the U.S. Department of Defense.

External expressions of voice can stand alone, or they can supplement the political protest of the client. For example, Mori's representation of Hicks allowed the lawyer to serve as the client's surrogate to the public. As we have seen, however, external resistance can also distract from the client's political goals. When the lawyers representing the SCLC in *Walker v. City of*

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129. See Part I.B.1.

130. See Part I.A.1.

131. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 73 (1983). Hart writes: "[I]f laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience." That is, "laws may be law but too evil to be obeyed." *Id.* at 77.

132. See *supra* Part I.B.1.

*Birmingham*<sup>133</sup> decided not to bring public attention to the injustice of the Alabama court, they did so because their clients wanted to retain focus on the protests against segregation in Birmingham, not on the injustices perpetuated by Southern state courts.<sup>134</sup>

Lawyers may choose internal and external resistance in the same case. Hicks's defense lawyers called press conferences, participated in rallies, and gave speeches,<sup>135</sup> but they also engaged in every legal strategy available within the military commission system. Their external resistance brought about a political intervention that resulted in a plea deal.<sup>136</sup>

Although internal and external expressions of resistance may overlap and manifest within the same case, the distinction between them is useful because it draws attention to sources of legal change. Internal resistance aims to alter the tribunal from inside the court system. Lawyers may seek a statement from another court that the first tribunal was wrong, or a statement from the tribunal itself that the rules are unjust. By contrast, external resistance places its faith in the political process. It seeks to change the tribunal through political action.

Finally, legal and practical considerations impose limits on lawyers' ability to engage in internal and external resistance. Lawyers may be held in contempt of court and even face jail time for voicing resistance in the courtroom.<sup>137</sup> Courts may curtail lawyers' public speech about a case under certain circumstances, even absent national security concerns.<sup>138</sup> Clients' goals and needs also affect lawyers' ability to engage in legal and political action. Often lawyers will argue that the duty to zealously represent the client and the duty to uphold the rule of law are in harmony. As one military lawyer defending a Guantánamo detainee explained: "If we're not advocating against the process, we're not

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133. 388 U.S. 307 (1967).

134. See *supra* note 24 and accompanying text.

135. See LEIGH SALES, *DETAINEE 002: THE CASE OF DAVID HICKS* 220–21 (2007) (describing the nature and success of the lawyers' public relations efforts).

136. See Morris Davis, *Op-Ed, AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, at A15 (accusing military commissions of being politicized); Josh White, *From Chief Prosecutor to Critic at Guantanamo*, WASH. POST, Apr. 29, 2008, at A1 (reporting that "[w]hen Hicks struck a secret plea deal that brought his release, [Chief Prosecutor Morris] Davis said he was not a party to it").

137. See *In re Dellinger*, 502 F.2d 813 (7th Cir. 1974) (upholding two contempt convictions of William Kunstler for disrupting trial and violating judge's orders during trial); Gerald F. Uelman, *Who Is the Lawyer of the Century?*, 33 LOY. L.A. L. REV. 613, 636–37 (2000) (describing the procedural history of Kunstler's contempt convictions in the Chicago Seven trial).

138. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (holding that local ethics rules may regulate extrajudicial lawyer speech regarding pending cases when the attorney knows or reasonably should know that statements will have "substantial likelihood of materially prejudicing" the proceeding).



competently representing our clients.”<sup>139</sup> Yet, as in *Walker*, situations arise in which a particular expression of resistance will harm the client. Even so, the lawyer may believe that their duty to the rule of law requires a particular resistance tactic. The next subpart analyzes the variety of tactics and strategies of resistance available to lawyers.

### C. Acts of Resistance

Having laid the foundation by discussing lawyers’ choices between two forms of resistance, exit and voice, and between expressing voice internally or externally, this subpart presents an original schema of actions available to lawyers who face unjust proceedings. In the face of unjust tribunals, lawyers may (1) boycott the proceedings collectively, (2) decide individually not to participate, (3) utilize existing law to ameliorate the procedural regime, (4) appeal to a higher, external authority to correct injustice, or (5) appeal to present or future members of the public. Each of these strategies may involve exit or voice and may employ internal or external resistance. Lawyers can also use these strategies of resistance simultaneously or sequentially. By setting out these strategies, I hope to spur a much-needed conversation about appropriate lawyer reactions to unjust proceedings.

#### 1. Organized Boycott

Imagine that every bar association in the United States prohibited lawyers from participating in the Guantánamo military commissions because the commissions failed to provide sufficient procedural protections and because they violated fundamental principles of the rule of law.<sup>140</sup> If no members of the bar were available to argue before the commissions or to serve as judges, the commissions could not function as an adversarial system. The government might choose to move forward with an inquisitorial process, but at a tremendous cost. In the United States, fair process is commonly understood to require an adversarial trial.<sup>141</sup> The U.S. government’s insistence on an adversarial process in the military commissions, in contrast to its permission of an inquisitorial process for the Combatant Status Review Tribunals (CSRTs),

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139. William Glaberson, *An Unlikely Antagonist in the Detainees’ Corner*, N.Y. TIMES, June 19, 2008, at A1 (quoting Lt. Cmdr. William Kuebler).

140. The 2003 ethics opinion issued by the NACDL was a failed attempt to start such a movement. This Article does not address the question of whether such a boycott would violate antitrust laws. See *Fed. Trade Comm’n v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (holding that a boycott by public defenders to increase their pay violated the Sherman Act).

141. See TYLER ET AL., *supra* note 91, at 79–80.

demonstrates the public relations stakes involved in forgoing adversarial presentation.

As a practical matter, however, boycotts are unlikely to succeed at combating procedural injustice in the American legal regime. Establishing a total boycott would be nearly impossible for two reasons. First, the political views of members of the legal profession are heterogeneous; achieving agreement among members of the bar, or between bar committees in individual states, would be difficult or impossible. Second, lawyers' traditional autonomy to choose their own clients similarly undermines the ability to establish a complete bar to representation.<sup>142</sup> Yet only a total boycott would shut down unfair tribunals. If individual lawyers were merely encouraged to withdraw, there would always be some who would agree to participate. For example, participation by some defense lawyers undermined the NACDL's attempt to promote a total boycott of the Guantánamo proceedings.<sup>143</sup>

Even if a boycott were feasible and consistent with the traditions of lawyer self-governance and pluralism within the legal profession, a strong principled argument exists against adopting this strategy. Boycotts are coercive. They force the tribunal to shut down, not through judicial or democratic political processes, but as a result of the concerted action of a minority. That minority is only able to close the tribunal because lawyers play a necessary role in its functioning—not because lawyers have a monopoly on righteousness.

The argument that boycotts are coercive resembles objections to civil disobedience. Some philosophers have argued that civil disobedience can cross the line and become coercion when it forces the majority to choose between accepting the position of the disobedient and doing something it abhors.<sup>144</sup> Thus, "the dissenters cross the line that separates civil disobedience from those forms of action that attempt to paralyze the majority's will

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142. This difficulty was evident in the NACDL's approach to the Guantánamo proceedings. Although the organization made clear its position that participation in the Guantánamo proceedings was unethical, it also explained that the "NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so." NACDL Ethics Advisory Comm., *supra* note 53, at 1. For lawyers who felt obliged to represent detainees, the opinion recommended a course of internal resistance through voice:

If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise . . . every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the Uniform Code of Military Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.

*Id.*

143. See *supra* Part I.B.1.

144. See Marshall Cohen, *Liberalism and Disobedience*, 1 PHIL. & PUB. AFF. 283, 287 (1972).

or the government's ability to act."<sup>145</sup> The difference is between speech and reason on the one hand, and force on the other. Whereas legal and rational arguments may convince the government or a court to repair the procedural injustice or to voluntarily shut down a tribunal, refusal to participate forces the government's hand. A successful defense counsel boycott of the military commissions would have forced the government to decide between forgoing all appearance of adversariness and accepting all of the defense lawyers' demands for reform.<sup>146</sup>

The coercion argument against lawyer boycotts is of a piece with arguments favoring role morality for lawyers. Advocates of role morality believe that lawyers have a professional morality different from the morality required of ordinary citizens.<sup>147</sup> These advocates object to lawyers exercising their own moral judgment with respect to clients' goals, so long as those goals are within the bounds of legality. This position is sometimes supported by the argument that zealous advocacy promotes democracy by maintaining the integrity of the adjudicative process.<sup>148</sup> In the adversarial model of adjudication, each party presents its case to a neutral arbiter, who listens to both sides and reaches a just outcome. Lawyers in an adversarial setting must represent their clients zealously in order for the system to function properly.

Proponents argue that role morality is necessary in all types of representation. By declining to pursue their clients' rights on the basis of their own moral convictions, lawyers substitute their judgment for that of the legislature, judge, and jury; they create an "oligarchy of lawyers."<sup>149</sup> By choosing to boycott, lawyers exercise independent judgment and concerted action to halt entire classes of proceedings. Instead, the decision of a democratically elected government to create a tribunal deserves to be respected by lawyers who value democratic decisionmaking processes, even if they believe the tribunal is unjust.<sup>150</sup> In such a situation, the only appropriate avenues for lawyer activism are political action or internal resistance through argument to the tribunal.

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145. *Id.*

146. Complicating this issue is the fact that some detainees have refused counsel; this issue, however, is not addressed here. See William Glaberson, *Arraigned, 9/11 Suspects Talk of Martyrdom*, N.Y. TIMES, June 6, 2008, at A1 (describing Khalid Sheik Mohammad's refusal to be represented by his attorneys at arraignment).

147. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613, 617–18.

148. See, e.g., Joint Conference on Prof'l Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160–61 (1958).

149. Pepper, *supra* note 147, at 617.

150. The military commissions as constituted in 2001 might be distinguished here because they were originally created solely by executive order. See Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War on Terrorism, 66 Fed. Reg.

Indeed, the strategy adopted by Salim Hamdan's lawyers in his appeal to the federal courts was based precisely on faith in democratic decisionmaking and in separation of powers principles.<sup>151</sup> Hamdan's lawyers argued that the commissions were an unconstitutional exercise of executive power.<sup>152</sup> The Supreme Court adopted this reasoning and Congress immediately set about authorizing the military commissions.<sup>153</sup> Hamdan's lawyers then shifted their argument to one of fundamental rights. When confronted by a manifestly unfair tribunal (even one created by a democratic process), lawyers may need to substitute their own judgments about what is unjust for those of the tribunal, at least in some situations.<sup>154</sup>

In addition to boycotts' coercive aspects in the political realm, they may have devastating effects on litigants. One prominent military lawyer advocated against a defense boycott of the military commissions by analogizing such an action to "doctors refusing to perform lifesaving surgery because of sub-standard hospital conditions."<sup>155</sup> This analogy overstates the potential impact on accused who are to be tried before severely unfair tribunals. The absence of counsel does not matter if the patient cannot be saved. On the other hand, if there is a possibility, however remote, that advocacy will affect the tribunal's decisions and lead to fairer results, then lawyers as a group arguably have a duty to participate in order to aid their clients and prevent injustice. Boycott is thus a strategy only for lawyers (and clients) who hold no hope of changing the system from within and who are willing to pay a bitter price.

In contrast, hope gave civil rights leaders a reason to pursue a legal strategy even in utterly inhospitable venues, such as the Alabama state courts presided over by segregationist judges. Although many members of the movement disagreed, King and others held out hope that civil rights demonstrators

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57,833 (2001). Only the passage of the Military Commissions Act of 2006 gave them legislative imprimatur. See Pub. L. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 & 42 U.S.C.).

151. For discussions of this decision, see MAHLER, *supra* note 72, at 227, and Neil Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 84-97 (2005). See also *supra* Part I.B.2.

152. Katyal, *supra* note 151, at 84-97.

153. See Hamdan v. Rumsfeld, 548 U.S. 557, 634-35 (2006); Military Commissions Act of 2006, 10 U.S.C.A. §§ 948-950 (West 2008).

154. I do not assume here that all democratic processes are in fact legitimate, either as a legal, sociological, or moral matter. See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (describing three types of legitimacy); Alan Hyde, *The Concept of Legitimacy in the Sociology of Law*, 1983 WIS. L. REV. 379, 407-18 (critiquing the concept of sociological legitimacy and arguing that legitimacy is an inaccurate description of why people obey the law).

155. Vanessa Blum, *Tribunals Put Defense Bar in a Bind*, LEGAL TIMES (Wash., D.C.), July 14, 2003, at 1 (describing the statements of Walter Cox III, former chief judge of the Court of Appeals for the Armed Forces).

might get a fair shake in Southern courts.<sup>156</sup> Similarly, lawyers pursuing justice in apartheid South Africa returned to the court system again and again with their clients' grievances.<sup>157</sup> For these advocates, legal victories, however small, "demonstrate[d the regime's] vulnerability and erode[d] its will to dominate."<sup>158</sup> Participation can be a powerful strategy for reform; and often a second-best solution is better than none. This was true in the Hicks case. A plea deal could not have been reached without attorney involvement, and, in the absence of a plea, Hicks would likely still be held in Guantánamo.<sup>159</sup>

On the other hand, a boycott may be warranted because it is better for the client that lawyers stop the injustice entirely, rather than continue to provide the cover of adversarialism to an unjust process. If the argument in favor of boycott rests on the client's welfare, then the client's consent would be required. But like lawyers, clients have heterogeneous points of view. Not all clients will agree with this strategy, even if their lawyer believes it is in the clients' long-term self-interest. Moreover, the process of convincing clients can change from persuasion to coercion, because the lawyer wields power by threatening to withdraw.

At bottom, undertaking a boycott is both morally problematic and risky. The government may respond by conducting inquisitorial tribunals without defense counsel present. Or it may postpone acting until the boycott ends, detaining the client for an indefinite period to force the lawyer to acquiesce to participation. To the extent the boycott is unsuccessful, the participating lawyers have abandoned the accused to trial alone *and* failed to achieve systemic changes.

## 2. Individual Refusal

In keeping with our individualistic tradition, the legal profession's response to procedural injustice is to permit each lawyer to decide individually whether or not to participate in an unfair hearing. As one public defender said of the military commissions, "You wonder whether you're doing more harm than good when you insert yourself into a system you don't agree with and find morally repugnant. We all have our breaking point where a system is so fundamentally flawed, we can't justify participating in it."<sup>160</sup> The tactic of

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156. See *supra* text accompanying note 19.

157. See ABEL, *supra* note 8, at 549.

158. *Id.*

159. See *supra* Part I.B.1.

160. Blum, *supra* note 155, at 1 (quoting Barry Boss, former assistant public defender and partner at Asbill, Moffitt & Boss).

individual refusal recognizes that people's breaking points differ as to when a tribunal is so unfair that withdrawal becomes necessary. This recognition affirms plural conceptions of justice. A commitment to plural conceptions of justice by implication requires that decisions regarding participation be made individually.

Individual refusal can consist of refusal to participate in the first instance, quiet withdrawal, or public withdrawal. Analogies between lawyer resistance and other forms of political resistance illuminate the choices lawyers face. The decision to publicly withdraw is analogous to civil disobedience, a form of public resistance that relies on political justifications. The decisions not to participate at all or to privately withdraw can be analogized to conscientious objection, a form of private resistance that originates in personal, moral convictions.<sup>161</sup> The categories of public versus private and political versus moral justifications are not fixed, but these concepts nevertheless aid in understanding the complexity of individual resistance. This is only a rough analogy because actors who engage in civil disobedience and conscientious objection in fact break the law, whereas lawyers who individually resist unjust tribunals do not, despite their acts manifesting a form of transgression.

Civil disobedience is a "public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."<sup>162</sup> It is a fundamentally public act, comparable "to public speech, and being a form of address, an expression of profound and conscientious political conviction, it takes place in a public forum."<sup>163</sup> In other words, civil disobedience is an exercise of communication through law breaking. The lawyer's decision to withdraw publicly from representation is similar. Consider Joshua Dratel's refusal to sign the notice of appearance requiring him to agree to comply with all rules of the Guantánamo military commission, including those not yet written, in his representation of David Hicks.<sup>164</sup> Dratel publicly refused to comply with the requirements of the tribunal, just as a civil disobedient refuses to comply with the offending law. Dratel's refusal resulted in his public disqualification, which served as a tool to communicate the depth of his opposition to the tribunal's injustice. His act is an example of exit with maximum voice.

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161. Several philosophers have discussed the distinction between conscientious objection and civil disobedience. I rely (in broad strokes) on the distinction as drawn by John Rawls. See RAWLS, *supra* note 85, at 363–91 (discussing civil disobedience and conscientious objection, and their roles in a just society); see also HANNAH ARENDT, *CRISES OF THE REPUBLIC: LYING IN POLITICS; CIVIL DISOBEDIENCE; ON VIOLENCE; THOUGHTS ON POLITICS AND REVOLUTION* 49–102 (1972).

162. RAWLS, *supra* note 85, at 364.

163. *Id.* at 366.

164. See *supra* Part I.B.1.

Conscientious objection, on the other hand, is a private act of “noncompliance with a more or less direct legal injunction or administrative order.”<sup>165</sup> Familiar examples include the refusal to pay a tax or to serve in the armed forces. The two principal differences between conscientious objection and civil disobedience are that conscientious objection is not a form of address to the larger public and it need not be based on political principles, but can be based on personal morality, religious conviction, or any other source.<sup>166</sup> Civil disobedience, on the other hand, is always addressed to the public and is “guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally.”<sup>167</sup>

The individual refusal to represent a client before an unjust tribunal initially or to withdraw from representation without taking a public stand may be analogized to conscientious objection. Had the SCLC’s lawyers refused to participate in King’s contempt trial, that would have been a form of conscientious objection. It seems likely that such a decision would have been made privately, without public spectacle.

Both civil disobedience and conscientious objection are acts intended at some level to resist injustice and strengthen the rule of law. At the same time, they pose a threat to democracy and to the rule of law; in both, individuals refuse to obey a law enacted by the legislature.<sup>168</sup> Nevertheless, “there are limits to the injustice that is compatible with political obligation.”<sup>169</sup> Some injustices are incompatible with the rule of law and with democratic principles, and they demand extralegal action.<sup>170</sup> Similarly, there are limits to the procedural injustice that a lawyer can tolerate as consistent with professional responsibility not only to the client, but to the rule of law.

In addition to political effects, we should not forget the personal costs to clients of individual refusal. Both quiet refusal to participate and public withdrawal have the practical effect of abandoning clients, who must work with new counsel or fend for themselves. Where withdrawal of individuals critical to the representation can halt the proceeding, this course of action may be justified on grounds that it will benefit the clients. But if the clients are left to defend themselves, the lawyers’ moral purity comes at the clients’ expense. What at first appears to be an other-regarding act of selflessness in the name

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165. RAWLS, *supra* note 85, at 364.

166. *Id.* at 369.

167. *Id.* at 365.

168. I leave open the question of whether such processes are truly democratic or legitimate.

169. David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 *PHIL. & PUB. AFF.* 31, 35 (1998).

170. An example is when one group bears the brunt of injustice systematically. See RAWLS, *supra* note 85, at 355.

of liberal legal principles is also a self-regarding act of moral purity that, in the end, is sullied by the harm done to the client.

If the clients can be represented by other lawyers, the coercive power of the lawyers' decision to refuse to participate or withdraw is limited. Lawyers who refuse to participate in the first instance will be replaced by others, with likely little effect on the tribunal. But such withdrawal, followed by replacement with substitute counsel, may be detrimental to the clients. In David Hicks's case, the Guantánamo military commission intended to go forward with the trial even after the withdrawal of Hicks's most experienced counsel.<sup>171</sup> The secret plea agreement appears to have been reached prior to Joshua Dratel's withdrawal, and therefore the harm to the client was minimal.<sup>172</sup> Hicks continued to be represented by able, but less experienced, assigned military counsel.<sup>173</sup> Nevertheless, the harm to the client of losing lead counsel so late in the proceedings could have been severe.<sup>174</sup> The story of Salim Hamdan's CSRT hearing illustrates the symbolic importance of the lawyer's continuing presence.<sup>175</sup> Although Hamdan's lawyer, Charles Swift, tried to explain that his presence would have changed nothing, Hamdan still felt abandoned.<sup>176</sup>

Withdrawal and refusal to represent the accused share the same basic difficulties. Lawyers who withdraw abandon their clients, to whom they owe a fiduciary duty, and give up the potential to prevent injustice through internal resistance. Lawyers may experience this crisis most acutely in the act of withdrawal, having already developed a relationship with and duty of loyalty to the particular clients. But the failure to fulfill the duty of representation and the loss of opportunity to effect change are equally present when lawyers choose not to participate in the proceeding at all.<sup>177</sup> They may rely on other lawyers to take their places, thereby alleviating some of the burden, but they know that these lawyers will likely face the same crises. These lawyers essentially pass the problems to others, rather than facing them. And the next lawyer asked to represent a defendant before the unfair tribunal faces the same choice. For this reason, individual autonomy in the decisions to withdraw

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171. See *supra* Part I.B.1.

172. See *supra* Part I.B.1.

173. See *supra* Part I.B.1.

174. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002) (governing withdrawal of counsel and requiring that upon withdrawal "a lawyer shall take steps . . . to protect a client's interests").

175. See *supra* Part I.B.2.

176. See *supra* notes 81–82 and accompanying text.

177. On the flip side, lawyers may attempt to participate even in the absence of a client, as Katyal urged the military defense lawyers before they were assigned to represent Hamdan. See *supra* Part I.B.2.



or not to participate at all come at the clients' expense and at the expense of the possibility of large-scale resistance to injustice. Both may result in the loss of opportunities to effect substantial change.

3. "Using the Master's Tools to Dismantle the Master's House"<sup>178</sup>

A third avenue available to lawyers facing procedural injustice is to participate in the tribunal and to use legal argument to import principles of procedural justice from the larger liberal legal regime into the unjust tribunal. This approach can be summed up in the phrase "using the master's tools to dismantle his house."<sup>179</sup> The idea is to appeal to fundamental principles of justice already existent in the law to alter unjust conditions. As one military officer said about the Guantánamo military commissions: "[H]aving civilian attorneys involved is good for the system. If they think the system is wrong, go prove it's wrong."<sup>180</sup>

If successful, this approach can result in either incremental or large-scale changes. For example, the Alabama state court judge presiding over King's 1963 trial could have ruled that the underlying injunction was invalid, representing incremental progress.<sup>181</sup> Conversely, a military commission judge could find that due process protections apply to noncitizen detainees, which would engender large-scale change. If this were to occur, lawyer advocacy will have had the direct and immediate effect of eradicating injustice. For this approach to work, the lawyer must believe that there are fundamental legal principles, found in universally recognized texts, which through legal interpretation and reason lead to the just result. Furthermore, the lawyer must believe that the judge is sufficiently neutral or at least sufficiently steeped in the liberal legal tradition to be able to hear these arguments. Whether the lawyer's evaluation is correct as an empirical matter will become clear only after the judge has made a determination. Evaluating the success of this strategy is only possible in hindsight.

The most well-known example of appeal to legal principles to bring sweeping change to an unjust legal system was the appeal to the Equal Protection Clause to undo the regime of legalized segregation in the American

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178. See LORDE, *supra* note 11, at 110–13.

179. See *id.*

180. Blum, *supra* note 155 (quoting Walter Cox III, former Chief Judge of the Court of Appeals for the Armed Forces).

181. See *supra* Part I.A.1.

South.<sup>182</sup> Yet upon reflection, this example is not one of rapid, large-scale change. The initial judicial pronouncements eliminating de jure segregation were powerful, but it took many years, substantial political agitation, and legislative action to eliminate the legal regime of segregation.<sup>183</sup> Moreover, the agents of change in the courts were not Southern state court judges, but instead federal judges who were both outside (not part of the Southern state judiciary) and inside (citizens of Southern states in which their courts were located) the unjust system.

Large scale change is gratifying when it happens; it represents a clear victory. Incremental change is more complicated. It is a tactic for optimists. In his book on lawyers in apartheid South Africa, Richard Abel concludes: "The legal battles described in this book did not win the war by themselves. But they empowered the masses while offering some protection from state retaliation."<sup>184</sup> Or as legal sociologists Susan Silbey and Patricia Ewick explain, "'individuals identify the cracks and vulnerabilities of organized power' in the acts of resistance."<sup>185</sup> The jurisprudential theory embedded in strategies seeking incremental change is pragmatic, taking advantage of the possibilities for justice wherever they can be found.<sup>186</sup> Small victories in the courtroom may open the door for more substantial changes.<sup>187</sup> For example, once Joshua Dratel obtained a concession from the Guantánamo military commission with regard to client monitoring, every civilian lawyer could demand this concession as well.<sup>188</sup> Such incremental changes may alter the law through internal logic or through external pressure. Incrementalism is also the strategy advocated by the Supreme Court in *Walker v. City of Birmingham*.<sup>189</sup>

182. See generally MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

183. See Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000a-2000h-6 (2006)).

184. ABEL, *supra* note 8, at 549.

185. EWICK & SILBEY, *supra* note 86, at 187.

186. For a history of pragmatism in American legal thought, see Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569 (1990).

187. See ABEL, *supra* note 8, at 549; EWICK & SILBEY, *supra* note 86, at 187.

188. See *supra* Part I.B.1.

189. The Supreme Court advocated this strategy of pursuing incremental change through legal argument to the civil rights movement in *Walker v. City of Birmingham*, 388 U.S. 307 (1967). The Court stated that the litigants had an obligation to challenge the injunction before the Alabama courts, and only if they met with "delay or frustration" could they choose to disobey the injunction. *Id.* at 318. This statement is an affirmation of the particular strategy of internal resistance through the court system. As commentators have pointed out, however, the opinion delegitimizes the petitioners' claim to civil disobedience that is respectful of the rule of law; this was expressed in their argument that the underlying injunction was clearly unconstitutional. This point is made in an excellent article by David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2174-75 (1989).

Audrey Lorde had quite the opposite in mind when she wrote that “the master’s tools will *never* dismantle the master’s house.”<sup>190</sup> Genuine change, she argued, must come from outside the system, because the system will only give insiders momentary victories limited by the master’s tools themselves.<sup>191</sup> For this reason some believe that unjust legal regimes can only be resisted extralegally—that only external resistance achieves progress. As we saw earlier, the civil rights movement focused its efforts on protest outside the courts, rather than on achieving justice within the Southern court system through legal argument.<sup>192</sup> The court system was secondary to its larger political strategy.

Some argue that internal resistance is merely “individualistic, self-interested, and inconsequential, as opposed to collective, principled and effective.”<sup>193</sup> Even worse, individual actions may sufficiently ameliorate conditions for a brief time to make insufferable situations tolerable, and in doing so “actually inoculate power from sustained and collective challenge.”<sup>194</sup> When Dratel negotiated in 2003 to obtain access to his client without monitoring, as a condition of participating in the military commission process, he achieved a significant victory.<sup>195</sup> But that victory was fleeting. In 2006, the presiding officer reasserted the arbitrary power of the tribunal by requiring that Dratel sign the notice of appearance.<sup>196</sup> Although the compromise initially allowed Dratel to agree to represent Hicks, it did little to alter the basic unfairness of the tribunal, including the absence of rules set in advance, the potential for the introduction of coerced evidence, and the fact that Hicks would still likely not be released absent a guilty plea. Perhaps the lawyers would have been in a stronger position to resist injustice had they boycotted the tribunal initially.

#### 4. Making a Record for a Higher Tribunal

Lawyers sometimes participate in unjust proceedings in order to create a record for another court, one with greater potential to be neutral, fair, and just, and with the power to undo the wrongs of the unjust tribunal. The lawyers defending King in his 1963 criminal contempt trial and the lawyers seeking habeas relief for Guantánamo detainees both adopted this strategy.<sup>197</sup> These lawyers participated in the unjust proceedings in the tribunals in order

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190. LORDE, *supra* note 178, at 112 (emphasis added).

191. *Id.*

192. *See supra* Part I.A.1.

193. EWICK & SILBEY, *supra* note 86, at 186 (critiquing the position presented herein).

194. *Id.* at 187.

195. *See supra* Part I.B.1.

196. *See supra* Part I.B.1.

197. *See supra* Parts I.A.1 and I.B.1.

to develop a record of injustice. They then turned to the federal courts, believing that these would stay true to fundamental legal protections: due process, equal protection, and separation of powers.

Lawyers for the civil rights movement defended King against contempt charges in the Alabama state court under the assumption that he would not get a fair trial there, but with the intent of making a record that would permit the reviewing federal court to find in his favor. As part of their strategy, they introduced evidence of the dismissive treatment of members of the SCLC who tried to obtain a permit to march.<sup>198</sup> That evidence was not relevant to the contempt proceeding, and was unlikely to sway the state court judge. Nevertheless it deeply affected the justices who dissented from the Supreme Court's decision in *Walker*. Only the dissenters were willing to acknowledge that the defendants could not have gotten a fair hearing in the Alabama state court. By contrast, in the Montgomery Bus Boycott trial, King's lawyers were not making a record for a higher tribunal (they never appealed). They also introduced evidence that was not strictly relevant to the trial in order to communicate to the White community the suffering of Blacks under segregation.<sup>199</sup>

Establishing facts at the trial level to demonstrate injustice may have a powerful impact on reviewing judges. But it still requires participation in the unfair tribunal. Again and again, as *Hamdan v. Rumsfeld*<sup>200</sup> moved up the federal court hierarchy, the lawyers used the fact of Hamdan's exclusion from the voir dire proceedings in 2004 to prove that the commissions were unfair.<sup>201</sup> The reviewing judges seem to have found the fact of his exclusion more offensive to fundamental ideas of due process than the discretionary rule permitting exclusion.<sup>202</sup>

The practical problems with the strategy of appeal to a higher tribunal are twofold. First, the higher court may not agree that the tribunal below is indeed unjust, as when the Supreme Court upheld King's contempt conviction in *Walker*.<sup>203</sup> Furthermore, even if the higher tribunal does ameliorate the injustice, it may do so in a way that does not ultimately reform the unjust system. Even Hamdan's success before the Supreme Court did not spell the end of the military commissions.<sup>204</sup> After the Court struck down the military

198. See WESTIN & MAHONEY, *supra* note 15, at 94.

199. See *Walker v. City of Birmingham*, 388 U.S. 307, 340 (1967); Part I.A.2.

200. 548 U.S. 557 (2006).

201. See MAHLER, *supra* note 72, at 133–37, 159.

202. See *id.* (describing judicial reactions in oral argument).

203. 388 U.S. 307.

204. See *Hamdan*, 548 U.S. 557. See generally Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1061–79 (2008) (accounting for the procedural focus of

commissions, Congress immediately set about authorizing them.<sup>205</sup> Although the Military Commissions Act of 2006 may have eliminated the grossest injustices, substantial criticisms remain.<sup>206</sup>

## 5. Appealing to Public Opinion

The final strategy lawyers may adopt is to participate in the tribunal in order to spur political action outside the courts. Lawyers might appeal to public opinion in three ways. First, they might conduct the trial in a way that highlights injustice, and use their position to present information about that injustice to the public. Lawyers adopting this method put the tribunal on trial in the court of public opinion. A related but somewhat different tactic involves creating a “theater of the absurd” in the tribunal. Finally, lawyers may participate in order to make a historical record and to bear witness for posterity.

When lawyers put the court on trial in the court of public opinion, they conduct the trial in a way that highlights injustice. Sometimes lawyers use their participation to gather evidence of this injustice to bring to the public. Participation in the proceedings gives lawyers direct proof of unfairness that they would otherwise lack. The lawyers publicize this information through the press or perform within the tribunal in a way calculated to draw the attention of the press (and thereby the public) to the injustice. This is a useful approach when the injustice facing the client is the tribunal. For example, in the military commissions context, the client detainees’ larger purpose was advanced by drawing public attention to injustice in the tribunal procedures because the tribunal’s injustice was the problem these clients faced.

Not only does participation provide lawyers with evidence of injustice, but it permits access to the client. This access allows the lawyer to speak credibly for the victim of injustice, amplifying the lawyer’s voice. Dan Mori adopted this strategy in his representation of David Hicks.<sup>207</sup> The Department of Defense denied Hicks contact with the outside world, so Mori spoke for him. Mori’s avowed purpose was to sway public opinion in Australia and to put

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the Supreme Court jurisprudence surrounding the “War on Terror” and the Court’s refusal to resolve substantive questions).

205. Military Commissions Act of 2006, 10 U.S.C.A. §§ 948–950 (West 2008) (giving the Executive power to convene military commissions).

206. Critics were concerned that the Military Commissions Act did not require the application of the Fifth Amendment to military commissions proceedings, did not bar the introduction of evidence obtained through torture and mistreatment, and did not provide for access to evidence against the accused. See sources cited in note 8, *supra*. Subsequent Supreme Court decisions have not addressed these questions. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (permitting habeas petitions to proceed in the lower federal courts).

207. See *supra* Part I.B.1.

pressure on the Australian government to act on behalf of his client.<sup>208</sup> Representing Hicks gave Mori credibility; being a *military* lawyer gave him even more credibility. Had Mori been an ordinary citizen concerned about Hicks or the military commission system, his protests would not have been meaningful.

In other cases, putting the court on trial does not advance the client's goals.<sup>209</sup> Lawyers for the civil rights movement adopted a purely legal strategy and ruled out suggestions to put the Southern courts on trial because they thought that such action would be counterproductive to the movement's reliance on federal injunctions to dismantle desegregation.<sup>210</sup> Furthermore, the SCLC and its lawyers agreed that trying the Southern courts in the court of public opinion would distract attention from the Birmingham protests. They did not want the contempt trial to overshadow their clients' larger purpose. In the Montgomery Bus Boycott trial, lawyers used the courtroom as a forum to air Black grievances, making a public statement through the trial. But there the court itself was not on trial; Jim Crow was.<sup>211</sup>

A second use of the trial for political action transforms the courtroom into a theater of the absurd. The defendants in the Chicago Seven Trial, and their lawyer, William Kunstler, adopted this tactic.<sup>212</sup> The defendants were eight social activists accused of conspiring to incite a riot at the 1968 Democratic National Convention in Chicago.<sup>213</sup> During the trial, the defendants and their lawyers staged many theatrical moments. Bobby Seale, the only Black defendant and a member of the Black Panthers, vociferously insisted on representing himself against the judge's orders. The judge ordered him bound and gagged before the jury.<sup>214</sup> Two other defendants, Abbie Hoffman and Jerry Rubin, arrived in judges' robes affixed with yellow Jewish stars. Hoffman then removed his robe to reveal the shirt of a Chicago police officer.<sup>215</sup> Judge Julius Hoffman at one point admonished: "We are not running a circus.

208. See SALES, *supra* note 135, at 220–21 (describing the nature and success of Mori's public relations efforts in Australia). The British government had earlier sought release of its citizens from Guantánamo, spurring the belief that political intervention was necessary to obtain release. See *id.* at 100–01.

209. See *supra* Part I.A.1.

210. See WESTIN & MAHONEY, *supra* note 15, at 94.

211. See *supra* note 33 and accompanying text.

212. The fascinating story of the way these defendants, with their lawyer's assistance, turned the courtroom into a circus is told in detail elsewhere. See Lahav, *supra* note 119, at 385 n.19 (citing studies of the Chicago Seven trial).

213. See *id.* at 385.

214. *Id.* at 387. Seale's trial was severed from that of the other seven defendants after this incident. *Id.* at 384.

215. *Id.* at 389–90.

This happens to be a court.”<sup>216</sup> William Kunstler called the proceedings a “legal lynching”<sup>217</sup> in open court and stated to the judge, “I am going to turn back to my seat with the realization that everything I have learned throughout my life has come to naught, that there is no meaning in this court, there is no law in this court.”<sup>218</sup> These statements were the basis of a contempt charge against Kunstler. At the end of the trial, the judge summarily convicted all the defendants and their attorneys of contempt for their actions throughout the trial.<sup>219</sup> The defense’s purpose in deploying these tactics seemed to be at once to attract personal attention, draw attention to the absurdity of the justice system, and entice the judge to act in ways that further demonstrated his lawlessness.<sup>220</sup> These types of spectacles can spur either insight or revulsion in the public. In addition to risking alienating the public, such theatrics arguably violate the Rules of Professional Conduct.<sup>221</sup>

Sometimes trying the tribunal in the court of public opinion or creating a theater of the absurd may not be possible. The lawyer may not be permitted to speak about the proceedings for national security reasons, or the public may not be ready to listen. Nonetheless, the lawyer may continue representation in order to bear witness, as did one appointed military defense lawyer appearing before the Guantánamo commissions. He sat at the defense table and declined to advocate under instructions from his client, who was boycotting the proceedings.<sup>222</sup> The lawyer’s presence has two possible purposes in this situation. First, the lawyer may choose to be present in order to create a historical record and serve as a witness to the injustice at later proceedings. Second, the lawyer may believe that his presence as a witness will shame the tribunal or spur the tribunal to recognize the injustice it is perpetuating. In sitting by the defendant’s side as a witness, the lawyer seeks to create self-awareness on the part of the tribunal that may lead to greater fidelity to the rule of law.

Bearing witness is a limited role, but one that may have great value. Salim Hamdan excoriated his lawyer, Charles Swift, for failing to attend his CSRT hearing, even though Swift’s presence would have had little effect on

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216. *Id.* at 381.

217. *In re Dellinger*, 370 F. Supp. 1304, 1338 (N.D. Ill. 1973).

218. *Id.*

219. Lahav, *supra* note 119, at 390.

220. *Id.* at 447 (“From the perspective of the defense, the trial was about showing how . . . leviathan harbors and often deploys lawlessness, thereby threatening ordered liberty.”).

221. See MODEL RULES OF PROF'L CONDUCT R. 3.5, cmt. 4 (2002) (“An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”).

222. See Glaberson, *supra* note 44.

the outcome.<sup>223</sup> Swift had quite literally prepared to be a witness solely in order to be by his client's side. If nothing more, perhaps Swift's presence could have partially alleviated Hamdan's feeling of abandonment before a hostile tribunal. At the same time, the lawyer who bears witness leaves behind the role of advocate and becomes something else entirely—an observer, supporter, conscience, or, perhaps, a friend. The role may seem like pretense and it risks creating the false appearance that the client has meaningful representation. As Joshua Dratel explained to the military commission when offered the opportunity to remain by Hicks's side without the ability to advocate on his behalf: "I'm not going to pretend that I'm here functioning when I'm not entitled to do my job."<sup>224</sup>

### III. THE LAWYER'S ROLE AND PROCEDURAL INJUSTICE

The analysis in Part II examined the choices available to lawyers faced with unjust proceedings and demonstrated the difficulty of the dilemmas they face. Two fundamental questions remain. First, can the lawyer's crisis be resolved by reference to a shared understanding of the lawyer's role in the adversarial process and in society? That is, do the lawyer's professional duties dictate a particular response to unjust proceedings? Second, at what point, if any, is procedural injustice so egregious that it demands resistance—and how can lawyers identify it?

With respect to the first question, our shared understanding of the lawyer's role grounded in the Model Rules of Professional Conduct—as fiduciary of the client and defender of the rule of law—does not help in resolving the lawyer's crisis. Instead, it creates conflicting obligations, particularly in the context of the unjust tribunal, that cannot be reconciled. The traditional argument is that this conflict is illusory. In service of their clients, lawyers will inevitably participate in doing justice. Whether or not this position is true in the ordinary case (and I do not think it is), we have seen that the ideal of client service does not resolve the problem of complicity in the unjust tribunal. In that context, service to the client through participation can render lawyers complicit in the tribunal's injustice and potentially leave their clients no better off. Refusal to participate or boycott may cleanse the lawyer of direct complicity, but abandons the client. Furthermore, I argue below that because law is dynamic, lawyers also have a role as architects of social structures and "builders-up" of law. This role puts further pressure on lawyers

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223. See *supra* note 81 and accompanying text.

224. Transcript of Record, *supra* note 2, at 27; see *supra* Part I.B.1.



not to contribute to injustice. The problem is that lawyers may contribute to injustice either by standing by or participating, by risking complicity or abandoning their clients. Therefore, our conceptions of the lawyer's role do not tell the lawyer which course of action to take in the face of procedural injustice.

Secondly, to distinguish between the ordinary case and the extraordinary case of procedural injustice that triggers the problems discussed here, we need a definition of procedural justice.<sup>225</sup> The mandate that lawyers promote justice begs the question of what justice is. A complete theory of procedural justice is beyond the scope of this Article, for among other reasons, the theory of procedural justice is contested. I attempt to demonstrate in Part III.B some of the ways in which procedural justice is contested as an empirical matter. Even so, this uncertainty does not absolve lawyers of responsibility for struggling with injustice because law is dynamic and lawyers play a crucial role in law's development. I discuss the implications of the fact that lawyers' actions play a role in increasing or decreasing injustice in Part III.C. Despite uncertainty, lawyers are forced to evaluate whether a tribunal is unjust, and their actions in response to that injustice will be judged by posterity. Lawyers themselves are aware of this.<sup>226</sup>

#### A. The Lawyer's Professional Duties Do Not Dictate the Response to Injustice

Recourse to our traditional, and ultimately rather thin, conception of the lawyer's role provides little help to the lawyer facing the unjust tribunal. Instead, it merely restates the tension between service to the client and fidelity to the rule of law.

There are two clichéd views of the lawyer: as a client-centered agent or as an officer of the court. In the traditional, client-centered view,<sup>227</sup> the rules

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225. This Article also leaves open the question of how to determine whether injustice is isolated or systemic. See *supra* note 7 (discussing the issue of systemic injustice in the context of death penalty appeals).

226. As one prosecutor in the military commissions wrote to his superior upon resigning: "It will be expected that I should have been aware of the shortcomings with this endeavor, and that I reacted accordingly." Email From Capt. John Carr to Col. Fred Borch (Mar. 15, 2004) (on file with author).

227. This ideal of lawyer responsibility to the client is sometimes referred to as "neutral partisanship," by which scholars mean that lawyers are to be neutral to their clients' ends and partisan in helping them to achieve their goals. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-37 (describing and critiquing the concept of neutral partisanship); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (same). This ideal is popularly thought of as "zealous advocacy," words that appear in the preamble to the Model Rules as well as in some of the commentary. See MODEL RULES OF PROF'L CONDUCT pmbl. (2002) ("As advocate, a lawyer zealously asserts the client's position under the rules

of professional ethics and the legal standards developed to govern lawyers generally reflect an understanding of the lawyer as a fiduciary to the client. For example, the Model Rules of Professional Conduct require lawyers to abide by their clients' decisions regarding the goals of representation as well as by the clients' choices made during the course of representation.<sup>228</sup> The Rules limit the lawyers' ability to represent clients with conflicting interests and emphasize the necessity of client consent to any conflict.<sup>229</sup> They require lawyers to maintain loyalty to the client even after the relationship has terminated.<sup>230</sup> Lawyers must not only *be* loyal to their clients, but they must be *perceived* to be loyal. When considering motions to disqualify counsel, for example, judges will look not only to actual conflicts, but also to the appearance of impropriety.<sup>231</sup> The Rules further limit lawyers' ability to withdraw from representation if withdrawal will harm the client.<sup>232</sup>

A robust version of the principle of fidelity to the client's goals is justified by the argument that access to lawyers in our society often is the only means of access to justice.<sup>233</sup> If lawyers withhold representation on the basis of their own judgments, particularly (although not exclusively) in the criminal context, the lawyer serves as "judge and jury" rather than leaving this function to the courts.<sup>234</sup> The lawyer's loyalty also affirms the values of respect for the autonomy and dignity of the individual—the ability to make one's own decisions and to set one's own goals.<sup>235</sup> Finally, in the absence of

of the adversary system."); MODEL RULE OF PROF'L CONDUCT R. 1.3, cmt. (2002) ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf.").

228. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

229. MODEL RULES OF PROF'L CONDUCT R. 1.7 (governing conflicts of interest with present clients), R. 1.9 (governing conflicts of interest with former clients) (2002).

230. MODEL RULES OF PROF'L CONDUCT R. 1.9.

231. See, e.g., *Analytica, Inc. v. NPD Res., Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983) (Posner, J.) (disqualifying counsel based on appearance of conflict).

232. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002).

233. See Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 36–37 (Harold J. Berman ed., 1961) (arguing that the lawyer must represent even the client he thinks is guilty in order for the adversarial system to work); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1482 (1966) (arguing that loyalty is required to realize the policies of "the maintenance of an adversary system, the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt, the right to counsel, and the obligation of confidentiality between lawyer and client"); Pepper, *supra* note 149 (arguing that subordination of the lawyer's own moral views to the client's goals is required to maintain client autonomy and provide access to justice).

234. George Sharswood wrote: "The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury." Quoted in DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 20 (2007).

235. This is the moral basis of Pepper's theory of "first class citizenship," which argues essentially that lawyers translate the goals of individuals into the language of the justice system so that individuals can participate fully in political life." See Pepper, *supra* note 149. For a similar argument that tries to

the promise of loyalty, clients might not seek legal representation, and both the clients and the bar would suffer as a result.

A second principle governing lawyer conduct is the conception that the lawyer is an officer of the court whose primary duty is to uphold the rule of law. This principle is much less developed in the ethics rules, but it nevertheless has been a consistent counterpoint to the principle of zealous advocacy. The Preamble to the Model Rules states that a lawyer is "an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>236</sup> To further this goal, the Rules require candor to the tribunal and demand that the attorney exercise "independent professional judgment."<sup>237</sup> The Rules explicitly forbid the lawyer from presenting testimony known to be false, bringing frivolous lawsuits, and engaging in "conduct intended to disrupt the tribunal."<sup>238</sup> Finally, lawyers may not agree to restrict their practice as part of a settlement.<sup>239</sup>

Scholars have relied on these provisions and other sources to argue that lawyers have various public duties in addition to their private obligations to the client. Some scholars argue that lawyers have a responsibility to safeguard the framework of arrangements that make society work, and that this means taking into account the good of society as well as their client's interests.<sup>240</sup> Others argue that lawyers have an obligation to apply the law to their clients' situations while upholding the meaning of legal norms broadly defined because law's legitimacy requires that lawyers act as its custodians.<sup>241</sup> Finally, scholars have debated the relationship between the lawyer's personal morality and the duty of service to the client,<sup>242</sup> as well as the tension between a lawyer's identification with an affinity group and the duty of loyalty to the client.<sup>243</sup>

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root lawyer fidelity to client goals in political theory see DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2008).

236. MODEL RULES OF PROF'L CONDUCT pmbl. (2002).

237. MODEL RULES OF PROF'L CONDUCT R. 3.3 (candor toward the tribunal), R. 2.1 (advisor) (2002).

238. MODEL RULES OF PROF'L CONDUCT R. 3.1 (meritorious claims), R. 3.5 (impartiality and decorum of the tribunal) (2002).

239. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2002).

240. See, e.g., Robert Gordon, *Why Lawyers Can't Just Be Hired Guns*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* (Deborah Rhode ed., 2000).

241. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005).

242. Compare Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976) (arguing that the lawyer's morality must be subordinate to the client's goals), with Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (arguing in favor of the lawyer's moral agency in the professional role).

243. See David B. Wilkins, *Identities and Roles: Race, Recognition and Professional Responsibility*, 57 MD. L. REV. 1502 (1998) (discussing the relationship between professional identity, race and morality in legal representation).

The twin values of duty to the client and fidelity to the rule of law may sometimes complement one another. This occurs, for example, when pointing out the injustice of a particular governmental action also serves a client's interests.<sup>244</sup> When these values conflict with one another, however, recourse to the lawyer's "role" does not dictate the correct course of action. For example, when Dratel was asked to sign a notice of appearance assenting to procedural rules that had yet to be promulgated, his duty to defend his client and his fidelity to the principle that laws should be known in advance were in conflict. Similarly, when King's lawyers contemplated whether to participate in a contempt hearing that they knew to be a sham, they faced a conflict between their duty to defend their client against contempt charges and the risk that their participation would perpetuate the injustice of a biased court by lending it the appearance of legitimacy.

The principle of fidelity to the rule of law is not as simple as the requirement that the lawyer uphold the law as written, because the relationship between lawyers and law is dynamic. The Model Rules assume that the law preexists the lawyer's decision to act.<sup>245</sup> But the lawyer's relationship with legal institutions is more than just that of a subject. The lawyer is also an "architect of social structures,"<sup>246</sup> and legal institutions are among these structures.

One of the definitions of architect is "a builder-up."<sup>247</sup> Lawyers build up legal institutions. They participate in designing and framing legal institutions in a variety of ways, such as by bringing lawsuits and by framing legal arguments, which are then adopted (or rejected) by judges and become precedent. The lawyer's role as architect (in collaboration with other legal and nonlegal actors) extends to all aspects of legal institutions, which are continually being made and remade by the lawyers who participate in them. For this reason, as David Luban explains, "the ordinary law practice of ordinary lawyers deserves attention because it is central to the rule of law."<sup>248</sup> A lawyer is not merely a legal technician hired to serve the client, but is also part of a legal community and a crucial participant in the maintenance and formation of legal institutions

244. I am thinking here of situations such as racial profiling, where demonstrating that the client suffered a constitutional deprivation also supports equal protection principles.

245. The best argument that the Model Rules incorporate a positivist view of law is Simon, *supra* note 227, at 36.

246. Lon L. Fuller, *The Lawyer as an Architect of Social Structures*, in *THE PRINCIPLES OF SOCIAL ORDER: THE ARTICLES OF LON FULLER* 264-70 (Kenneth I. Winston ed., 1981).

247. *THE OXFORD ENGLISH DICTIONARY* 613 (2008) (Definition 3 of the word "architect" states: "One who so plans, devises, contrives, or constructs, as to achieve a desired result (especially when the result may be viewed figuratively as an edifice); a builder-up.").

248. LUBAN, *supra* note 234, at 6.

and laws. The individual lawyer's actions may seem small, but they are part of a very large, important project that structures our lives.<sup>249</sup>

Consider the decisions made by lawyers for Salim Hamdan in their arguments before the Supreme Court as an example of this architectural role. In the course of their representation, Hamdan's lawyers sought a ruling from the Supreme Court that the military commissions were unconstitutional. They framed their arguments in terms of separation of powers and the correct process for convening military commissions rather than in terms of fundamental rights. The Supreme Court invalidated the military commissions on these structuralist grounds, but the victory for the client was short lived because, in response, Congress promptly passed the Military Commissions Act.<sup>250</sup> We cannot know what would have happened had Hamdan's lawyers chosen to make arguments rooted in fundamental rights.<sup>251</sup> We know that the arguments they did make resulted in congressional ratification legalizing military commissions, largely insulating the tribunal that the lawyers opposed and ultimately resulting in their client's conviction by that tribunal. In sum, Hamdan's lawyers laid the foundation for the Military Commissions Act.

It is lawyers' ability to form the law, not merely parrot it, that makes law a "public profession."<sup>252</sup> The lawyer's professional role preserves the status quo in the face of "any attempted domination of the legal apparatus by executive tyrants, populist mobs, or powerful private factions."<sup>253</sup> But lawyers can also

repair defects in the framework of legality, serve as a policy intelligentsia, recommending improvements in the law to adapt it to changing conditions, and use the authority and influence deriving from . . . public prominence and professional skill to create and disseminate, both within

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249. This role is virtually ignored by the Model Rules, which make only one reference to such a role. MODEL RULES OF PROF'L CONDUCT pmb. (2002) ("Lawyers play a vital role in the preservation of society.").

250. Military Commissions Act of 2006, 10 U.S.C.A. §§ 948-950 (West 2008).

251. See Katyal, *supra* note 151, at 95.

252. During the American revolutionary period, lawyers were seen as a "separate estate of society, committed by professional instincts and habits to serving as a balance wheel in political life." Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988). For further support of this historical point see Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001), and Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992). David Luban similarly writes: "Historically, an independent bar, like an active and free press, has often formed an important counterweight to arbitrary authority." LUBAN, *supra* note 234, at 5. But see Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001 (2005) (disputing Gordon's historical claims and arguing that the zealous advocacy model was quite strong during the antebellum period).

253. Gordon, *supra* note 252, at 14.

and without the context of advising clients, a culture of respect for and compliance with the purposes of the laws.<sup>254</sup>

This dynamic understanding of the lawyer's relationship to law and society means that there is a lot at stake in the decisions lawyers make in the course of representing their clients.<sup>255</sup>

The difficulty in conceiving of the lawyer as social architect is that in our pluralist society, we disagree about what good institutions should look like. The lawyer looking to fulfill his obligation to justice faces the problem of defining what justice is. It may be impossible to say that a particular legal rule or institution is in the "public interest" because the concept is so thoroughly contested.<sup>256</sup> Some argue that precisely because we are a pluralist, secular society we need a common language of shared legal norms to foster agreement. For example, Robert Gordon writes that "[o]ne function of lawyers, . . . in addition to pursuing their client's interests[,] is to give advice that will help align those interests with the set of general social norms."<sup>257</sup> I would go a step further and argue that the function of lawyers, who are engaged in the building-up of legal institutions, is to build them in ways that are consistent with aspirational legal norms.

Unfortunately, the general obligation to advance justice does not solve the dilemma for lawyers facing the unjust tribunal because it is unclear which tactics will be most likely to advance the cause of justice. As Part II demonstrated, sometimes acts of resistance intended to advance justice will render the lawyer complicit in injustice, and similarly sometimes acts that appear complicit will end up being powerful forms of resistance. Perhaps more troubling, the obligation to pursue justice is difficult to fulfill because exactly what constitutes procedural justice in any particular situation will likely remain contested. That brings us to the critical issues for lawyers facing injustice: What is procedural injustice? After all, without a definition of procedural justice, how can a lawyer know that a tribunal is in fact so unjust that resistance is appropriate?

254. *Id.*

255. See generally WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998) (arguing in favor of a lawyer's duty to build just institutions); LUBAN, *supra* note 234 (same); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2003) (same); Russell G. Pearce, *Professional Responsibility for the Age of Obama*, 22 *GEO. J. LEGAL ETHICS* 1595 (2009) (same).

256. See Austin Sarat, *The Profession Versus the Public Interest: Reflections on Two Reifications*, 54 *STAN. L. REV.* 1491, 1497 (2002) ("The public interest is a notoriously slippery concept that generally does little or no analytic work.").

257. Gordon, *supra* note 252, at 17–18.

B. The Difficulty of Defining Procedural Injustice and the Parameters of Disagreement

Thus far, the analysis has been concerned with how lawyers can react to procedural injustice once they recognize it. Yet a more fundamental question remains unanswered: What is procedural injustice? As mentioned, developing a complete theory of procedural justice is beyond the scope of this Article.<sup>258</sup> It is also evident that there is no available theory of procedural justice that garners widespread agreement. The lack of such a theory of procedural justice to guide lawyer action has serious implications. If there is no measure of injustice that we can all agree on in application, then it is up to individual lawyers to make their own determinations. As a result, the best that can be said is that lawyers are in a position to judge what constitutes injustice.

Our system indeed leaves it to individual lawyers to decide when injustice is present in a tribunal such that some form of resistance is warranted. This autonomy is the product both of the traditional freedom of lawyers to choose their clients and of our pluralist society in which there is disagreement about justice in application, if not in principle.<sup>259</sup> It would be easy if lawyers could simply lay the question of justice at the client's door. But deferring to client goals is insufficient because lawyers do have agency and their actions in response to a tribunal have the potential to support or prevent injustice, to resist or be complicit.

Most everyone would agree that some tribunals violate the basic principles of procedural justice. Yet even if we agree on basic principles, they are contested in practice. The lack of agreement poses a problem for justifying resistance to a tribunal. If the tribunals are vindicated and judged to be fair retrospectively, lawyer resistance may be seen as a betrayal. On the other hand, not resisting may signal that an unfair tribunal is just because the adversarial system lends that tribunal the appearance of justice.

Some basic principles of procedural justice are generally agreed upon in our society. Fundamental to procedural justice is that the tribunal should

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258. The difficulty of identifying procedural injustice is further complicated by the presence of substantive injustice. In this Article, I am concerned with situations in which injustice in the proceedings before the tribunal is at issue, while recognizing that procedural injustice is often linked with substantive injustice, and that the distinction between the two is oftentimes difficult to draw. Cf. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (noting the difficulty of distinguishing between substance and procedure for *Erie* purposes).

259. See, e.g., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 251 (2004) (arguing in the context of civil litigation that a theory of procedural justice based on moral theories will never get widespread agreement).

"hear the other side."<sup>260</sup> From this principle arguably flow the requirements that the decisionmaker be impartial;<sup>261</sup> the procedures for trial and the elements of the crime be established in advance;<sup>262</sup> and the accused be permitted access to the adverse evidence and an opportunity to rebut that evidence.<sup>263</sup> These principles could be derived from the Due Process Clause of the Fifth Amendment (which, even if held to apply to a given case, does not tell us how much process is due),<sup>264</sup> from the more fixed provisions of the original Constitution and the Bill of Rights providing for procedural protections in criminal trials,<sup>265</sup> or from international law.<sup>266</sup>

260. See *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J. dissenting) ("Audi alteram partem—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them—executive, legislative, and judicial, whenever any individual, however lowly and unfortunate, asserts a legal claim."). For a philosophical discussion of this maxim, see Luban, *supra* note 8, at 1984–85 (describing the work of the philosopher Stuart Hampshire).

261. "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST NO. 10, at 131 (James Madison) (Benjamin F. Wright ed., 1961); see also Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (arguing that the most basic due process requirement is an unbiased judge).

262. See LON L. FULLER, THE MORALITY OF LAW 38–39, 46–81 (1964). Fuller articulated eight requirements for the rule of law to be achieved: rules must (1) be general rules, rather than ad hoc decisions; (2) be promulgated and publicized; (3) be prospective, rather than retroactive; (4) be clear and understandable; (5) not be contradictory; (6) not command the impossible; and (7) not be changed too frequently; and (8) there must exist a congruence between the rules and their actual administration. *Id.*

263. *Hamdan v. Rumsfeld*, 548 U.S. 557, 624, 634 n.67 (2006) (citing cases holding that the right of the accused to know and dispute adverse evidence is fundamental).

264. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."). One question before the military commissions was whether the Fifth Amendment would apply in these tribunals. The military commission judge held that the Fifth Amendment did not apply to the commission proceedings in *Hamdan's* trial. See *infra* note 283.

265. See *Medina v. California*, 505 U.S. 437, 443 (1992) (holding that the due process calculus articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), does not apply in the criminal context); Martinez, *supra* note 204, at 1048. For specific provisions that might be applicable, see U.S. CONST. art. I, § 9 (prohibiting ex post facto laws); U.S. CONST. art. III, § 2 (providing for trial by jury in all criminal cases); U.S. CONST. art. III, § 3 (procedural requirements for crime of treason); U.S. CONST. amend. V (requiring indictment by a Grand jury for capital crimes, prohibiting double jeopardy, and providing for a right against self-incrimination); U.S. CONST. amend. VI (providing for the right to a speedy trial; by impartial jury; to know the accusations in advance; to confront witnesses; and for the assistance of counsel).

266. In the context of the military commissions, some have argued that the principles described in the text are embodied in the Geneva Convention requirement that individuals be provided "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Hamdan*, 548 U.S. at 633 (quoting Protocol I to the Geneva Convention of 1949). The United States is not a signatory to this Protocol, but recognizes it as a part of international customary law. Martinez, *supra* note 204, at 1057–58. In *Hamdan*, the Court stated that the rights under the Protocol include the right to be tried in one's presence and to defend oneself in person or through legal assistance. 548 U.S. at 633 n.66;



In the application of these principles, however, disagreement surfaces—proving Justice Holmes's well-worn maxim that general propositions do not decide concrete cases.<sup>267</sup> For example, we cannot agree on whether some procedural requirements are absolute or whether (and when) they may be weighed against other considerations, such as national security or efficiency.<sup>268</sup> This is especially true in cases implicating our concept of due process. As Justice Frankfurter famously explained, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."<sup>269</sup> Due process is instead a malleable concept that can accommodate very broad or very minimal procedural protections.

*Hamdan v. Rumsfeld*<sup>270</sup> illustrates the contested nature of procedural justice. The fact that there were six opinions in the case demonstrates this point. Some of the justices disagreed on the basic question of whether structural indicia of bias rendered broad judicial discretion unjust.<sup>271</sup> One of the issues raised by the defendant's lawyers was that the accused could be excluded from his trial, and had in fact already been excluded from voir dire. The plurality opinion called the right to be present at one's trial "one of the most fundamental protections," and stated that "the jettisoning of so basic a right cannot lightly be excused as 'practicable.'"<sup>272</sup> In his concurrence, Justice Kennedy conceded that the provision of the Executive Order creating the military commissions that permitted the accused to be excluded from his trial was "troubling,"<sup>273</sup> but he found solace in the provisions of the military commission regulations that "bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a 'full and fair trial.'"<sup>274</sup>

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see also David Glazier, *Full and Fair by What Measure? Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55 (2006).

267. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Justice Holmes exempted from this general proposition "fundamental principles as they have been understood by the traditions of our people and our law" when the violation meets with "universal condemnation." *Id.* Condemnation of the tribunals in the case studies presented here was not *universal*, although today it is arguably widespread.

268. For example, in *Hamdi v. Rumsfeld*, 452 U.S. 507 (2004), members of the Court disagreed over whether the *Mathews* due process calculus applies to citizens detained as part of the "War on Terror," *id.* at 531, or whether there were fundamental constitutional guarantees that were not amenable to such balancing. *Id.* at 576 (Scalia, J., dissenting).

269. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

270. 548 U.S. 557.

271. Compare *id.* at 624, with *id.* at 654 (Kennedy, J., concurring).

272. *Id.* at 624 (majority opinion).

273. *Id.* at 654 (Kennedy, J., concurring).

274. *Id.* While trusting the judge's discretion, Justice Kennedy recognized that the structure of the military commission process created concerns that this same decisionmaker would not be neutral. *Id.* at 648–50.

The disagreement between the plurality and Justice Kennedy demonstrates the extent to which even the right of the defendant to be present at his trial, usually considered fundamental to procedural justice, is contested in application.

Disagreement over the fairness of the military commissions' procedures was further reflected in the arguments of participants and observers. While many, including some prosecutors, deplored the commissions as unfair, others took the opposite view. Bush Administration and Department of Defense Officials, prosecutors in the military commission system, and the presiding authority often affirmed their commitment to providing full and fair trials, and insisted that the procedures they created *were* fair.<sup>275</sup> As Army Colonel Robert L. Swann, the commissions' Chief Prosecutor, stated: "More than anyone in the courtroom, I want a full and fair process. If there is a case on appeal, I want it sustained on appeal."<sup>276</sup>

Hamdan's lawyers framed his case in terms of separation of powers and the correct processes for convening military commissions rather than in terms of fundamental rights, precisely because of the difficulty of achieving agreement on what procedural justice requires.<sup>277</sup> This framing was controversial. As one of the litigators on the case, Neil Katyal, explained: "Many organizations did not like this approach and wanted me to argue that the military commissions were unconstitutional. But such claims seemed quite premature."<sup>278</sup> The Supreme Court itself dodged the issue of the commissions' procedural fairness entirely. On the one hand, it encouraged the executive to return to Congress to explicitly authorize the military commissions,<sup>279</sup> which Congress immediately did, but on the other set no constraints on those commissions once ratified by Congress.<sup>280</sup>

Even the federal judge considering the issue of procedural justice in Hamdan's case admitted his inability to make definitive rulings on the subject. In July 2008, days before he was set to be tried by military commission, Salim

275. See generally Borch, *supra* note 38; ROTUNDA, *supra* note 38.

276. Scott Higham, *Hearings Open With Challenges to Tribunals*, WASH. POST, Aug. 29, 2004, at A12 (quoting Army Colonel Robert L. Swann) (internal quotation marks omitted).

277. See Martinez, *supra* note 204, at 157–58.

278. Katyal, *supra* note 151, at 95.

279. See *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary.").

280. See Military Commissions Act of 2006, 10 U.S.C.A. §§ 948–950 (West 2008). Similarly, the Justices disagreed widely about whether a citizen detained as part of the "War on Terror" was entitled to a hearing, and what that hearing should require. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Likewise, when the Court held that noncitizen detainees are entitled to habeas corpus rights in *Boumediene v. Bush*, 553 U.S. 723 (2008), it gave little guidance about what would inevitably be the subject of those habeas petitions: what procedural protections ought to apply to the Combat Status Review Tribunals at issue in that case.

Hamdan appealed to the D.C. District Court to stay his trial and to determine whether the commissions' procedures comported with due process.<sup>281</sup> The Court declined to hear the case, pointing to Hamdan's right to appeal after his trial by military commission had been completed.<sup>282</sup> The Court recognized that judges might differ on the requirements of procedural justice and left the determination to the appellate process.<sup>283</sup>

Another point bears mentioning. To the D.C. District Court, the appearance of justice was as important as the *fact* of procedural justice. As the judge explained: "The eyes of the world are on Guantánamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially."<sup>284</sup> The statement could be taken to mean simply that a public trial, rather than a secret one, was critical to procedural justice. Or the judge could have meant that the *appearance* of procedural justice is equally important as a just outcome. The latter implication is consistent with social-psychological studies showing that processes perceived to be fair improve perceptions of unjust outcomes.<sup>285</sup>

The psychological and sociological emphasis on the appearance of justice underscores the importance of the lawyers' decision to resist in the first place, as well as the lawyer's choice of strategy for that resistance. Particularly in moments when procedural justice is heavily contested and when the winds of public opinion might sway in different directions, the lawyer's actions play an important role. Social psychological studies demonstrate that Americans perceive adversarial proceedings to be more fair than other types of processes.<sup>286</sup> While there is a risk that people may attach too much importance to procedures and that procedures may distract from unjust outcomes, there is also the concern that certain procedures may falsely signal procedural justice that is in fact absent.<sup>287</sup> Adversarial adjudication is one of the signposts of our collective conception of procedural justice, even if it is only perceived as a necessary but not sufficient condition. This perception of the fairness of adversarial procedures increases the responsibility of lawyers, whose participation

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281. See *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008).

282. *Id.*

283. See *id.* In Hamdan's trial, the military commission judge held that the Fifth Amendment did not apply to the commission proceedings, but did exclude some evidence he found was obtained by coercion. Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices (D-029) and Ruling on Motion to Suppress Statements Based on Fifth Amendment (D-044), *U.S. v. Hamdan* (U.S. Military Comm'n July 20, 2008).

284. *Gates*, 565 F. Supp. 2d at 137.

285. See TYLER, *supra* note 91, at 79–80.

286. *Id.*

287. See *id.* at 80.

is part of the presentation of justice being *seen* to be done. Therefore, the decisions of the lawyer to participate or to withdraw, with their concurrent risks of complicity, will alter the outcome of the debate about procedural justice. The lawyer's complicity may justify an unjust system, while successful resistance may spur recognition of the tribunal's injustice.

That the appearance of adversarialism can be a misleading indicator of fairness was noted by Justice Rutledge in *In re Yamashita*.<sup>288</sup> The case concerned a Japanese General tried by a military commission on the field of battle in the Philippines in 1945 for failing to prevent terrible atrocities committed by the Japanese Army. Yamashita applied to the Supreme Court for a writ of habeas corpus, and the Court denied the petition. Writing about the lawyers who represented Yamashita, Justice Rutledge explained:

One basic protection of our system and one only, petitioner has had. He has been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties. But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their function.<sup>289</sup>

In cases of procedurally unjust tribunals, the adversarial system breaks down. The fact that a client is zealously represented does not in and of itself make a system just. Nevertheless, lawyer resistance can, in some circumstances, bend the trajectory of an unjust system towards justice.

### C. Lawyer Choices and the Dynamism of Procedural Change

Because procedural justice is contested, lawyers' choices matter. Procedural rules, like any rules, are dynamic; they change over time. Change can be slow, such as when a set of rules that appear procedurally unjust are reinterpreted over time to become more just. Or change can be rapid, such as when a procedural rule is repealed, or when a court holds that a particular rule violates due process. For example, the battle over what rights detainees in Guantánamo Bay are entitled to, and what procedural protections military tribunals ought to offer, has been ongoing for nearly eight years. President Obama's decision to close the military commissions, if he follows through with it, would end this particular debate once and for all.

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288. 327 U.S. 1 (1946).

289. *Id.* at 45 (Rutledge, J., dissenting).

Moreover, change is not a one-way ratchet. Procedural regimes can change for the better or for the worse. Lawyer actions are part of this process of procedural change and may increase or decrease injustice. Richard Abel and David Dyzenhaus have both shown that litigation strategies in apartheid South Africa had a positive, if not always entirely successful, effect of mitigating injustice.<sup>290</sup> By contrast, Richard Weisberg has demonstrated how the interpretive strategies of lawyers in Vichy France increased injustice and enabled the persecution of Jews.<sup>291</sup>

The dynamism of procedural regimes affects the choices available to lawyers who attempt to advance justice in unjust proceedings. The particular quality of dynamism within a legal system depends in part on the surrounding political system. The procedurally unjust tribunal within an otherwise liberal legal regime, such as the Guantánamo military commissions or state courts in the Jim Crow South, presents different opportunities for lawyers than do totalitarian legal regimes. Lawyers in a totalitarian regime must draw on principles external to the regime in arguing for justice. By contrast, lawyers litigating in the context of a liberal democracy may access domestic legal norms to make their case.

This access may be jurisdictional, or it may invoke substantive ideals. Lawyers representing SCLC leaders against criminal contempt charges, and lawyers filing habeas corpus petitions on behalf of Guantánamo detainees, sought and received federal court review of the unjust systems they faced.<sup>292</sup> For them, access to justice was jurisdictional. Lawyers for the Guantánamo detainees also attempted to import substantive ideals into the military commissions trials. For example, Joshua Dratel used the NACDL ethics opinion to negotiate with the commissions' appointing authority to alleviate some of the burdens the government imposed on the attorney-client relationship. The ethics rules enabled Dratel to import constitutional and other principles of legal liberalism into the military commissions.

The particular quality of dynamism also depends on the judges presiding over unjust tribunals. What lawyers think judges will do is one of the primary motivators for lawyer action, and will influence the lawyers' choice of tactics for resistance. For example, a lawyer who believes a judge is a strict positivist may try to organize a collective boycott of the proceedings or may individually

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290. See ABEL, *supra* note 8, at 549 (describing how legal battles against racially restrictive laws "empowered the masses while offering some protection from state retaliation"); DYZENHAUS, *supra* note 84 (arguing that the application of Ronald Dworkin's theory of law in South Africa enabled judges to ameliorate racially restrictive laws).

291. See generally WEISBERG, *supra* note 8.

292. See *supra* Part I.A.1 and I.B.2.

refuse to participate. By contrast, a lawyer who believes a judge will be willing to access principles and values from the broader liberal legal system may think it possible to persuade the judge to rule fairly. But lawyers' predictions of judicial response alone do not dictate the strategy they adopt; the choice of strategy will also be influenced by the lawyer's goals.<sup>293</sup> For example, imagine that a lawyer believes a judge is a strict positivist who will not access fundamental principles from the larger legal regime. That lawyer may try to organize a collective boycott of the proceedings or may individually refuse to participate. Or the lawyer may nevertheless choose to participate in order to make a record for a higher tribunal; bring pressure to bear through the court of public opinion; or bear witness to injustice for some future proceeding or for posterity. On the other hand, a lawyer who believes the judge is a functionalist or otherwise open to legal principles may choose to participate in order to effect a change in the law through the tribunal. When Dratel negotiated with the convening authority to change the rules of the military commissions, he was participating in the system because he believed he could change it from within. By contrast, when Dratel refused to sign the notice of appearance, he did so because he had failed to convince the presiding officer of the necessity of fundamental rule of law principles.

Ultimately, the types of resistance lawyers engage in are a function of lawyers' own optimism, which is in turn related to their theories of law. The type of optimism that dictates engagement with an unjust tribunal is expressed in Dr. King's words, although he was not a lawyer: "Not every judge will issue an injunction; we can't assume that."<sup>294</sup> This optimism is based in part on faith that fundamental principles exist and may be accessed, and in part on faith in the ability of judges to do justice even within the unjust tribunal.<sup>295</sup> Lawyers who hold theories of law closer to the natural law tradition will have an easier time arguing that certain fundamental principles should

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293. How the lawyer adopts these goals is an important question. The legal profession literature often makes the distinction between the "cause" and the client. See generally AUSTIN SARAT, *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (1988); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997). As a descriptive matter, the lawyer may develop goals in conjunction with the client or on his own, depending on the nature of the lawyer's relationship with the client.

294. WESTIN & MAHONEY, *supra* note 15, at 62.

295. What theories of law are or ought to be adopted by judges to best promote justice is beyond the scope of this Article, although there are many fine book-length studies of the question. See, e.g., COVER, *supra* note 13 (analyzing the jurisprudence of judges in decisions regarding the Fugitive Slave Act); RONALD DWORKIN, *LAW'S EMPIRE* (1986) (presenting a complete theory of judging justly); DYZENHAUS, *supra* note 84 (presenting a sophisticated application of Dworkin's theory of judging to the South African context).

be imported into the unjust tribunal than will lawyers closer to the positivist school.<sup>296</sup> Similarly, lawyers' views on the proper role of the judiciary will have an impact on their tactics and their decisions to invoke different types of legal arguments. For example, as discussed, in the *Hamdan v. Rumsfeld*<sup>297</sup> litigation Neil Katyal decided to raise separation of powers arguments against the military commissions, rather than those based on fundamental rights.<sup>298</sup> This decision was likely influenced by Katyal's strongly held jurisprudential views about judicial minimalism.<sup>299</sup> The lawyers' decisions in that case raise a question of what limitations a lawyer's jurisprudential views can place on the representation.<sup>300</sup> Katyal's decision to make a separation of powers argument opened the door to legislative action but did not encourage the Court to give Congress any guidance as to what type tribunal would impermissibly violate fundamental rights. The result was congressional ratification of the military commissions.<sup>301</sup> Whether this particular tactic was the best course of action for the client, the legal system, and society is an open question. The lawyers' tactics shaped the law and the possibilities for procedural justice going forward, demonstrating the central role of lawyers' decisions—including the forms of lawyer resistance—in shaping the direction of the law.

## CONCLUSION

American lawyers facing unjust tribunals have most commonly chosen to participate with an eye toward appeal to a higher tribunal, or they have refused to participate on an individual basis. For example, lawyers representing Salim Hamdan and those representing Martin Luther King Jr. all chose to engage with the tribunals in order to reach the federal courts, where they hoped to obtain a fair hearing for their respective clients. Other lawyers, including prosecutors, have either refused to participate or have withdrawn from representing clients before the military commissions because they believed

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296. The debate between Lon Fuller and H.L.A. Hart regarding the concept of law, in particular with respect to the Nazi regime, sheds some light on these differences. For a very useful discussion of Fuller's theory in the context of lawyering, see LUBAN, *supra* note 234, at 99–130. See also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *supra* note 128.

297. 548 U.S. 557 (2006).

298. See Katyal, *supra* note 151.

299. *Id.*

300. Another way of thinking about this is that Katyal's decision calls into question the separation between the goals of the representation, which are supposed to be controlled by the client, and the strategies adopted to achieve those goals, which are ordinarily assumed to be controlled by the lawyer.

301. See *Hamdan*, 548 U.S. 557.

the commissions to be unfair.<sup>302</sup> But these decisions have spurred little public debate about the role lawyers ought to play with respect to these tribunals. It is worthwhile to reflect on the assumptions behind these choices, and what they say about law, our legal culture, and the legal professional.

Lawyers who have participated in the military commissions worried about the effects of participation. Some were “concerned[ ] that fighting would serve to validate the system.”<sup>303</sup> But at the same time, as this analysis has attempted to demonstrate, their strategy—to attack the system head on—has also had its share of complications. Lawyers who resist injustice by attacking a sham system are not guaranteed absolution of responsibility for injustice. Neither are lawyers who refuse to participate absolved by keeping their hands clean while letting others get theirs dirty. Many lawyers facing procedural injustice have adopted risky and brave strategies of resistance.<sup>304</sup> Often, these are the lawyers we hear about in the media. Others have pursued silent but equally powerful acts of resistance. All these decisions have their pitfalls, and none offer moral purity.

This Article has considered the dilemma and the strategic options for lawyers facing unjust tribunals. It has shown the difficulty of identifying injustice, and has analyzed the complex set of choices lawyers have when confronted by this injustice. What is most surprising is not the diversity of approaches to injustice, nor the difficulty of the problems it poses for lawyers who want to represent their clients and uphold the rule of law. Rather, most surprising is the fact that the bar has barely engaged in a discussion of which approaches are best for our democracy. This conversation is critical because of the lawyer’s special role as a “builder-up” of legal systems.

The portraits of resistance presented here do not represent the first time, nor the last, that the American legal system has been accused of injustice. The resistance that the military commission system has spurred in the legal community offers an opportunity to explore the strategies of resistance lawyers adopt in the face of injustice and the interplay of resistance and complicity in the context of representation. This Article is just the beginning of such an exploration. Many questions remain: Is it possible to agree on the minimum requirements of procedural justice to guide lawyers in choosing resistance? Is resistance as appropriate in cases of isolated injustice as it is in cases of systemic injustice? Does lawyer participation actually legitimate or lend credibility to injustice as an empirical matter? Which forms of resistance (if any) are

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302. See *supra* note 136 (discussing the withdrawal of Morris Davis).

303. William Glaberson, *An Unlikely Antagonist in the Detainees’ Corner*, N.Y. TIMES, June 19, 2008, at A1 (quoting Charles Swift, former detailed military counsel for Salim Hamdan).

304. See generally Luban, *supra* note 8 (describing heroic efforts of lawyers before the military commissions).



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most compatible with the lawyer's responsibility to the rule of law, to legal institutions, and to the client? This analysis therefore calls for further empirical study of how lawyers in real situations think about and respond to injustice, and for an evaluation of their justifications for these responses.

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