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DUE PROCESS IN THE AMERICAN IDENTITY

*Cassandra Burke Robertson**

ABSTRACT

In the last four years, public opinion polls have found an increasingly high level of public support for the methods applied in the war on terror. A significant majority of the population now expresses support for targeted killing through drone strikes and for the indefinite detention of suspected terrorists at Guantánamo Bay. While there are undoubtedly many dynamics at play in the public's changing views of national security and due process, this Article examines one piece of the puzzle: how the concept of due process fits within the structure of the American identity.

This Article examines due process and national security through the lens of social psychology, and its approach helps to shed light on how and why public opinion has changed. It opens by contrasting the doctrinal view of due process as a legal principle with an opposing view of due process as an expression of American values, and it concludes that both views can give rise to similar policy choices—but for fundamentally different reasons. The Article then applies two related theories from social psychology to explore how people's views of due process interact with their national identity to create support for different policy choices. Finally, it argues that separating these strands in the public debate on the war on terror can facilitate the conscious consideration of our national identity. In turn, this explicit recognition of the intertwining of identity and policy can create the opportunity to intentionally shape national identity. In order to do so, however, we must broaden the discussion beyond the legality of national security policies—or even their instrumental value—and move the discussion into an examination of more fundamental questions of who we are as a nation and who we want to be.

* Associate Professor, Case Western Reserve University School of Law. For helpful inspiration, discussions, and suggestions, I thank Jonathan Adler, Peter Burke, Jonathan Entin, Amos N. Guiora, Jessie Hill, Sharon Hoffman, Jacqui Lipton, Peter Margulies, Thom Robertson, Michael Scharf, Mano Singham, Johanna Staral, Jan Stets, and Bob Strassfeld.

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Roy: Our studies indicate the weapon is totally useless in warfare.

David Decker: It's not intended for use in your kind of warfare, Roy.

It's the perfect peacetime weapon. That's why it's secret.

Man: So it's both immoral and unethical?

*David Decker: Yes. [laughter]*¹

*"We needed a court order to eavesdrop on him, . . . but we didn't need a court order to kill him. Isn't that something?"*²

INTRODUCTION

In 1985, the heroes of teenage caper movie *Real Genius* foiled CIA plans to develop a weapon capable of “laser-zap[ping] specific targets from outer space”—a weapon described as “eerily similar” to the Predator drones in use today.³ From the opening scenes, the movie made it clear to

1. REAL GENIUS (Columbia TriStar 1985).

2. Doyle McManus, *Who Reviews the U.S. 'Kill List'?*, L.A. TIMES, Feb. 5, 2012, at A24, available at <http://articles.latimes.com/2012/feb/05/opinion/la-oe-mcmanus-column-drones-and-the-law-20120205>.

3. Elizabeth Wilcox, *It's a Moral Imperative*, A BRIGHT WALL IN A DARK ROOM, <http://brightwalldarkroom.tumblr.com/post/10486272238/real-genius-1985> (last visited Feb. 22, 2012).

the viewer that the architects of the weapon were villains: they laughed over the idea that they were creating “the perfect peacetime weapon” that was “both immoral and unethical,” and they threatened colleagues who expressed reservations about the idea of targeted killing.

Twenty-seven years later, however, the idea of targeted killing through drone strikes is no longer just the purview of movie villains. Drone strikes have become a key part of America’s counterterrorism initiative; during the second year of the Obama presidency, the United States conducted 111 drone strikes in Pakistan—significantly more than had been authorized during the Bush years.⁴ In some strikes, a particular terrorist leader is targeted; other times, however, a so-called “signature strike” or “crowd killing” is used to target “groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t necessarily known.”⁵

Targeted killing has also gained support with the American public. The United States President has gone on record as supporting the “judicious” use of drones as an alternative to conventional warfare,⁶ and 83% of Americans approve of that policy.⁷ Even when the drone target is an American citizen living abroad, support declines only modestly; 79% still approve targeted killing in this scenario.⁸ This level of public support proved surprising to those who object to extrajudicial killing, especially to those troubled by the death of a sixteen-year-old American citizen, born in Denver, Colorado, and “killed when one of his country’s drones hit him and a number of other people in Yemen.”⁹

Current public support for targeted killing appears to reflect a larger change in attitudes toward due process and national security.¹⁰ It is mirrored by a shift in public opinion about the indefinite detention of suspected terrorists, as 70% of Americans have grown to support the

4. DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 117 (2012).

5. *Id.* at 41.

6. David Jackson, *Obama Defends Drone Strikes*, USA TODAY, Jan. 31, 2012, <http://content.usatoday.com/communities/theoval/post/2012/01/obama-defends-drone-strikes/1>.

7. *Washington Post-ABC News Poll*, WASH. POST (Feb. 12, 2012), http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_020412.html.

8. *Id.*

9. Amy Davidson, *An American Teen-ager in Yemen*, NEW YORKER, Oct. 18, 2011, <http://www.newyorker.com/online/blogs/closethread/2011/10/an-american-teen-ager-in-yemen.html>.

10. Of course, the current shift is part of a larger historical framework in which support for procedural due process has at times given way to a perceived need for greater security. *See, e.g.*, Micah Herzig, Note, *Is Korematsu Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIGR. L.J. 685, 703 (2002) (“From its inception, America has a history of security outweighing liberty in times of national crisis.”); Sarah A. Whalin, *National Security Versus Due Process: Korematsu Raises Its Ugly Head Sixty Years Later in Hamdi and Padilla*, 22 GA. ST. U. L. REV. 711, 711 (2006) (“During times of war, this balance tends to shift in favor of national security”).

continued operation of the Guantánamo Bay detention facility¹¹—a significant departure from the 39% who wanted to keep it open at the time President Obama took office.¹² It is also preceded by an earlier shift in the number of people who believed that torture could sometimes be justifiable.¹³ Each of these policies—targeted killing, detention without judicial review in the civilian courts, and “enhanced interrogation,” or torture—represents a limitation on the traditional scope of procedural due process normally found in civil and criminal proceedings.¹⁴

Commentators have offered different explanations for the shift in public opinion. Some have suggested that the American population is falling in line with policy decisions imposed from above.¹⁵ Others have suggested that instead of shaping public opinion, Congress and the President are instead following the popular will.¹⁶ Likewise, observers disagree about what the shift means: are people abandoning ideals of due process in favor of a more expedient policy choice,¹⁷ or are they supporting these policies because they believe that current incarceration and targeted killing policies have already incorporated a high level of due process?¹⁸

There are undoubtedly many dynamics at play in the public’s changing views of national security and due process. This Article examines one piece of the puzzle: how the concept of due process fits within the structure of

11. See *ABC News Poll*, *supra* note 7.

12. Pew Research Center, *Obama Faces Familiar Divisions over Anti-Terror Policies*, PEW RES. CENTER FOR THE PEOPLE & THE PRESS (Feb. 18, 2009), <http://pewresearch.org/pubs/1125/terrorism-guantanamo-torture-polling>.

13. Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT’L L. 389, 399 (2009) (“Between 2005 and 2009—a period of time well after the 9/11 attacks—the percentage of Americans who ‘believed torture was at least sometimes justifiable’ rose from thirty-eight percent to fifty-two percent.”); see also David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1425 (2005) (“Torture used to be incompatible with American values.”).

14. See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 7 (2006) (noting that procedural due process in civil litigation is based on the “premise that notice and a hearing should precede liberty or property deprivations” and that procedural due process in criminal cases focuses on the trial itself, offering fewer pretrial due process rights).

15. Glen Greenwald, *Repulsive Progressive Hypocrisy*, SALON (Feb. 8, 2012), http://www.salon.com/2012/02/08/repulsive_progressive_hypocrisy/singleton/ (criticizing the “blind loyalty” of Democrats).

16. Jack Goldsmith, *What Changed U.S. Attitudes About Counterterrorism Policies*, WASH. POST, Feb. 15, 2012, http://www.washingtonpost.com/opinions/counterterrorism-policies-have-been-legitimized-by-courts-and-consensus/2012/02/13/gIQA5btbGR_story.html (arguing that President Obama was following the lead of Congress, which “was responding to the views of the American people”).

17. See, e.g., Suzanne Ito, *Targeted Killing: Death Without Due Process*, ACLU BLOG OF RIGHTS (Aug. 30, 2010), <http://www.aclu.org/blog/national-security/targeted-killing-death-without-due-process>.

18. See, e.g., Goldsmith, *supra* note 16 (“One reason Americans have grown more comfortable with Guantanamo detentions is that the detentions no longer rest on presidential unilateralism and are no longer legally doubtful. . . . The CIA’s drone program also has been vetted to an extraordinary degree.”).

the American identity. United States citizens have long incorporated a high regard for due process into their conceptions of what it means to be an American. However, this aspect of the American identity is not absolute. First, a regard for due process may give way to a perceived need for national preservation and self-defense.¹⁹ But second, and perhaps more relevant to current political discourse, there are other aspects of the American identity—such as an expectation of strength and authority—that may conflict with due process when people consider various counterterrorism measures. Even when due process is viewed as a moral value central to one's identity, it may conflict with other aspects of the individual's identity that play a greater role in shaping the person's policy views.

This Article opens a discussion of individual and national identity in considering public support for policies enacted in the so-called war on terror, including targeted killing, detention without review in the civilian court system, and torture or enhanced interrogation.²⁰ Part I of this Article begins with an analysis of procedural due process as an American value. It contrasts the doctrinal analysis of procedural due process as a legal principle (encompassing such legal safeguards as pre- and post-deprivation notice and hearing, judicial review, and the systemic integrity of the civilian justice system) with an opposing view of due process as an expression of American values. It concludes that both views can give rise to similar policy choices—but for fundamentally different reasons. Next, Part II delves deeper into the expressive view of procedural due process. It uses two different theories from social psychology—social identity theory and identity theory—to explore how people's views of due process interact with their national identity to create support for different policy choices. Finally, Part III offers a way to reframe the public dialogue over counterterrorism policy that accounts for both a legal conception of due process and an identity-based expressive conception of due process. It concludes that the legal doctrine can protect against the worst excesses of human nature that may desire to withhold process entirely from those perceived as the enemy, and it asserts that the expressive function of due process should be considered in determining whether to raise due process protections beyond the legal minimum as a matter of public policy. Thus, this Article argues in favor of explicitly recognizing both the deontological

19. See RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

20. Seth C. Lewis & Stephen D. Reese, *What is the War on Terror? Framing Through the Eyes of Journalists*, 86 *JOURNALISM & MASS COMM'N Q.*, 85, 85 (2009) ("Whether called the *war on terror*, the *war on terrorism*, or the *war against terrorism*, . . . this frame took on ideological dimensions, . . . providing linguistic cover for widespread political change in the name of national security . . .").

and consequentialist views of due process in framing the public dialogue on national security. While it ultimately concludes that both views provide support for increasing due process protections above the constitutional baseline, its main goal is not to recommend specific changes in the law but, rather, to move the public discussion into an arena that explicitly considers who we are as a nation and who we want to be.

I. DUE PROCESS AS AN AMERICAN IDEAL

Due process is part of all functional legal systems. Enshrined in Magna Carta, the concept of procedural due process derives from a commitment to the rule of law.²¹ It is also a fundamental component of the United States Constitution, which provides that neither federal nor state governments may deprive an individual of “life, liberty, or property, without due process of law.”²² But in spite of its central place in American law, the requirements of procedural due process have rarely captured public attention; details of the doctrine are often fleshed out in corners of the law inhabited by administrative lawyers, civil procedure professors, and tax professionals.²³

In the post-9/11 era, however, the requirements of procedural due process took on a more prominent role in public debate. A conflict between due process and national security—whether real or perceived—began to play a huge part in public discourse. Courts and scholars took a central role in the public discourse, examining the relationship between due process and national security in counterterrorism initiatives including interrogation, detention, and targeted killing.²⁴ Some argued in favor of a focus on

21. A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1118 (2006) (“The antecedent of ‘due process of law’ is ‘per legem terrae’ or ‘law of the land,’ which originates from the Magna Carta.”).

22. U.S. CONST. amends. V, XIV. This Article does not address the related question of substantive due process—that is, “whether the government has an adequate reason for taking away a person’s life, liberty, or property.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICES* 420 (1997). Other scholars have closely examined the relationship between procedure and substance. *See, e.g.*, Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1092 (2008); *see also* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 730 (1975).

23. *See, e.g.*, *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010); *MeadWestvaco Corp. successor in interest to Mead Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 18–19, (2008); *see also* Cynthia R. Farina, *On Misusing “Revolution” and “Reform”: Procedural Due Process and the New Welfare Act*, 50 ADMIN. L. REV. 591, 592 (1998).

24. *See generally* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 (2002); Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, 37 WM. MITCHELL L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1981379>; Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362 (2009); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUM. L. (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754223; Richard H.

security over process,²⁵ while others favored process over security,²⁶ and still others contended that due process need not conflict with robust national security protections.²⁷

Understandably, most of the legal scholarship in this area focused on the relationship between national security and the legal doctrine of due process. As a legal construct, due process protects against arbitrary action by the government and affords individuals a chance to be heard.²⁸ Courts have interpreted the due process requirement to mean that governmental bodies must, at a minimum, afford “notice and a hearing” before depriving a person of life, liberty, or property.²⁹ Thus, much of the national security discussion revolved around the question of what level of judicial process was constitutionally required in counterterrorism operations.³⁰

Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2107 (2007); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319 (2004); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 199–200 (2006); Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195 (2010); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009); Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343 (2010); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237 (2010); Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT’L SEC. L. & POL’Y 439 (2012); Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 996 (2007); Ellen Yaroshesky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063 (2006).

25. See, e.g., POSNER, *supra* note 19, at 12 (“A recurrent theme of the book is that a nonlegal ‘law of necessity’ that would furnish a moral and political but not legal justification for acting in contravention of the Constitution may trump constitutional rights in extreme situations.”).

26. Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a “Suicide Pact,”* 20 WM. & MARY BILL RTS. J. 287 (2011).

27. Amos N. Guiora, *Due Process and Counterterrorism*, 26 EMORY INT’L L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680009; Harold Hongju Koh, Legal Advisor, U.S. State Department, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s//releases/remarks/139119.htm>; Eric Holder, Remarks as Prepared for Delivery by Attorney General Eric Holder at Northwestern University School of Law (March 5, 2012), available at <http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/> (“The Constitution’s guarantee of due process is ironclad, and it is essential—but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war—even if that individual happens to be a U.S. citizen.”).

28. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”).

29. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

30. See, e.g., Guiora, *supra* note 27 (“Due process is the essence of a proper judicial process; denial of due process, whether in interrogation or trial, violates both the Constitution and moral norms.”); Murphy & Radsan, *Due Process*, *supra* note 24, at 405 (concluding that “the due process model . . . does not break down in the extreme context of targeted killing. Instead, it suggests useful

But due process is more than a legal principle; it is also a personal value that carries a special weight in the American identity. When people talk about what it means to be American, the respect for procedural rights is paramount. Since the nation's founding, due process has been one of the "core values . . . set in stone as the nation's lifeblood."³¹ This value grew even stronger during both the Cold War and the civil rights struggle of the twentieth century: during the Cold War, judicial rhetoric contrasted our democratic judicial procedures with the arbitrary use of power associated with communist and totalitarian regimes,³² and this identification with procedural justice grew stronger with the civil rights movement, creating an associated respect for litigation as a "noble calling" and an agent of social change.³³ In the American mind, judicial process is not merely a means by which we resolve individual disputes; instead, it is a mechanism by which we "announce to the world something about our beliefs and values and our sense of ourselves and our society."³⁴

When it comes to public discourse over the policy choices inherent in national security efforts, people often talk past each other. Because *due process* is a legal term of art, many commentators focus exclusively on the complexities of legal doctrine in determining how to apply due process protections in the national security arena.³⁵ Other commentators, however, ground their policy views about due process not on the legal perspective, but rather on a position based on questions of morality and identity—a

means to control this practice and heighten accountability"). Outside of the national-security arena, scholars have focused more directly on the relationship between political ideology and legal interpretation. *See, e.g.*, Frederick Schauer, *Is Legality Political?*, 53 WM. & MARY L. REV. 481, 481 (2011) ("Quite often, it appears, officials and citizens alike condemn the unlawful character of policies they oppose on substantive grounds, but ignore any illegalities in the policies they favor."); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 831 (2011) ("While originalists assert that interpreting the Constitution according to its original meaning takes politics out of constitutional interpretation, the Tea Party movement shows that originalism can also function as purely political rhetoric.").

31. Sam Greenberg, *Israel's Identity Crisis*, PENN. POL. REV. (Jan. 18, 2011), <http://pennpoliticalreview.org/2011/01/israels-identity-crisis/>.

32. Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 679 (2010); *See, e.g.*, U.S. *ex rel.* Caminito v. Murphy, 222 F.2d 698, 701 (2d Cir. 1955) (referring to "psychological punishment" as a "favorite weapon of the secret police" in "brutalitarian regimes").

33. Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1976 (2004) ("*Brown* and the civil rights litigation movement helped create a renewed belief, not just in the law, but more specifically in litigation as a noble calling and as an avenue for social change. . . . [W]hether or not it is well-founded, this belief, with roots traceable to *Brown* and civil rights litigation, has endured for several generations."); *see also* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 187 (1996).

34. Robert N. Strassfeld, *Responses to Ten Questions*, 37 WM. MITCHELL L. REV. 5133, 5148 (2011).

35. *See* Ku & Yoo, *supra* note 24.

fundamental belief about who they are and about what it means to be American.³⁶

Thus, when people do object to policies such as rendition or torture, they commonly express their objection in terms of identity, as did one resident who observed a local company participating in transport for renditions: “Our country is better than this. . . . We’re supposed to be a beacon of light.”³⁷ And even when an objection is couched in terms of legality, it may nonetheless be founded in terms of personal values and identity—so, for example, when Rosie O’Donnell stated that she felt “upset” by the fact that Osama Bin Laden “didn’t have due process, that he didn’t get tried, that he wasn’t you know brought to The Hague for a war-crime tribunal,”³⁸ she was not criticizing specific legal doctrine. Even though she characterized the raid as “criminal,” her underlying concern was that “America may have become the type of ‘monsters’ we loathe with our targeted killing of Osama bin Laden.”³⁹ It is unlikely that O’Donnell would have been persuaded by a well-reasoned legal argument for extrajudicial killing. The crux of her concern was the expressive function of due process and public trials—what such practices say about “our sense of ourselves and our society,”⁴⁰ rather than the complexities of legal doctrine.

Essentially, then, there are two competing dimensions of procedural due process—a formal legal doctrine and an expressive moral view. The legal doctrine applies a utilitarian and consequentialist⁴¹ equation to due process, taking an interest-balancing approach to determine what process is due in a particular case.⁴² The expressive function of due process, however,

36. See Bayer, *supra* note 26.

37. Joby Warrick, *Ten Years Later, CIA ‘Rendition’ Program Still Divides N.C. Town*, WASH. POST, Feb. 9, 2012, http://www.washingtonpost.com/world/national-security/ten-years-later-cia-rendition-program-still-divides-nc-town/2012/01/23/gIQAwrAU2Q_story.html.

38. Matt Schneider, *Rosie O’Donnell: Without Due Process For Bin Laden, We May Be ‘Monsters’*, MEDIAITE (May, 9, 2011, 9:01 AM), <http://www.mediaite.com/online/rosie-odonnell-without-due-process-and-trial-for-bin-laden-we-may-be-monsters/>.

39. *Id.*

40. Strassfeld, *supra* note 34, at 5148.

41. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1473 (2000) (“A moral theory is consequentialist if it has the same general structure as utilitarianism: if it evaluates actions solely in light of the world-states, or outcomes, that the actions produce. Utilitarianism is the specific variant of consequentialism that uses the criterion of *overall well-being* to rank world-states.”) (emphasis in original); see also Stephen Patrick Hoffman, *Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views*, N. ILL. U. L. REV. (forthcoming 2013) (manuscript at 5–6), available at SSRN: <http://ssrn.com/abstract=2041556> (explaining consequentialist, deontological, and threshold deontological theories of torture).

42. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (“We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.”); *Boumediene v. Bush*, 553 U.S. 723, 781 (2008) (“The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.”) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335

is essentially deontological; that is, it constitutes an “element of morality that cannot be captured within a consequentialist framework.”⁴³ Under the expressive view, the “process that is due” cannot be defined by a cost–benefit approach; instead, it is defined by reference to values and identity.⁴⁴ This deontological perspective asserts that “certain choices are inherently evil and can never be justified, even if they would bring about a good outcome.”⁴⁵ An expressive view of the law combines national values with legal practice; it assumes that “legal constraints must come from the values that inform the constitutional order.”⁴⁶

When it comes to decisions about specific counterterrorism measures, there is some empirical support for the idea that people’s views accord more with a deontological perspective than a consequentialist one.⁴⁷ And indeed, due process is not the only legal concept in which expressive functions may conflict with a utilitarian perspective. In the criminal law context, for example, Professor Dan Kahan has argued that a similar dichotomy exists in assessing criminal sanctions.⁴⁸ He points out that the public often rejects the idea of alternative punishments beyond imprisonment “not because they perceive that these punishments won’t work or aren’t severe enough, but because they fail to express condemnation as dramatically and unequivocally as imprisonment.”⁴⁹ Cass Sunstein has made a similar argument that applies across other areas of the law, including integration, capital punishment, restrictions on speech, and environmental protection.⁵⁰

Interestingly, the expressive function of due process can lead to radically different policy choices. On the one hand, individuals with a strongly deontological view of due process may be unwilling to sacrifice due process at the altar of expediency. As a result, they are unlikely to

(1976)); *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) (“Even the United States Supreme Court seems to have suggested that the most basic procedural rights, notice and an opportunity to be heard, may be denied if the balance of interests does not favor them.”).

43. Adler, *supra* note 41, at 1481.

44. Bayer, *supra* note 26, at 295.

45. *Id.* (quoting Gabriella Blum, *The Laws of War and the “Lesser Evil,”* 35 YALE J. INT’L L. 1, 38 n.165 (2010)).

46. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1570 (2000).

47. Miroslav Nincic & Jennifer Ramos, *Torture in the Public Mind*, 12 INT’L STUD. PERSP. 231, 246–47 (2011) (“Whether a deontological or consequential argument was invoked, opinions remained stable whether or not an external threat was suggested. Perhaps counterintuitively, whether or not one is subject to threatening conditions, they seem to play little role in an individuals’ commitment to their stances on torture.”).

48. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996).

49. *Id.*

50. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996) (“Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.”).

support extrajudicial killing, indefinite detention, or enhanced interrogation even if it means accepting some risk—perhaps even significant risk—to national security.⁵¹ This view of due process is not limited either to non-lawyers or to lawyers; members of both camps have expressed support for such a view.⁵²

On the other hand, however, an expressive view of due process could also cut the other way: due process could be viewed as simply too valuable to be expended on the undeserving. Again, such a view is fundamentally not a consequentialist one; it is held regardless of the actual risk to national security, though it cuts the other way. Under this view, due process should not be extended to suspects in the war on terror even when doing so would risk no harm to the country, and attempts to use legal process in the war on terror are derided as “lawfare.”⁵³ Thus, Mitt Romney appears to take an expressive view of due process rather than a consequentialist one in his statement that “people who join al Qaeda are not entitled to rights of due process under our normal legal code. They are entitled instead to be treated as enemy combatants”⁵⁴ The statement focuses on who “deserves” process without attention to the results. Likewise, the statement that McCain “supports legislation to grant due-process rights to terrorists,” was viewed as a “slur” in the 2008 primary when the statement was made by a Romney consultant.⁵⁵ Congressional testimony arguing that “we can’t let [a suspected terrorist] use our process, our due process, our legal system as one of his other weapons as he carries on this fight”⁵⁶ carries a strong metamessage⁵⁷ supporting the expressive function of due process. Although it is couched in consequentialist terms, it does not specify what harm will

51. See, e.g., Bayer, *supra* note 26, at 295.

52. See *id.* (containing a legal scholar’s deontological argument); see also Schneider, *supra* note 38 (summarizing the views of a non-lawyer celebrity commentator).

53. Although the term “lawfare” was initially coined as a neutral term, “[c]onservative political pundits . . . jumped on the bandwagon by decrying as ‘lawfare’ virtually any attempt to apply the rule of law to the conduct of the war on terror.” Melissa A. Waters, “Lawfare” in the War on Terrorism: A Reclamation Project, 43 CASE. WES. RES. J. INT’L L. 327, 329 (2010). More recently, the term has been brought back to its more neutral meaning. *Id.*; see *About Lawfare*, LAWFARE: HARD NATIONAL SECURITY CHOICES, <http://www.lawfareblog.com/about/> (last visited Oct. 19, 2012).

54. *Mitt Romney on Homeland Security*, ON THE ISSUES, http://www.issues2000.org/2012/Mitt_Romney_Homeland_Security.htm (last visited Oct. 19, 2012) (noting Mitt Romney’s statement on the War on Terror from the Fox News debate on MLK Day in Myrtle Beach, S.C. on Jan. 16, 2012).

55. David C. Morrison, *Behind the Lines: Our Take on the Other Media’s Homeland Security Coverage*, CONG. Q. HOMELAND SEC. (Jan 22, 2008).

56. *Standards of Military Commissions and Tribunals: Hearing Before the H. Comm. on Armed Services*, 109th Cong. 29 (2006) (statement of Daniel J. Dell’Orto, Deputy Gen. Counsel; Dep’t of Def).

57. See DEBORAH TANNEN, *THAT’S NOT WHAT I MEANT: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS* 29 (1992) (“Information conveyed by the meanings of words is the message. What is communicated about relationships—attitudes towards each other, the occasion, and what we are saying—is the metamessage. And it’s metamesages that we react to most strongly.”).

befall the nation if due process is extended, and it emphasizes the idea that due process is a value that is uniquely “ours.”

In the national dialogue over security policy, the expressive view of due process can unexpectedly collide with the consequentialist view in ways that impede communication. A person with a strong deontological view of due process—and who values due process over security—simply will not be persuaded by consequentialist arguments that focus on the costs and benefits of due process within a legal framework, if those arguments support the denial of judicial process. Consequentialist arguments may be seen as weakening moral principles.⁵⁸ At the same time, a consequentialist approach may in some cases support the extension of due process rights—and in those cases, such an approach may prove equally unpersuasive to other people who also take a deontological view of due process but who view terrorism suspects as unworthy of such process.

When participants in the national dialogue fail to recognize that others are taking a different view of due process—either consequentialist or expressive—confusion inevitably results. Thus, for example, a recent speech by Attorney General Eric Holder characterized calls to ban civilian courts from acting in terrorism cases as “baffling.”⁵⁹ In consequentialist terms, Holder viewed the courts as critically important components of an effort “to incapacitate and punish those who attempt do us harm,” and stated that an attempt to foreclose action by civilian courts would “ignore reality.”⁶⁰ The opposition to the use of civilian courts is less baffling, however, if it is not seen as a reasoned response to safety concerns but is instead viewed as an expressive choice. Likewise, lawyers who litigated detention cases at Guantánamo realized with hindsight that they had focused too much on the legal doctrine and too little on the political side of the equation, mistakenly believing in “the myth of rights”—that is, the idea that “if we can identify, elaborate, and secure judicial recognition of the legal ‘right,’ political structures and policies will adapt their behavior to the

58. Peter Margulies, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 312 (2006) (“Debate about the possibility of torture, including institutional devices such as the ‘torture warrants’ proposed by Alan Dershowitz may erode those moral intuitions, making torture merely one point on a spectrum of policy choices.”).

59. Eric Holder, Remarks as Prepared for Delivery by Attorney General Eric Holder at Northwestern University School of Law (Mar. 5, 2012), *available at* <http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/> (“[T]he calls that I’ve heard to ban the use of civilian courts in prosecutions of terrorism-related activity are so baffling, and ultimately are so dangerous. These calls ignore reality. And if heeded, they would significantly weaken—in fact, they would cripple—our ability to incapacitate and punish those who attempt do us harm.”).

60. *Id.*

requirements of the law and change will follow more or less automatically.”⁶¹

Given these different ways of thinking about due process, understanding public opinion about the war on terror becomes much more complicated. Professor Goldsmith may be right that some Americans, at least, support current counterterrorism initiatives because they are legally persuaded that these initiatives comply with constitutional due process.⁶² And other observers may also be correct in concluding that some Americans value security over process and for that reason support these initiatives.⁶³ But it is also likely that there is a third group of supporters—a group that values process but does not want to extend due process rights to people they view as the enemy, even when they could do so without harming national security.⁶⁴

Thus, even people with very different views about the nature and role of due process can converge in agreement on specific policy choices—and apparently have done so in the national security arena. The following Part takes a closer look at these divisions, examining how social psychology can help explain some of these differences and how these views are likely to be reflected in the policy choices made by individuals and by the larger society.

II. SHAPING THE AMERICAN IDENTITY

Separating the legal doctrine of due process from the expressive moral view allows a deeper examination of due process in the American identity. As other scholars have pointed out, a deontological view of due process “is ultimately also about a sense of identity”; it is a way of defining “who we really are.”⁶⁵ As a moral construct, the concept of due process also plays a very large role in the American imagination and has become integrated into the American identity.

61. Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 437 (2011).

62. See Goldsmith, *supra* note 18.

63. See Ito, *supra* note 17.

64. Of course, those who oppose current policies likely also fall into different camps: some may take a consequentialist view, believing that due process—and especially judicial process—could be broadened without significant threat to the country, while others would extend due process rights further in the war on terror even at some risk to national security.

65. Nincic & Ramos, *supra* note 47, at 240.

A. Identity Theory and Social Identity Theory

Two related sociological theories may help shed light on how due process interacts with both individual and group identity.⁶⁶ Social identity theory examines how people define themselves as group members and categorize others according to ingroup and outgroup status.⁶⁷ Identity theory, on the other hand, focuses on individuals' role identities and role-related behaviors.⁶⁸

1. Social Identity Theory

Social identity theory explores how individuals identify with larger groups.⁶⁹ Individuals associate with a larger group based on perceived similarities, and group membership reinforces uniformity. Even when individuals do not interact directly, identifying with the group creates a common "ingroup" that is viewed in opposition to others who are part of the "outgroup."⁷⁰ While the group identity might arise from shared characteristics that are outside the individual's control, shared characteristics alone do not create identity; instead, social identities arise from individuals' self-categorization.⁷¹ So, for example, while people have long been able to estimate their relative financial net worth, it is only in the last year that the Occupy Wall Street movement has made "the 99%" a shared social identity.⁷²

66. Ian Long, Note, "Have You Been an Un-American?": *Personal Identification and Americanizing the Noncitizen Self-Concept*, 81 TEMP. L. REV. 571, 589 (2008) ("In the field of social psychology, there are two prominent theories used to describe self-concept and explain how this concept of self is either altered or reinforced by one's existence within society.").

67. See *infra* Part II.A.1.

68. See *infra* Part II.A.2.

69. See PETER J. BURKE & JAN E. STETS, *IDENTITY THEORY* 118 (2009); MICHAEL A. HOGG & DOMINIC ABRAMS, *SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES* 172 (1988).

70. BURKE & STETS, *supra* note 69, at 118; HOGG & ABRAMS, *supra* note 69, at 172.

71. See Marilynn Brewer, *The Social Self: On Being the Same and Different at the Same Time*, in *INTERGROUP RELATIONS*, 245, 247 (Michael A. Hogg & Dominic Abrams eds., 2001) ("Membership may be voluntary or imposed, but social identities are chosen. Individuals may recognize that they belong to any number of social groups without adopting those classifications as social identities."); see also John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in *SOCIAL IDENTITY AND INTERGROUP RELATIONS* 15 (Henri Tajfel ed. 1982) ("[A] social group can be defined as two or more individuals who share a common social identification of themselves or, which is nearly the same thing, perceive themselves to be members of the same social category."); Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 71 (2006) ("The individual chooses specific 'social categories' with which he identifies and places himself . . .").

72. See Jordan Cooper, *A "Post-Social" View of Occupy Wall Street*, JORDAN COOPER'S BLOG: STARTUPS, VENTURE CAPITAL, HYPERPUBLIC (Oct. 22, 2011), <http://jordancooper.wordpress.com/2011/10/22/a-post-social-view-of-occupy-wall-street/> ("There is a social identity that has formed around acceptance of Occupy Wall Street, and it has roots in much more generic empathy toward concepts of protest, and movement, and change in general.").

The shared group identity increases members' self-esteem. Members have categorized themselves on factors they value. By defining the ingroup this way—and by contrasting it to an outgroup that lacks the valued characteristic—group members “judge their group positively and the outgroup negatively, thereby raising their evaluation of themselves as ingroup members.”⁷³ As a result, group members develop an increasingly favorable perception of the ingroup and a less favorable perception of the outgroup.⁷⁴

In addition to influencing group member's views of the outgroup, the emphasis on belonging and group identity also diminishes the focus on the individual. Group members de-emphasize their individual differences and inclinations, focusing instead on creating and adopting shared norms within the group.⁷⁵ This “process of *depersonalization*” views others not as “idiosyncratic individual[s]” but instead as “more or less prototypical member[s] of an ingroup or an outgroup.”⁷⁶ While this process is a natural byproduct of group identification, it may also heighten the risk that groups will engage in counterproductive stereotyping of the outgroup.⁷⁷

2. Identity Theory

In contrast to social identity theory's focus on “group processes and intergroup relations,” identity theory emphasizes “individuals' role-related

73. BURKE & STETS, *supra* note 69, at 120–21 (“For example, if the ingroup consists of members of the military, the value of ‘serving one’s country’ would benefit the members of the ingroup and degrade the value of outgroup members who do not share this value. Knowing that members of the ingroup share this value makes the ingroup more attractive to ingroup members and makes one glad to be a member.”).

74. Michael Hogg, *Social Identity and Misuse of Power: The Dark Side of Leadership*, 70 BROOK. L. REV. 1239, 1242 (2005) (“Since the groups and categories we belong to furnish us with a social identity that defines and evaluates who we are, we struggle to promote and protect the distinctiveness and evaluative positivity of our own group relative to other groups.”).

75. See Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 826 n.196 (2007); Michael A. Hogg & Barbara A. Mullin, *Joining Groups to Reduce Uncertainty: Subjective Uncertainty Reduction and Group Identification*, in SOCIAL IDENTITY AND SOCIAL COGNITION 249, 254 (Dominic Abrams & Michael A. Hogg eds., 1999).

76. Hogg, *supra* note 74, at 1242; BURKE & STETS, *supra* note 69, at 124 (“Depersonalization does not mean that one loses his or her personal identity; rather, there is simply a change in focus from the individual to the group. In social identity theory, because the personal identity and the social identity are mutually exclusive bases of self-definitions, both are unlikely to be operating at the same time.”).

77. Mark Bartholomew, *Advertising and Social Identity*, 58 BUFF. L. REV. 931, 963 (2010) (“Although this process, if taken too far, can lead to stereotyping and deep mistrust of outside groups, it is also a crucial ingredient in developing the self-esteem necessary for a healthy sense of self.”); see also Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1312 (2003) (“[G]roups cultivate a special social identity. This identity often encourages risky behavior, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against nonmembers.”).

behaviors.”⁷⁸ Identity theory focuses particularly on roles people adopt: “In identity theory, the core of an identity is the categorization of the self as an occupant of a role, and the incorporation, into the self, of the meanings and expectations associated with that role and its performance.”⁷⁹ So, for example, a person might identify as a “doctor,” “spouse,” “parent,” and “American.” When the person adopts and internalizes the cultural meanings and expectations associated with these roles, they become role identities.⁸⁰

Role identities can overlap with group identities: for example, when a person identifies oneself as “American,” that category may include both a group identity and a role identity. At the group level, the person is a member of a shared ingroup that excludes others (noncitizens). But the “American” or “citizen” identity can also be a role identity that guides individual behavior in choosing which political candidate to support, whether to vote in favor of a tax levy, or whether to participate in a political protest.⁸¹ Thus, a person may express an American social identity when they talk about “who we are” (or, from the other side, what it means to be “un-American”). That same person may perform an American role identity in choosing to vote for a particular candidate; the action of voting represents an individual action (“a hushed and private choice”) that shapes the country’s future.⁸² Finally, performance of an American role identity through individual political participation can influence the meanings of the American social identity; as author and commentator Rachel Maddow has argued, it is only when public participation ultimately influences national policy choices that the public retains control over “who we are as a country.”⁸³

The individual’s “identity standard” contains the meanings that the person associates with the identity.⁸⁴ Thus, while individuals will have

78. Michael A. Hogg, Deborah J. Terry & Katherine M. White, *A Tale of Two Theories: A Critical Comparison of Identity Theory with Social Identity Theory*, 58 SOC. PSYCHOL. Q. 255, 255 (1995).

79. Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 SOC. PSYCHOL. Q. 224, 225 (2000).

80. *Id.*

81. BURKE & STETS, *supra* note 69, at 122–23 (“[W]hen one identifies with a group, the identification may not only be on the basis of a social category but also be on the basis of being a particular role-holder.”).

82. See Lisa Belkin, *Teaching Children How to Vote*, N.Y. TIMES MOTHERLODE BLOG (Nov. 3, 2010, 1:38 PM), <http://parenting.blogs.nytimes.com/2010/11/03/teaching-children-how-to-vote/> (“When I was 3 or 4, my father took me into the voting booth for the first time. . . . it was a ritual, that visit to the voting booth—closing the curtain, making a hushed and private choice, snapping the curtain open again.”).

83. RACHEL MADDOW, DRIFT: THE UNMOORING OF AMERICAN MILITARY POWER 7 (2012).

84. Jan E. Stets & Michael J. Carter, *A Theory of the Self for the Sociology of Morality*, 77 AM. SOC. REV. 120, 124 (2012).

different ideas about what it means to be a doctor or to be a parent, each of these terms still has certain meanings and expectations that are shared within the larger culture.⁸⁵ There is broad agreement, for example, that a “moral identity” will include meanings of “justice” and “care.” For some people, though not for all, a moral identity may also include meanings of “purity,” “loyalty,” or “respect.”⁸⁶ Role and group identities may be related by shared meanings; in the social identity, the focus is on what “we” believe or value, while in the role identity, the focus is on what “I” believe or value—but in both, the object may be the same.⁸⁷

Identities are reinforced through a process called “self-verification,” in which people attempt “to confirm what they already believe about themselves.”⁸⁸ Individuals compare their own identity standards to the evaluations of themselves that are made by others. They see themselves reflected in the eyes of others, and they compare this reflected self-assessment to their own ideas of who they are. When the reflected feedback matches their own identity standards, they have obtained “self-verification,” and they experience positive emotions.⁸⁹ Conversely, when the reflected feedback does not match their identity standards, people experience emotional distress.⁹⁰

B. Due Process in Identity Structures

Both identity theory and social identity theory may help explain the shifting role of due process in American foreign relations in the so-called war on terror. In particular, social identity theory helps to explain how we

85. Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 13 (2009); Lynn Mather, Presidential Address: Reflections on the Reach of Law (and Society) Post 9/11: An American Superhero?, 37 LAW & SOC'Y REV. 263, 276–277 (describing the cultural meanings associated with the role of “lawyer” at different times: “Law works through its cultural practices and images, as well as through its institutional forms and social processes. . . . The image of Perry Mason has given way to one of an attorney general filing suit on behalf of an entire state or a wealthy plaintiff lawyer filing a class action . . .”).

86. Stets & Carter, *supra* note 84, at 124.

87. Robertson, *supra* note 13, at 395 (“For example, the meaning of being a member of the Republican party and a lawyer within the Republican administration involved sharing the common meaning of ‘fighting terrorism.’”).

88. BURKE & STETS, *supra* note 69, at 59.

89. *Id.* at 76.

90. Stets & Carter, *supra* note 84, at 125. The distress resulting from a failure to verify one’s identity is annually experienced in law school when students obtain their first-year grades. Because most law students have achieved strong academic success in the past, they have typically developed a strong identity tied to academic success. When some law students obtain lower grades than they are used to, the greatest source of emotional distress may not relate to fears about employability or other future prospects; instead, it arises from the disconnect between identity and reflected assessment. Thus, when a self-identified “A-level student” receives a B on an exam, the student may experience anger, depression, and general distress. Cassandra Burke Robertson, *Organizational Management of Conflicting Professional Identities*, 43 CASE W. RES. J. INT’L L. 603, 607 (2011).

define who we believe should be entitled to due process, and identity theory helps to explain when we, as individuals, decide to support policies that extend or retract a due process framework.

1. Social Identity

The process of social identity may be easier to understand: the “us vs. them” mentality is a common construct.⁹¹ The tragic events of September 11, 2001, reshaped—at least for a time—the dominant ingroup and outgroup.⁹² Instead of dividing along racial, political, or economic lines, the country united in an “American” identity. The outgroup, however, proved harder to define: for some, it was “al-Qaida”; for others, it was “terrorists” in general; for still others, it was “Arabs,” “Middle Easterners,” or “Muslims.” In some cases, these distinctions were blurred.⁹³

A broadly defined outgroup makes it easier to refuse due process protections to individuals targeted in the war on terror. First, to the extent that due process is viewed as part of “us” or “who we are,” a broader definition of “them” or “who we are not” makes it easier to limit due process protections only to a narrow ingroup. Second, a broadly defined outgroup makes it easier to conflate characteristics such as race, religion, or nationality with terrorism or crime.⁹⁴ The purpose of due process itself is to distinguish between guilt and innocence; refusing to extend due process to those presumed guilty risks recreating the witchhunts of the colonial era, in which “[m]en feared witches and burnt women.”⁹⁵

Thus, as described in Part I, even though due process may be a fundamental part of the American identity, social identity theory can explain why, in some cases, people do not want to extend due process to

91. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1082 (2003) (“Counterterrorism measures and emergency powers are often perceived as directed against a clear enemy of ‘others.’ . . . One is either with ‘us’ or with ‘them.’ There is no middle way.”); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592 (2002) (“The shift in perceptions of racial profiling is clearly grounded in the fact that those individuals who are being profiled are not considered to be part of ‘us.’”).

92. Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 150 (2003).

93. Bram van Heuveln, Letter to the Editor, *Think, Analyze and Then Decide*, ALBANY TIMES UNION, Aug. 23, 2010, available at <http://web.timesunion.com/AspStories/story.asp?newsdate=5/18/2011&navigation=nextprior&category=OPINION&storyID=962703> (concluding that opposition to building a mosque near Ground Zero makes sense only if opponents believe that “[m]osque equals Muslims equals Islam equals al-Qaida equals Taliban equals terrorists”).

94. Daniel Kanstroom, *Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle over Deportation*, 39 CONN. L. REV. 1911, 1921 (2007) (noting that in the aftermath of 9/11, “legal permanent residents [were] targeted for all sorts of problematic reasons: race, national origin, political opinions, religion, etc.”).

95. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

the outgroup.⁹⁶ For example, the political advocacy organization Keep America Safe makes the denial of a due process framework part of its mission, proclaiming that “by treating terrorism as a law enforcement matter, giving foreign terrorists the same rights as American citizens, . . . the current administration is weakening the nation, and making it more difficult for us to defend our security and our interests.”⁹⁷ Liz Cheney, daughter of former Vice President Dick Cheney and founder of Keep America Safe, has repeatedly argued against due process protections in the trials of suspected terrorists. After evidence in a civilian trial against Ahmed Ghailani was excluded because it derived from “the testimony of a witness whom the government obtained only through information it allegedly extracted by physical and psychological abuse of the defendant,”⁹⁸ Cheney issued a statement decrying the idea that “al Qaeda terrorists” would get “the kind of due process rights normally reserved for American citizens.”⁹⁹ She argued that “insisting on trying Ahmed Ghailani in civilian court with full constitutional rights,” had “jeopardize[d] the prosecution of a terrorist” and was therefore “irresponsible and reckless.”¹⁰⁰

Cheney’s statement combines the concepts of social identity and due process in several ways. First, though her statement seems to account for both an expressive view of due process and a utilitarian one, she is ultimately prioritizing the expressive view; Ghailani’s subsequent conviction did not change her view that civilian courts were an inappropriate forum. This expressive view of due process is closely aligned with group identity.¹⁰¹ Although Cheney contrasts “due process” with “security,” she is not making a cost–benefit calculation of the benefits of either approach as a policy matter; instead, she is discussing due process as a value and attaching that value to a social identity. Her statement articulates the idea that due process is something for “us” but not for “them.” But who is “them”?

When Cheney refers to the prosecution of “a terrorist,” she seems to be limiting the outgroup just to the nation’s declared enemies—or at least, since the trial had not yet reached a conclusion, to those accused by the executive branch of engaging in terrorism. But when she refers to “the kind of due process rights normally reserved for American citizens,” she appears

96. See *supra* Part I.

97. *Mission Statement*, KEEP AMERICA SAFE, http://www.keepamericasafe.com/?page_id=217 (last visited Oct. 19, 2012).

98. *United States v. Ghailani*, 743 F. Supp. 2d 261, 264 (S.D.N.Y. 2010).

99. John McCormack, *Liz Cheney Reacts to Delay of Ghailani Trial*, WKLY. STANDARD (Oct. 6, 2010, 5:54 PM), http://www.weeklystandard.com/blogs/liz-cheney-reacts-delay-ghailani-trial_501028.html.

100. *Id.*

101. See *supra* Part I; see also Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1286 (2011) (linking social identity theory with an expressive function of law).

to be making a broader distinction; in this instance, the outgroup not entitled to due process may be any noncitizen.¹⁰² Finally, the context of her statement—the decision to exclude testimony gained through coercive interrogation—also suggests that her restriction on due process would allow coercive interrogation against members of the outgroup.

While Cheney's position is highly controversial even among those otherwise politically aligned with her,¹⁰³ she is not alone: Senator Scott Brown expressed a similar sentiment when he asserted that “[i]n dealing with terrorists, our tax dollars should pay for weapons to stop them, not lawyers to defend them.”¹⁰⁴ Again, the focus on “our” tax dollars emphasizes a shared ingroup that deserves due process, in contrast to the terrorist outgroup that should not have “lawyers to defend them.” These statements highlight how social identity can encourage support for limitations on due process. By emphasizing a shared identity in the war on terror and broadly defining the outgroup in a way that merges “terrorist” with “noncitizen,” it becomes much easier to justify limitations on traditional due process protections. And such statements are not limited to politicians; lawyers have used similar rhetoric in legal scholarship advocating for the use of military tribunals rather than civilian courts in terrorism cases, arguing that “our” Bill of Rights was not intended to protect those who engage in terrorism.¹⁰⁵

Thus, a broad definition of the outgroup—even, perhaps, an unconsciously broad definition of the outgroup that conflates race or

102. It is also possible, of course, that Cheney has not consciously defined the outgroup, and may be unconsciously linking race, religion, and/or nationality in the outgroup characterization. *See supra* note 93; *see also* Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1698 (2009) (footnotes omitted) (“[T]he neo-Orientalist formation of the ‘Muslim-looking’ category in the aftermath of September 11 helped to make Guantánamo not only possible, but necessary.”); Jasbir K. Puar & Amit S. Rai, *Monster, Terrorist, Fag: The War on Terrorism and the Production of Docile Patriots*, 72 SOC. TEXT 117, 126 (2002) (noting that in the aftermath of 9/11, some Americans associated Osama Bin Laden with Apu, a South Asian convenience store owner and character on the Simpson television show).

103. John Schwartz, *Conservatives Split Deeply over Attacks on Justice Dep’t Lawyers*, N.Y. TIMES, Mar. 10, 2010, at A1.

104. David J. R. Frakt, *Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 CASE W. RES. J. INT’L L. 335, 335 (2010) (quoting Senator Scott Brown, U.S. Senator, Special Election Victory Speech (Jan. 10, 2010), available at *Scott Brown’s Victory Speech*, N.Y. TIMES, Jan. 19, 2010, http://www.nytimes.com/2010/01/20/us/politics/20text-brown.html?pagewanted=all&_r=0).

105. Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 405 (1996) (“Our Bill of Rights was designed to protect individuals in society against the arbitrary exercise of government power. It is not meant to protect commando groups warring on society through arbitrary acts of mass violence.”); *see also* Daniel M. Filler, *Values We Can Afford—Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson*, 21 OKLA. CITY U. L. REV. 409, 412 (1996) (criticizing Crona and Richardson’s arguments and noting that their claim is at some level “purely normative,” as even if their utilitarian concerns could be mitigated, they “would nonetheless deny these suspects the full panoply of criminal procedural rights”).

religion with terrorism—can make it easier to justify a refusal to extend due process rights. And indeed, this is what many argue happened at Guantánamo, where “detainees were assigned the ‘terrorist’ or ‘enemy’ label without any semblance of what is generally considered a pinnacle of Western and international due process rights—the presumption of innocence until proven guilty.”¹⁰⁶ In fact, U.S. military analysts have noted that up to 20% of the detainees may have been innocent civilians caught up by mistake.¹⁰⁷

Interestingly, this rhetorical move was perhaps made easier by a political reality not immediately related to the terrorist threat: specifically, the fall of Communism and the end of an Eastern bloc “other.” During the Cold War, democratic processes (including judicial process) were an especially important part of the American social identity; thus, “‘the foreign’ sometimes stood as a negative exemplar prompting descriptions of ‘American’ democratic precepts that refused to condone custodial practices identified with despotic regimes.”¹⁰⁸ By 2001, however, Communism was no longer perceived as the relevant outgroup; instead, terrorist regimes with roots in the Middle East were perceived as the new “other.” As a result, due process protection of the individual against the state was no longer the salient difference between “us” and “them”; instead, freedom of religion, freedom of speech, and women’s rights took on greater salience as the relevant political comparators, while democratic and judicial institutions took on lesser salience.¹⁰⁹

106. SHADI MOKHTARI, AFTER ABU GHRAIB: EXPLORING HUMAN RIGHTS IN AMERICA AND THE MIDDLE EAST 55 (2009).

107. *Wikileaks: Many at Guantanamo ‘Not Dangerous,’* BBC NEWS (Apr. 25, 2011, 5:06 AM), <http://www.bbc.co.uk/news/world-us-canada-13184845> (noting that “assessments of all 780 people ever held at the facility” reveal that “US military analysts considered only 220 of those ever detained at Guantanamo to be dangerous extremists”; “[a]nother 380 detainees were deemed to be low-ranking guerrillas”; and “[a]t least 150 people were revealed to be innocent Afghans or Pakistanis—including drivers, farmers and chefs—rounded up during intelligence gathering operations in the aftermath of 9/11”).

108. Resnik, *supra* note 32, at 679; Mary L. Dudziak, *Law, Modernization, and the Question of Agency in American Legal History*, 40 TULSA L. REV. 591, 596 (2005); *see also* United States v. Carignan, 342 U.S. 36, 46 (1951) (Douglas, J., concurring) (“We in this country, however, early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police.”); *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) (“Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.”).

109. *See, e.g.,* Aminah B. McCloud, *American Muslim Women and U.S. Society*, 12 J.L. & RELIGION 51, 56 (1996) (“With Islam perceived as a threatening enemy, values that express the core of American justice—neutrality, pluralism, freedom of expression, freedom of religion, equal protection under the law, as examples—are denied to many Muslim women.”); Brooke Goldstein & Aaron Eitan Meyer, “*Legal Jihad*”: *How Islamist Lawfare Tactics Are Targeting Free Speech*, 15 ILSA J. INT’L & COMP. L. 395, 410 (2009) (“The reality is that the Muslim community has nothing to gain from supporting the censorship of debate about Islam. . . . [Moreover,] [t]he actions of CAIR and the CIC and

Finally, it is possible that individuals' policy choices are based on a narrower conception of the ingroup.¹¹⁰ For many, the relevant ingroup may be a political party or movement rather than the country as a whole: the social identity may be "Democrat," "Republican," "conservative," "liberal," or "progressive." Thus, for example, at the time of the 2008 election, there appeared to be a significant partisan split in defining the American identity. This difference was reflected in opinion polling at the time, as 66% of Republicans versus 33% of Democrats reported a belief that "torture was at least sometimes justifiable."¹¹¹ In the last four years, however, there appears to be less of a partisan split; even self-defined liberal Democrats have moved closer to supporting broad executive power in the war on terror.¹¹² This narrowing may reflect a sense that the dominant political leaders of both parties have moved closer together in this area. As others have noted, "once the policy becomes the hallmark of both political parties, then public opinion becomes robust in support of it. . . . [P]olicies that enjoy the status of bipartisan consensus are removed from the realm of mainstream challenge."¹¹³ The shifting positions of partisan leaders could very well influence group members' support of these policy choices.

2. Role Identity

Like social identity, role identity can also influence how individuals think about due process and national security. Individuals perform an "American" or "citizen" role identity when they participate in the United States democratic process—for example, by making decisions about which candidates to support, by debating friends and colleagues about policy choices, or by answering political polling questions. This role identity is

others who engage in Islamist lawfare offer a great rebuttal to those who see Islamism as compatible with democracy.").

110. Indeed, people will sometimes narrowly define the relevant ingroup to avoid the cognitive dissonance that can arise when members of the larger group engage in identity violative behaviors. Thus, for example, the focus on two individual perpetrators of prisoner abuse at Abu Ghraib "reinforces the official response that the events at Abu Ghraib were aberrational and do not represent America," and although "the American faces in the Abu Ghraib pictures may look like ours, the representation of [the individuals] allow[] many Americans to use class, geography, lifestyle, and education to distance themselves from torture and abuse." Robert N. Strassfeld, *American Innocence*, 37 CASE W. RES. J. INT'L L. 277, 305 (2006).

111. See Robertson, *supra* note 13, at 399.

112. Scott Wilson & Jon Cohen, *Poll Finds Broad Support for Obama's Counterterrorism Policies*, WASH. POST, Feb. 9, 2012, at A6 ("[A 2012] poll shows that 53 percent of self-identified liberal Democrats—and 67 percent of moderate or conservative Democrats—support keeping Guantanamo Bay open, even though it emerged as a symbol of the post-Sept. 11 national security policies of President George W. Bush, which many liberals bitterly opposed.").

113. Glen Greenwald, *Repulsive Progressive Hypocrisy*, SALON (Feb. 8, 2012, 10:13 AM), http://www.salon.com/2012/02/08/repulsive_progressive_hypocrisy/singleton/.

likely to be activated any time individuals deliberate over matters of public policy and public choice. Of course, many individuals do not deliberate over policy matters at all; the limited impact of an individual vote may create an incentive to be “rationally ignorant.”¹¹⁴ Nevertheless, people participate in political activities more than a rational-ignorance theory suggests that they ought to; it may well be that the activation of the “citizen” identity and a desire to verify that identity can offset the incentive towards rational ignorance.¹¹⁵

As noted above, the identity standard for a role identity includes various culturally agreed-upon meanings.¹¹⁶ As other scholars have pointed out, the American identity has more than one meaning, and its meanings may, at times, conflict with each other.¹¹⁷ On the one hand, the value of due process is central to the American identity; due process has been characterized by President Obama as “the essence of who we are,”¹¹⁸ and Senator McCain made a similar point in the 2008 Republican primary debate, where he condemned torture by stating that his experience in Vietnam had convinced him “[i]t’s not about the terrorists; it’s about us. It’s about what kind of country we are.”¹¹⁹ Even a group of high-school student leaders linked identity to political policy when they wrote a note to President Bush during a White House visit stating, “we have been told that we represent the best and brightest of our nation. Therefore, we believe we have a responsibility to voice our convictions. We do not want America to represent torture.”¹²⁰

But although “respect for due process” is one meaning in the American identity, it is not the only one: the American identity also includes a “focus

114. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1211 (2007) (“The acquisition of political information is a classic collective action problem, a situation in which a good (here, an informed electorate) is undersupplied because any one individual’s possible contribution to its production is insignificant. And those who do not contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others.”).

115. See *supra* Part II.A.

116. BURKE & STETS, *supra* note 69, at 114–15 (citation omitted) (“Individuals are socialized into what it means to be a student, friend, or worker. Importantly, they learn the meanings of a role identity in interaction with others in which others act toward the self *as if* the person had the identity appropriate to their role behavior. In this way, role identities acquire meaning through the reactions of others.”).

117. Brent J. Steele, *‘Ideals that Were Really Never in Our Possession’: Torture, Honor, and US Identity*, 22 INT’L REL. 243, 248 (2008), available at <http://ire.sagepub.com/cgi/reprint/22/2/243.pdf>.

118. Ruth Marcus, *Court Appointments Critical to Election*, SEATTLE POST-INTELLIGENCER, June 19, 2008, at B6.

119. CHRISTOPHER H. PYLE, GETTING AWAY WITH TORTURE: SECRET GOVERNMENT, WAR CRIMES, AND THE RULE OF LAW 152 (2009).

120. MOKHTARI, *supra* note 106, at 242.

upon strength [and] will.”¹²¹ The “strength and will” part of the American identity may conflict with the “justice” or “due process” part of the identity.¹²² The events of 9/11 put these two meanings squarely into conflict: the terrorist act on American soil caused fear amid the destruction, and directly countered America’s sense of strength with a realization of vulnerability.¹²³ Thus, it is not surprising that individuals would need to regain a sense of strength in order to achieve self-verification of their American identity, and supporting harsh counterterror measures was one way in which Americans could assert strength. This dynamic played out especially in popular culture, with country song lyrics promising “[Y]ou’ll be sorry that you messed with the USofA, ‘Cuz we’ll put a boot in your ass, It’s the American Way”;¹²⁴ t-shirts with a surf design proclaiming “I’d rather be waterboarding”;¹²⁵ and television shows such as *24* that regularly depicted heroic American figures engaging in torture.¹²⁶

This tension between “strength/will” and “due process/justice” in the American identity can create a conflict for individuals, and may lead to a change in the identity standard in order to reconcile this conflict.¹²⁷ Identity theory suggests that commitment (the more “ties to others because of an identity”) and salience (a higher likelihood of identity activation, with more “occasions making demands to have particular meanings portrayed”) will

121. Brent J. Steele, *supra* note 117, at 248 (quoting Jutta Weldes, *The Cultural Production of Crises: U.S. Identity and Missiles in Cuba*, in *CULTURES OF INSECURITY: STATES, COMMUNITIES AND THE PRODUCTION OF DANGER* 46 (J. Weldes et al. eds., 1992)).

122. See, e.g., Amos N. Guiora, *Interrogation of Detainees: Extending A Hand or A Boot?*, 41 U. MICH. J.L. REFORM 375 (2008).

123. See, e.g., David Crumm, Editorial, *Unfinished Business: At the Height of America’s Power, We Are Learning to Live with Anxiety over Our Surprising Vulnerability*, DETROIT FREE PRESS, Sept. 11, 2003, at 1A (“Our image of ourselves as fortress America ended that day . . .”).

124. See Guiora, *supra* note 122, at 375 (citing Toby Keith, *Angry American (Courtesy of the Red White and Blue)*, on UNLEASHED (Dreamworks Nashville 2002)) (contrasting “an ethical commitment to the norms of civil society,” with “an attitude analogous to Toby Keith’s ‘American Way’”).

125. See Robertson, *supra* note 13, at 399 n.52 (“In the fall of 2009, t-shirts reading ‘I’d rather be waterboarding’ were offered for sale by Conservative T-Shirts.com, alongside other shirts stating ‘Proud Republican,’ ‘Jesus Christ is a Personal Friend of Mine,’ and ‘Annoy a Liberal: Work Hard and Live Free.’”).

126. See Sam Kamin, *How the War on Terror May Affect Domestic Interrogations: The 24 Effect*, 10 CHAP. L. REV. 693, 705 n.49 (2007) (“Fox’s ‘24’ showed 67 scenes of torture in the first five seasons. Upon review of prime time broadcast programming from 1995 to 2001, there were 110 scenes of torture. From 2002 to 2005, the number increased to 624 scenes of torture.”); *id.* at 707 n.58 (describing scenes in which “Jack shoots a woman suspected of having information about a bomb in the arm and then refuses to give her pain medication until she divulges the information about the location of a bomb, which again, she does”; “Jack breaks a suspect’s fingers, one by one, to get him to release the whereabouts of another suspected terrorist”; “Jack uses a cigar cutter to cut off the tip of a suspect’s pinky, and the suspect then states that a terrorist is in the Mojave Desert preparing to launch aerial drones to deliver nuclear warheads.”).

127. See BURKE & STETS, *supra* note 69, at 183–84 (providing an example where the role identities of “woman” and “wife” may come into conflict and thereby lead to “some level of distress because of the discrepancies,” ultimately causing “the identity standards for both her identities [to] shift slowly toward each other, becoming identical at some ‘compromise’ position”).

influence the direction of change in the identity standard.¹²⁸ Thus, when the “strength” meaning appears more prevalent in the media, in politics, and among the individual’s friends, the tension between the “due process” and “strength” aspects of individual’s identity may be resolved closer to the “strength” part of the continuum. Because of the prominence of the “strength” meaning in daily life, the individual finds it easier to achieve identity verification through the support of policy choices that emphasize American strength and might.

This shift in the identity standard is likely to happen at an unconscious level, leaving people unaware that they are adjusting their ideas about what it means to be American. When a conflict between a person’s identity standard and reflected assessment arises, a person may bridge that gap through strategies that are either “overt/behavioral” or “covert/cognitive.”¹²⁹ Overt/behavioral strategies are conscious ones; for example, a person might intentionally decide to affiliate with others who share the individual’s identity, increasing the opportunities for self-verification (thus, for example, a person who joins the military would find it easier to verify the “strength” aspect of the American identity). Covert strategies, on the other hand, operate at an unconscious level, as the individual engages in selective attention (“self-verifying information is given attention and processed, and information that is not self-confirming is ignored”) and selective interpretation (“endorsing feedback that fits self-views and denying feedback that does not fit self-views”).¹³⁰ The large percentage of Americans who have grown to support counterterrorism measures such as drone strikes and indefinite detention may well have unconsciously moved away from a “due process/justice” identity and toward a “strength/will” identity.

III. REFRAMING THE PUBLIC DIALOGUE

A shift in public support for policies such as targeted killing, indefinite detention, and enhanced interrogation cannot be explained by morality, legality, or efficacy alone. Each of these factors combines with individuals’ identities and ideas about what it means to be an American. Recognizing this complexity and adopting a more nuanced view of due process in the American identity can facilitate public dialogue about policy choices in the war on terror. Ultimately, public dialogue on due process and national security needs to account for values and identity as well as legal doctrine.

128. *Id.* at 184.

129. Jan E. Stets & Alicia D. Cast, *Resources and Identity Verification from an Identity Theory Perspective*, 50 SOC. PERSP. 517, 522–23 (2007).

130. *Id.* at 522; *see also* Robertson, *supra* note 85, at 18.

This Part begins such a discussion. It first examines how constitutional due process can serve as a legal baseline, protecting against efforts to withhold basic legal rights from those perceived to be our enemies. It then explores arguments for extending due process rights beyond those minimum requirements and recommends expanding public discussion beyond the legality of the policies—or even their instrumental value—and moving the discussion into an examination of more fundamental questions of national identity.

A. Constitutional Due Process as a Baseline

This Article has asserted that legality alone is not a sufficient basis on which to make policy choices about the desirability of various counterterrorism policies. But while legality alone is insufficient, it is still important. At the most basic level, the legal doctrine of constitutional due process protects against a desire to withhold legal protections from those perceived to be enemies.¹³¹ The Constitution protects due process rights even in the absence of a political will to do so.¹³²

Indeed, the Supreme Court itself has recently reaffirmed this protection in strong terms, stating that

“[w]hatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.”¹³³

Thus, constitutional due process does not permit withholding process from suspected terrorists, even if some might wish to do so; instead, it requires a real analysis of the actual threat to national security. Politicians and commentators who decry the extension of “our due process”¹³⁴ to terrorists may be displeased, but the Supreme Court has reaffirmed the

131. See Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1065 (2005) (noting that there is no evidence of the Supreme Court’s “willingness to assume a co-equal role in the war on terrorism,” but that the Court’s detainee jurisdiction is “best understood as a reminder to the President and Congress that they need to ensure that there is *some* process to address individual concerns. Due process being flexible, that process will necessarily vary depending on the circumstances.”).

132. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 470 (2003) (“The rule of law becomes more vital, not less so, when democracy is attacked.”).

133. Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004).

134. See *Standards of Military Commissions and Tribunals*, *supra* note 56, at 29.

existence of a constitutional baseline that the war on terror has not abrogated.¹³⁵

Nevertheless, the Supreme Court's view of procedural due process is not absolute. Instead, it is fundamentally consequentialist;¹³⁶ the question of "what process is due" turns heavily on the costs and benefits of extending that process.¹³⁷ As a result, individual justices do not always agree about how to measure the benefits of extending process or how to measure the potential threats to national security. For example, when the Court took a due process approach to indefinite detention in *Hamdi v. Rumsfeld*, Justice Thomas disagreed with the Court's conclusion and would have weighed the potential costs more strongly.¹³⁸ He wrote that although "Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause," that deprivation must be measured against "the Government's overriding interest in protecting the Nation."¹³⁹

The consequentialist focus also makes it easier for individuals to talk past each other in a policy debate about due process in the war on terror. Observers sometimes make what is essentially a deontological argument, even while wrapping it in the trappings of a consequentialist due process perspective. As one scholar has noted, a number of those who have objected to the legality of targeted killing "lack proof for their claims about the legal, diplomatic and strategic results of drone strikes."¹⁴⁰ For such objectors, empirical evidence of the result of drone strikes may be beside the point; their objections may be founded on deontological grounds rather than purely consequentialist ones. Defining what is meant by "due process" in a particular argument—whether it be a consequentialist or deontological

135. Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 392 (2010) ("In the War on Terror cases decided so far, the Supreme Court has repeatedly upheld petitioners' claims of rights to fair procedures, including judicial review of executive branch decisions to classify detainees as enemy combatants.").

136. While the Court's view has been fundamentally consequentialist, scholars have noted that there may still be deontological restraints on the due process balancing test. See Solum, *supra* note 42, at 257–59, 321 ("We can easily rationalize the sacrifice of procedural justice from a consequentialist perspective In the end, however, these rationalizations ring hollow. Procedure without justice sacrifices legitimacy."). And still others have argued that the deontological values of dignity and legitimacy represent the ultimate goal of procedural fairness. Martinez, *supra* note 22, at 1084 (2008) ("A leading competitor to the utilitarian procedure-as-efficient-application-of-substantive-law theory outlined above gives more weight to the dignitary, legitimacy-conferring aspects of procedure."). Of course, substantive due process, while beyond the scope of this Article, may well have a basis in deontological philosophy. See Walter C. Long, *Appeasing a God: Rawlsian Analysis of Herrera v. Collins and a Substantive Due Process Right to Innocent Life*, 22 AM. J. CRIM. L. 215, 219 (1994).

137. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

138. *Hamdi*, 542 U.S. at 598 (Thomas, J., dissenting).

139. *Id.*

140. Gregory S. McNeal, *Are Targeted Killings Unlawful? A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 326, 346 (Claire Finkelstein, Jens David Ohlin, & Andrew Altman, eds. 2012).

conception, and whether the argument is founded on questions of legality or identity—can help clarify the contours of the debate.

B. Policy Choices Above Baseline Due Process

Clarifying the terms of the policy debate means that analysis of constitutional due process as a legal matter is only the beginning; we also need to consider questions of values and identity in deciding what process is due. The Constitution's view of procedural due process creates a floor, not a ceiling; a heightened level of due process that exceeds constitutional requirements may be awarded when there is the political will to support it.¹⁴¹

1. Procedural Mechanisms for Heightening Due Process

What would a heightened level of due process look like? First—and contrary to Liz Cheney's position—it would involve not just extending, but also expanding the due process protections offered to people suspected of terrorism. It may give the courts a greater role in determining the legality of targeted killing.¹⁴² It may give civilian courts, in particular, a greater role in dealing with individuals who have been detained in the war on terror.¹⁴³ It would likely mean that evidence gained from torture would not be admissible in court.¹⁴⁴ Of course, many people have argued that these elements are already part of the baseline due process protection, and indeed they may be, but because the legalities are still uncertain, this Article recommends that policymakers consider whether due process should be heightened as a policy matter regardless of what the law may require.

141. See *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985) (noting that even though “[a]liens seeking admission to the United States . . . have no constitutional rights with regard to their applications” they are provided “limited due process protection” by statute, including a right to a hearing before an administrative law judge, a chance to present evidence, and a chance to appeal an adverse finding).

142. Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1380 (2011) (“[A] FISA-style court is a potentially effective possibility because it would provide ex ante review of targeted killing orders, and the pre-killing stage is the only stage during which judicial review would be meaningful.”); see also *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (dismissing on political question grounds a lawsuit brought by the father of Anwar al-Awlaqi seeking to prevent the United States from targeting him for execution).

143. Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1270 (2007) (“Detention of non-POW enemy combatants for the period of an entire war, especially the wholly indeterminate war on terror, without a criminal trial is a deprivation of a liberty interest that requires some due process.”) (statement by Professor Choper).

144. See generally Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?*, 65 WASH. & LEE L. REV. 129 (2008).

Some have argued that heightened due process could rely on executive branch procedures rather than the judiciary. As Attorney General Holder has noted, “‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.”¹⁴⁵ Additionally, some scholars have suggested that targeted killings may comport with due process as long as the executive branch conducts an “independent, impartial, prompt, and (presumptively) public investigation of its legality.”¹⁴⁶ While Holder and other scholars may be right as a matter of constitutional law, they are not accounting for the fact that many citizens do indeed equate “due process” with “judicial process”¹⁴⁷—the idea “that law, in an intensely legalistic society, [is] enough.”¹⁴⁸ To the extent that the nation relies on executive-level due process, it will have to be especially transparent in those procedures to persuade its citizens that their country still embraces due process values.¹⁴⁹ Thus, publicly available guidelines and procedures are important,¹⁵⁰ and it is also important that legal counsel is kept in the loop on the decision-making process—even if some of the lawyers offer a view that restricts executive power.¹⁵¹

Equally as important as transparency is a willingness to follow through on policy decisions. When stated policy positions are not carried over into the legal realm, observers may doubt the sincerity of those positions. Thus, for example, President Obama has been criticized for “publicly assert[ing] that waterboarding was torture but then refus[ing] to take any criminal action against those who authorized or carried out the technique.”¹⁵² While this reluctance may stem from a desire to move forward rather than to re-fight the partisan battles of the last decade, this failure to address perceived violations sends a message that supporting the rule of law is not the country’s top priority. As a result, this “[f]ailure to seek real

145. Holder, *supra* note 59.

146. See Murphy & Radsan, *Due Process*, *supra* note 24, at 446.

147. See Schneider, *supra* note 38.

148. Margulies & Metcalf, *supra* note 61, at 471.

149. See LARRY MAY, *GLOBAL JUSTICE AND DUE PROCESS* 56 (2011) (“Fair methods are generally ones that are open to public scrutiny—they conform to what I have called ‘the principle of visibleness.’”).

150. Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 2011 UNIV. ILL. L. REV. 1201, 1237 (2011) (“To enhance accountability, the IG could prepare public reports detailing as much information on strikes as reasonably consonant with national security.”).

151. See MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* 182–83 (2010) (noting that the State Department Legal Adviser was excluded from the Bush Administration’s War Council).

152. Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa’eda, the Taliban, and Associated Forces—the First Year*, 30 PACE L. REV. 340, 361 (2010).

accountability . . . undermines the United States' position as a champion of justice and the rule of law."¹⁵³

2. *Advantages of Choosing a Heightened Level of Due Process*

As a policy matter, offering a heightened level of due process may have positive effects. First, it better accounts for the true costs and benefits of counterterrorism practices, offsetting cognitive biases that affect this calculation. Second, it also likely increases the perceived legitimacy of U.S. government action—at least when such action does not violate individuals' sense of identity. Finally, heightened due process can also reconcile deontological and consequentialist views of due process and preserve the centrality of process in the American identity.

Providing a higher level of due process can guard against cognitive biases that cause us to overestimate the risks of events that are catastrophic and outside our direct control—two hallmarks of the terrorist threat.¹⁵⁴ First, the risk of a terrorist strike is perceived as a more short-term and immediate risk than the potential harm to judicial process in the long run, and “in a period of crisis, long-term costs are easily overshadowed by perceived short-term gains.”¹⁵⁵ Second, the terrorist threat raises existential fears—it “threatens to change the way we experience our lives, draining meaning from relationships of trust and community, and coloring life with the awful hues of suspicion, intimidation, and fear.”¹⁵⁶ Thus, we are predisposed to misjudge the risk of terrorism in a due process calculus, and as a result, “we have all too often” realized only with hindsight that we overestimated the potential emergency “after civil liberties have been sacrificed at the altar of national security.”¹⁵⁷ By maintaining and even increasing traditional elements of procedural due process, we may offset

153. David J. R. Frakt, *Military Accountability (or the Lack Thereof) for Detainee Abuse: The Instructive Case of Mohammed Jawad*, 45 U.S.F. L. REV. 873, 910 (2011).

154. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 202 (2008) (noting that this type of catastrophic threat is “precisely the sort of threat that terror poses”); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 138–39 (1993); Thomas A. Lambert, *Two Mistakes Behavioralists Make: A Response to Professors Feigenson et al. and Professor Slovic*, 69 MO. L. REV. 1053, 1057 (2004) (“[T]he perceived risk levels were orders of magnitude greater than actual risk levels—respondents . . . greatly overestimated the actual risk of both occurrences (SARS and terrorism).”).

155. David Welsh, *Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy*, 9 U.N.H. L. REV. 261, 294 (2011).

156. BOBBITT, *supra* note 154, at 202.

157. Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 68 (2007).

this cognitive bias to some degree by forcing a more reasoned analysis of long-term risks.¹⁵⁸

In addition to guarding against cognitive bias, heightened due process may also increase institutional legitimacy over time. This benefit would not be immediate; nevertheless, as Professor Lawrence Solum has noted, even a consequentialist approach to due process need not confine itself to a calculation of only the most obvious or short-term costs and benefits.¹⁵⁹ Instead, it should account for more far-reaching effects, including political legitimacy.¹⁶⁰ And a respect for procedural justice, in particular, can increase institutional legitimacy; as scholars have noted, “procedural fairness plays a key role in shaping the legitimacy that citizens grant to government authority.”¹⁶¹

Institutional legitimacy can have significant value in the fight against terrorism.¹⁶² When institutions have a high level of political legitimacy, they possess “a reservoir of goodwill that allows the institutions of government to go against what people may want at the moment without suffering debilitating consequences.”¹⁶³ Without this reservoir, governments must spend additional resources to monitor compliance and to create incentives for desired behavior.¹⁶⁴ But with such a reservoir, it is easier to encourage global cooperation in specific counterterrorism initiatives and to foster “the development of international legal norms against terrorism.”¹⁶⁵

This legitimacy benefit only accrues when procedures comport with identity, however.¹⁶⁶ It has long been noted that fair procedures can improve participants’ reactions to decisional outcomes—that is, even when

158. Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301, 355 (2009) (arguing that a commitment to due process can “liberate counterterrorism policy from the rigidities that inevitably plague partisan-political reactions to national-security emergencies”). Ensuring due process protections for public officials involved in national-security decision making is similarly important; just as cognitive biases may cause people to overestimate the risks of the terrorist threat, so too may hindsight bias cause people to judge officials’ decisions more harshly in retrospect than is warranted. See Margulies, *supra* note 24, at 210-18.

159. Solum, *supra* note 42, at 183.

160. *Id.* (noting that due process is “an essential prerequisite for the legitimate authority of action-guiding legal norms”).

161. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 180 (2005).

162. Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 967 (2009); Welsh, *supra* note 155, at 294.

163. JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* 289 (2004).

164. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 377 (2006).

165. Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 356 (2005).

166. David M. Mayer, Rebecca L. Greenbaum, Maribeth Kuenzi & Garry Shteynberg, *When Do Fair Procedures Not Matter? A Test of the Identity Violation Effect*, 94 J. APP. PSYCH. 142 (2009).

those decisions go against them, the existence of fair procedures minimizes people's negative reaction.¹⁶⁷ Recently, however, work in experimental psychology has revealed an exception to this "fair process effect"; namely, when individuals "have their identity violated by a decision outcome," they "will be motivated to find flaws in the procedure to justify being upset about the decision outcome."¹⁶⁸ That is, "if a decision damages a central part of an individual (i.e., one's identity), it is unlikely that providing a voice or having consistent procedures can remedy the situation."¹⁶⁹

This "identity violation effect" suggests that in considering whether to increase reliance on traditional mechanisms of judicial due process, we should explicitly consider questions of identity. The recent data on public opinion may indicate that a majority of Americans do not currently feel that counterterrorism policy violates their sense of identity. For some, in fact, extending due process to accused terrorists may violate their sense of self.¹⁷⁰

But for that portion of the population who opposes such tactics, the identity violation effect may come into play when considering executive-branch alternatives to judicial process. To the extent that extrajudicial counterterrorism measures violate some individuals' sense of what it means to be American, it may be impossible to persuade them that alternative processes such as military commissions or executive-branch level review of targeted killings offer sufficient protection. Indeed, those who oppose such procedures often frame their objections in terms of identity, suggesting that the identity violation effect is felt at least by a significant minority.¹⁷¹ Even without a majority, this group can have a significant impact on public policy, especially in influencing others who attach both a "due process" and "strength" meaning to the American identity but who have found the "strength" meaning to be more salient up till now.¹⁷²

As a policy matter, a legal doctrine of due process will be most robust when it is informed by sociological realities as well as political realities.¹⁷³ Due process serves a truth-seeking function and protects against the abuse of governmental power.¹⁷⁴ But it also serves a political role "designed to engage the litigant qua citizen in an important governmental institution for

167. *Id.* at 142.

168. *Id.* at 144 (citation omitted).

169. *Id.* at 159.

170. *See supra* text accompanying notes 97–106.

171. *See supra* text accompanying notes 37–40.

172. *See supra* Part II.B.2.

173. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 239 (1993) ("In the end, law informed by politics is the best guarantee of politics informed by law.").

174. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

deciding rights.”¹⁷⁵ This political function can only work effectively if our due process rights conform to our national identity.

A fundamental reliance on due process—even to the detriment of competing goals such as access to justice—is woven into the fabric of both American law and American identity.¹⁷⁶ This Article has argued that such considerations already run through the public dialogue regarding counterterrorism policy, albeit often at an unacknowledged and unconscious level.¹⁷⁷ Those implicit considerations should be made explicit and brought to the forefront of public debate.

CONCLUSION

Due process is a fundamental American value, and it is a value that deserves a role in the national debate over security. Perhaps harkening back to Immanuel Kant, the protagonists in *Real Genius* responsible for stopping the weapon deployment repeated the catchphrase “It’s a moral imperative!”¹⁷⁸ In the debate over due process in the war on terror, however, commentators have frequently merged the moral view with the legal. This blending is understandable; although due process is a legal doctrine with consequentialist roots, it is also a deontological value with a significant place in the American identity.

Separating these strands in the public debate on the war on terror can facilitate the conscious consideration of our national identity. In turn, this explicit recognition of the intertwining of identity and policy can create the opportunity to intentionally shape this identity. As Professor (now Legal Adviser to the State Department) Harold Koh has noted, “national identities are not givens, but rather, socially constructed products of learning, knowledge, cultural practices, and ideology.”¹⁷⁹ Reinforcing a deontological commitment to an identity founded on the rule of law—and to judicial process as an expression of that commitment—helps to create such a social construction by establishing “a shared cultural belief” that people can “take . . . for granted as a necessary and proper aspect of their

175. *Id.* at 1185.

176. *See* Ronald A. Brand, *Access-to-Justice Analysis on a Due Process Platform*, 112 COLUM. L. REV. SIDEBAR 76. “[T]he United States focuses on the ‘due process rights of the defendant,’ while the rest of the world focuses on ‘access to justice’—the plaintiff’s right to have his or her day in court.” *Id.* at 79.

177. *See supra* Part II.

178. *See supra* notes 1, 3; Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1867 (2000) (explaining that under Kant’s “categorical imperative,” “[i]t is morally wrong . . . to fail to respect the absolute moral worth of anyone, including yourself, as a self-determining rational being, regardless of whether you would allow others to treat you without proper respect.”).

179. *See* Koh, *supra* note 33, at 202.

society.”¹⁸⁰ In order to do so, however, we must broaden the discussion beyond the legality of the policies—or even their instrumental value—and move the discussion into an examination of more fundamental questions of who we are as a nation and who we want to be.

180. Brian Z. Tamanaha, *The History and Elements of the Rule of Law* 26 (Washington University in St. Louis Legal Studies Research Paper No. 12-02-07, 2012), available at <http://ssrn.com/abstract=2012845>.