Portraits of Resistance: Lawyer Responses to Unjust Proceedings

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Abstract

This Article considers a question rarely addressed: what is the role of the lawyer in a manifestly unjust procedural regime? Many excellent studies have considered the role of the judge in unjust regimes, but the lawyer’s role has been largely ignored. This Article draws on two case studies: that of lawyers representing civil rights leaders during protests in Birmingham, Alabama in 1963 and that of lawyers representing detainees facing military commission proceedings in Guantánamo Bay, Cuba. These portraits illuminate the role of the lawyer in a procedurally unjust tribunal operating within a larger liberal legal regime such as our own.

The purpose of the Article is to paint a landscape of lawyer resistance to procedural injustice that can be used as a basis for further inquiry. The Article considers hard questions about lawyer participation in unjust tribunals such as whether lawyers who participate in unjust tribunals are complicit in injustice and what lawyers can do in the face of an unjust procedural regime. It presents a new way of understanding the forms of lawyer resistance to injustice. The Article demonstrates that complicity and resistance are not on opposite poles of human behavior within organizational systems. Rather, there is a dualistic interplay between complicity and resistance. Acts that appear to be resistance can be perceived as complicit, and acts that appear to be complicit can result in powerful forms of resistance. The Article also explores some questions raised by this analysis, such as what are the lawyer’s responsibilities to society and to his or her client and whether lawyers can know when a tribunal is so unjust as to merit resistance. It concludes by considering avenues for further research.

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Introduction

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

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1 Dratel’s story is told in greater detail in part I(B)(1), infra.
2 Transcript of Trial at 27, United States v. Hicks, I.S.N. 0002 (Office of Military Commissions, March 26 & 30, 2007) (on file with author).
him and Dratel left the room. A few days later Hicks pled guilty. He returned to Australia to serve a nine month sentence.3

Dratel faced the possibility that the system he was working in was a sham. The military commission system was not organized by a set of rules known in advance, but instead the rules seemed to be manufactured on a whim. This unpredictability was compounded by a bias against the accused that was structured into the system. William Haynes, Chief Counsel to the Department of Defense and legal advisor to the military commissions reportedly told the Chief Prosecutor Morris Davis, the man who prosecuted the Hicks case: “We can’t have acquittals! We’ve got to have convictions! If we’ve been holding these guys for so long, how can we explain letting them get off?”4 Dratel was asked to choose between signing a statement agreeing to a system that violated basic prerequisites of the rule of law or abandoning his client to face the tribunal without his help.

Dratel’s experience represents a crisis of the lawyer’s professional role as well as a moral crisis. It embodies the dilemma facing the lawyer before an unjust tribunal, a choice between two values that are central to the lawyer’s professional identity: the duty to zealously advocate for his client and fidelity to the rule of law. His story offers us an opportunity to ask questions that we often ignore, questions about the limits of lawyers’ duties to clients and to the rule of law and about the lawyer’s role in maintaining or undermining the legal system.

Guantánamo is closing.5 As the Obama administration decides how to try detainees, the issues raised by the prosecutions by military commission in Guantánamo Bay are more relevant than ever. The military commissions system was considered by many to be an extreme example of injustice, a literal outlier based not only on its geographical location outside the United States but also on the government’s avowed refusal to permit application of constitutional principles to the trials conducted there. The issues that extreme examples such as this raise are important to study because our history has been marked by periodic cases of extreme injustice, such as courts deciding cases under the Fugitive Slave Act and Southern state courts under the system of segregation. Closing Guantánamo will not mark the end of unjust tribunals going forward.

Extreme examples also enable us to consider questions that lawyers face in everyday practice when using the strategies articulated here to resist less egregious injustices. What is the lawyer’s responsibility when he sees injustice in the system? What is the significance of using one strategy of

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

resistance rather than another? How is the lawyer to distinguish between isolated and systemic injustice and how does the lawyer know that injustice is sufficiently egregious to merit resistance? Is procedural injustice different than substantively unjust laws?

How often lawyers face the reality that the system they are working in is a sham we do not know. As members of the legal profession, we tend not to entertain or openly discuss the illegitimacy of legal processes. Lawyers may often complain that a particular judge was biased or the results of a particular trial unfair, but these are understood as isolated problems, fundamentally different from the allegation that an entire legal system is corrupt. Even so, such accusations raise the specter of fundamental injustice and are only considered isolated because we believe that on a systemic basis the system is just. But this, too, is a question of judgment and a subject of dispute.6

Surprisingly, the question of lawyer resistance to and complicity in unjust tribunals has not been the subject of sustained study.7 This Article is

6 For example, even the civilian criminal justice system in the United States today can be accused of harboring fundamental injustice. In one case the head of the Capital Defender Service of the state of Georgia resigned to protest budget cuts which he said made it impossible to fairly represent his clients. “The old adage ‘you get what you pay for’ is particularly true with regard to the defense of capital cases,” he told the press, “which involve the greatest responsibility and most difficult assignment that any lawyer is asked to undertake.” Associated Press, Top State Defender Quits: Death Penalty Lawyer Calls Cases’ Funding “Grossly Inadequate,” AUGUSTA CHRONICLE, Sept. 7, 2007. See also Brenda Goodman, Official Quits in Georgia Public Defender Budget Dispute, N.Y. TIMES, Sept. 7, 2007. For a scholarly argument about the effects of resource inequality on procedural fairness, see Alan Wertheimer, The Equalization of Legal Resources, 17 PHIL. & PUB. AFF. 303 (1988).

7 Thoughtful recent scholarship on lawyer participation in the military commission process has considered lawyer resistance only as a local phenomenon. See, e.g., Muneer I. Ahmad, Resisting Guantánamo: Rights at the Brink of Dehumanization, 103 NORTHWESTERN L. REV. (forthcoming 2009) (discussing and critiquing rights-based strategies of internal resistance adopted by the author in his own work); Mary M. Cheh, Should Lawyers Participate in Rigged Systems: The Case of the Military Commissions, 1 J. OF NAT’L SEC. L. & P. 375 (2005) (advocating lawyer boycott of the military commissions as then constituted); David Luban, Lawfare and Legal Ethics in Guantánamo, 60 STAN. L. REV. 1981 (2008) (arguing that, in the context of the military commissions, the lawyer’s role as zealous advocate is necessary to upholding human dignity of those imprisoned in Guantánamo Bay), Peter Margulies, The Detainees Dilemma: the Virtues and Vices of Advocacy Strategy in the War on Terror, 57 BUFF. L. REV. 347 (2009) (describing out of court advocacy strategies). Lawyer resistance has been given some consideration in the context of lawyers practicing in Apartheid South Africa. See, e.g., RICHARD ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID 1980-1994, 549 (1995) (arguing in favor of lawyer resistance to the Apartheid regime in South Africa through litigation); DEMOCRACY AND THE JUDICIARY (Hugh Corder, ed. 1988) (an intriguing series of Articles written by practicing lawyers in Apartheid South Africa). Lawyer complicity in Vichy France is also the subject of an excellent study. RICHARD WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE (1996). Lawyer complicity in unjust tribunals in the United States has been completely ignored in scholarship, although the legal
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the first analysis of lawyer responses to unjust tribunals focusing on the American experience. It draws on two historical episodes to analyze the difficulties facing lawyers asked to participate in procedurally unjust tribunals. It presents a map that will help the reader understand the contours of the dilemma of lawyers facing unjust tribunals.

The goal of the Article is to make room for the possibility of various answers to the problem of the unjust tribunal. I proceed from the position that if there were a right answer to the lawyer’s dilemma, it would not be a dilemma at all. Arguably some choices are better than others, but this position requires recourse to criteria in order to determine which choice is better. There will inevitably be disagreement about such criteria, and furthermore the operation of these criteria will change depending on context.

My contribution is to paint the first landscape of lawyer resistance to manifest procedural injustice, an undertaking that can form the basis of further inquiry. In the process, the Article makes two normative claims. First, it is possible for the lawyer to be degraded by his participation in an unjust tribunal. Lawyers may be complicit in the conduct of unjust tribunals because of their special role in our legal system. Second, recourse to the lawyer’s professional role does not resolve the dilemma of the lawyer facing an unjust tribunal.

Part I sets the stage with two portraits of resistance. The first portrait is of the trial of Martin Luther King, Jr. for criminal contempt before a moderate segregationist judge in Birmingham, Alabama in 1963. The second portrait is of lawyers representing Guantánamo Bay detainees facing trial before military commissions in 2007 and 2008. These stories represent instances of lawyers facing a tribunal they believe is unjust within an otherwise liberal legal regime. They provide the foundation for the discussion in the remainder of the Article.

Part II interrogates understandings of lawyer complicity and resistance to injustice. It analyzes the concept of lawyer complicity in unjust tribunals and explains more fully the concept of lawyer resistance. This Part demonstrates the dualistic interplay between complicity and resistance. Acts of apparent resistance can be perceived as complicit, and acts appearing to be complicit can result in powerful forms of resistance. I then present a new schema for understanding lawyer resistance and complicity, consisting of five forms of lawyer resistance to procedural injustice: (1) collective boycott, (2) individual refusal to participate (or

implications of lawyer complicity have been considered in the context of the torture debate. See Christopher Kutz, The Lawyers Know Sin: Complicity in Torture in THE TORTURE DEBATE IN AMERICA (Karen Greenberg, ed. 2006); PHILIPPE SANDS, TORTURE TEAM (2007).

8 The nature of a moral dilemma is that it forces a person to choose between two courses of action both of which are wrong. If it were resolvable by recourse to a higher principle, it would not be a moral dilemma. See Michael Walzer, Political Action: The Problem of Dirty Hands, 1 PHIL. & PUB. AFF. 161-62 (1973).

9 This Article uses the male pronoun to refer to lawyers generally. I do this because the English language does not offer a satisfactory gender neutral pronoun, the use of he/she is awkward, and the lawyers discussed in the Article are male.
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“conscientious objection”), (3) arguing directly to the tribunal (or “using the master’s tools to dismantle his house”), (4) making a record for a higher tribunal and (5) addressing the court of public opinion. None of these is a perfect solution to the lawyer’s dilemma; each risks upholding the procedural status quo and each leaves potential clients in jeopardy.

Part III considers some questions raised by this analysis. First, to what extent does recourse to the lawyer’s professional role help in understanding resistance to and complicity in the unjust tribunal? I argue that recourse to the lawyer’s professional role does not dictate a particular approach to resistance. This is because the crisis is created by conflicting values imbedded in the lawyer’s role. Second, how is the lawyer to know when the tribunal is unjust? Here I demonstrate that procedural injustice is the subject of disagreement even in the most extreme cases, and show that this complicates the lawyer’s role by requiring him to make hard choices without knowing in advance that his evaluation is correct.

The conclusion explains why the issue of lawyer resistance to unjust tribunals is an important one for lawyers and future lawyers to consider more deeply. It lays the groundwork for further research on lawyer responses to unjust proceedings, which will shed light not only on the extreme situation of the manifestly unjust tribunal, but also on the role of the lawyer in our legal system more generally.

I. Two Portraits of Resistance

There are many stories of lawyers resisting injustice in American history. The lawyers who sought to defend alleged slaves facing return to slavery under the Fugitive Slave Act and tried to prevent their exportation to the South, through litigation as well as outright purchase, were resisting an unjust procedural regime (as well as the substantive injustice of slavery). That regime permitted an ex parte determination of the individual’s status by a commissioner, explicitly excluded the accused’s testimony from the proceeding, and entitled the commissioner to a ten dollar fee if he issued a certificate of removal but only a five dollar fee if he denied the certificate.10 Similarly, lawyers who represented socialists and anarchists in the early decades of the twentieth century, and communists in the middle of the century, were representing their clients in tribunals that they believed were unjust.11

This Article tells two such stories. The first is the story of the lawyers representing Martin Luther King Jr. and members of the Southern Christian Leadership Conference in a criminal contempt trial in Birmingham, Alabama in 1963, during the height of their protests against de jure segregation. The second is the tale of some of the lawyers

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representing persons detained as part of the “War on Terror” and set to be tried before military commissions in Guantánamo Bay, Cuba. The clients are different, the historical and legal context is different, but the basic problem is the same: what can a lawyer do when asked to participate in an adversarial proceeding he believes to be a sham?

A. The Trial of Dr. King

Dr. Martin Luther King, Jr. was tried and convicted of criminal contempt in Birmingham, Alabama in 1963.12 The Southern Christian Leadership Conference (SCLC) had planned a significant protest in Birmingham that April and intended to march on Good Friday for symbolic reasons. They were summarily denied a permit to march by Eugene “Bull” Connor, a militant segregationist and member of the Birmingham City Council.13 Knowing of the planned protest, lawyers for the City of Birmingham sought and received an ex parte injunction barring any such demonstration. No notice of the hearing to the demonstrators was required under Alabama rules of procedure at the time.14

When the leaders of the SCLC were served with the injunction, they had to decide what their next step would be. Their position was complicated by their insistence that governments in Jim Crow states should comply with the federal court injunction in Brown v. Board of Education.15 This position, some felt, required obedience to the rulings of local state courts as well. Others thought that there was no reason to pursue any option in state courts, because they could never prevail before a Southern state court judge. Martin Luther King, by contrast, was more conflicted. As Bayard Rustin recalled some time later:

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

13 Connor told Lola Hendricks, who had come to apply for a permit on behalf of the movement: “No, you will not get a permit in Birmingham, Alabama, to picket. I will picket you over to the City Jail.” WESTIN, supra note _ at 122. See also Walker v. City of Birmingham, 388 U.S. 307, 318 (1967) (quoting Hendricks’ testimony).
14 7 ALA. CODE ANN. § 1054 (MICH. 1960).
cheerful acceptance might lead some judges to be moral.\textsuperscript{16} 

Upon reviewing the injunction, Norman Amaker, the NAACP lawyer who had been sent from New York to attend to the situation, reached the conclusion that the injunction must be challenged in state courts, where the civil rights leaders were unlikely to obtain a fair hearing. There was never any serious discussion of going to court to seek relief before the Good Friday march, because both the clients and their lawyers considered it a practical impossibility. Postponing the weekend marches was seen as politically unacceptable.\textsuperscript{17} Instead, Amaker briefed his clients on the legal situation:

I tried to make clear to them what the situation was: if they did march, they would probably be in violation of the injunction….Even though [the injunction] might be unconstitutional, though, the leaders might be convicted for violating it...I said that whatever they decided to do – and that was their decision – we would try to find the best possible way of supporting their actions in the courts.\textsuperscript{18} 

Thus the lawyers’ view was similar to King’s: the process might not yield results, but still they would proceed through the courts. Amaker’s statement assumes that the lawyers will act solely through the courts, but as the analysis below will show, this was not the only option open to them.

Dr. King was arrested at the march for violating the injunction and the Alabama judge who had issued it held a contempt trial. The lawyers and their clients considered a variety of tactics, but not participating in the trial was not one of them. This was not because they believed that they were getting a fair hearing. Rather, they hoped to reach the more neutral federal courts on appeal. In order to do so, they had to defend the contempt charges in state court, where most believed they would lose regardless of the merits, and to make a record for the federal court to review.\textsuperscript{19} 

The lawyers and their clients faced another choice: whether to make the contempt hearing a trial of the injustice of Southern state courts. They decided not to try the Southern state courts in the court of public opinion for strategic reasons. The contempt hearing was held while protests in Birmingham were ongoing. To make the contempt hearing, unfair though it was, into a public spectacle would distract from the purpose of the protests in the first place. The SCLC wanted the focus to be on injustices of segregation in the City of Birmingham, not on the injustices wrought by Southern state courts.\textsuperscript{20} They sought to protest the substantively unjust laws rather than the procedurally unjust tribunal. But

\textsuperscript{16} Id. at 62. 
\textsuperscript{17} Id. at 80. 
\textsuperscript{18} Id. at 81. 
\textsuperscript{19} Id. at 94. 
\textsuperscript{20} Ibid.
that meant the lawyers were required to litigate the case before a biased court as though their client could get a fair hearing, despite the fact that they knew the case was lost before it began. They participated in a sham to help their clients achieve their larger goals.

The United States Supreme Court affirmed King’s conviction, although in a separate case it found that the underlying injunction was unconstitutional. In *Walker v. City of Birmingham*, the Court upheld the conviction for contempt on the basis that the Alabama court had the jurisdiction to issue the injunction, and that the place to dispute its constitutionality was in a suit to lift the injunction, not after its violation. This is known as the collateral bar rule. The Court offered one olive branch to the petitioners, writing that “[t]his case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims.” The Supreme Court decision ignored the injustice that resulted both from the procedural rules that permitted *ex parte* hearings without requiring notice to the other side and from the fact that the judge overseeing the case, a moderate segregationist, was perhaps not a neutral arbiter. It is almost certain that had the petitioners sought to challenge the injunction in the Alabama courts, they would have lost. Although the court had jurisdiction to issue an injunction as a formal matter, everything about its order betrayed a fundamental injustice that could easily have served to create an exception to the collateral bar rule without diminishing the power of the courts as a general matter.

King had faced a similar trial in March 1955 during the Montgomery Bus Boycott. He was indicted under a state law that prohibited “conspiring ‘without just cause or legal excuse’ to hinder a business.” The case was tried before a segregationist judge and, to no one’s surprise, King was convicted. In his legal history of this trial, Randall Kennedy explains that despite the fact that the trial was lost, the conduct of the trial was a victory. Black lawyers were able to take on white lawyers directly in an adversarial environment, were treated with (some) respect and matched, or even outshone, their white counterparts. Furthermore, the trial aired black grievances that were otherwise hidden from the view of the white population. Thus, Kennedy argues, trial testimony by black citizens “eroded the myth of symmetry that had long sustained the separate but equal doctrine.” This testimony was part of a

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23 *Id.* at 318.
26 *Id.* at 1034.
strategy to put the bus company on trial. Using a trial as a means to communicate to the court of public opinion is a strategy sometimes adopted by lawyers resisting unfair tribunals. Like the contempt trial in Birmingham seven years later, the lawyers in Montgomery did not put the injustices of the court itself on trial.

Kennedy describes another strategy that raises some more troubling questions. King’s lawyers argued that the boycott was not a concerted action at all, but rather a series of individual decisions all made at the same time.28 The problem with this strategy is that it was based on a lie to the tribunal. Kennedy explains:

This raises the thorny question whether, or to what extent, King and his allies owed a moral obligation of truthfulness to institutions that oppressed them. Lying would seem to pose something of a quandary for a protest that derived much of its inner and outer strength from its sense of moral purity. Furthermore, given that King's conviction was virtually certain no matter how he portrayed his role in the protest, the question arises why he adopted a position at trial so at odds with the candid defiance and plain-spoken eloquence that had helped to make the boycott the extraordinary event it had become. Perhaps he deemed evasion necessary to protect participants in the protest; to have been open and forthright on the witness stand might have risked exposing vulnerable people to extra-legal retribution. Perhaps, if pressed, King would also have noted that he was being tried, after all, in a court that lacked basic elements of justice.29

The knowing introduction of perjured testimony at a trial is a violation of the ethical rules governing lawyer conduct.30 But beyond that rather clear issue are more troubling questions. Kennedy frames the issue as the question of whether an individual owes a moral duty to follow otherwise completely legitimate rules when faced with gross injustice. This is an important question. One might also ask: To what extent does the act of participating in an unjust adversarial proceeding invite immoral or unethical conduct by participants? Participation itself, if taken seriously, may sully the moral purity of the participants, invite them to take positions and play tactical games against an unfair adversary that will likely, if not inevitably, lead to some conduct they should be ashamed of. The problem is that refusal to participate has grave consequences as well, both for the lawyer and the client. This is especially true if one holds out hope that through reasoned argument the tribunal can be swayed.

28 Id. at 1035.
29 Id. at 1035-36.
30 For the modern version see MODEL RULES OF PROF’L CONDUCT R. 3.3 (2002) (stating that a lawyer “shall not knowingly … offer evidence that the lawyer knows to be false.”).
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B. The Military Commissions in Guantánamo Bay, Cuba

The government’s use of military commissions to try detainees held in Guantánamo Bay, Cuba spurred substantial resistance from members of the United States legal community who believed the commissions to be deeply flawed. Numerous useful academic studies and popular books described the flaws of the military commissions. This section will provide only a brief overview to set the stage for understanding the difficult issues lawyers who represented the accused before these commissions faced.

The military commissions were created by a Presidential Military Order issued in November 2001. From the beginning, the Department of Defense faced accusations that the military commissions failed to meet fundamental rule of law requirements: the decision makers were not neutral, rules were created ad hoc rather than set in advance, ex post facto laws were permitted, defense lawyers were unable to adequately represent their clients, access to evidence was limited, and evidence tainted by coercion (even torture) could be introduced at trial. After the Supreme Court invalidated the commissions in Hamdan v. Rumsfeld, Congress reinstated them by passing the Military Commissions Act of 2006. Some of the problems were ameliorated in the new legislation, while others remained. For purposes of discussion, I shall assume that the lawyers were justified in their evaluation that the tribunals continued to be procedurally unjust.


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The first two cases tried under the military commission system were those of David Hicks and Salim Hamdan. Hicks’ case ended in a guilty plea that was widely reported to have been reached in response to pressure by the Australian government. Hicks received a seven year suspended sentence of which he would serve nine months in his native Australia. As part of the plea agreement, he agreed not to speak publicly about his experiences for a period of one year. Hamdan, by contrast, was tried and convicted of providing material support for a terrorist organization and sentenced to five and a half years in prison, which left him approximately five months to serve. Initially, the Department of Defense did not commit to releasing Hamdan at the end of his sentence. He was eventually released to the Yemeni government.

1. The Case of David Hicks

In August 2003, the National Association of Criminal Defense Lawyers (NACDL) issued an advisory ethics opinion stating that “it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.” The terms imposed on defense counsel as a condition of appearing before the tribunals included monitoring of attorney-client communications, refusal to permit counsel to request adjournments, limited access to information, a prohibition on sharing even unclassified information with experts, and waiver of counsel’s right to protest closed proceedings.

Joshua Dratel, the criminal defense attorney described at the beginning of this Article, used this ethics opinion to negotiate better conditions for his representation of David Hicks. He relied on the opinion to convince Brigadier General Thomas Hemingway, Legal Adviser to the Convening Authority in the Department of Defense Office of Military Commissions, to permit Dratel to have conversations with his client free from monitoring, to leave Guantánamo while the case was ongoing, to seek

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41 NACDL Ethics Advisory Committee, Opinion 03-04 (August 2003).
42 See Department of Defense Military Commission Instruction No. 5: “Quality of Civilian Defense Counsel,” Annex B (setting forth limitations on civilian counsel as a condition of representation) (on file with author).
discretionary adjournments just as in ordinary courts, to consult with experts outside the defense team on unclassified information, and to contest closed proceedings. Having assuaged some of his concerns, Dratel agreed to represent Hicks before the commission.

This success was not to last. In the course of preparing the case to go to trial in 2007, the Presiding Officer of the military commission asked Dratel to sign a notice of appearance in order to participate in the military commissions newly convened pursuant to the Military Commissions Act of 2006. This new notice, promulgated by the Presiding Officer, stated that Dratel agreed to abide by all the rules of the Commission. Since many of those rules were not yet written, Dratel was concerned that the government would institute provisions similar to those he had objected to in 2003 and that by signing this notice of appearance he would waive the right to contest those rules. To solve this problem, he altered the notice so that instead of saying “all applicable regulations” it said “all existing applicable regulations.” (emphasis added). This was to indicate that he would agree to abide by all the rules of the commission currently in effect and reserved his right to object to any unethical rules should they be promulgated. The Presiding Officer refused to accept the altered notice of appearance, warning Dratel that he should sign the notice as written or be disqualified. The Presiding Officer held a conference to determine whether Dratel should be disqualified for refusing to sign the notice before Dratel could arrive at the base and without the defendant present. Hicks and Dratel were represented by detailed defense counsel Michael “Dan” Mori.

At the public hearing, after the Presiding Officer had made public the decision to disqualify him, Dratel explained to the court (and the public):

I cannot sign a document that provides a blank check on my ethical obligations as a lawyer, my ethical obligations to my client, my ethical obligations under the rules of professional responsibility for the State of New York to which I am bound… I cannot again buy a pig-in-a-poke in this process. These are the same problems that plagued the previous commission; that everything is ad hoc, that everything moves in a way where you cannot predict from one day to the next what the rules are.

The Presiding Officer offered Dratel the opportunity to remain as a counselor but without the ability to advocate on behalf of Hicks before the tribunal. Dratel refused, stating “…you don’t have to ask Mr. Hicks about whether he wants me here or not, I’m not going to pretend that I’m here

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43 The description that follows is taken from the transcript of the hearing before the military commission, supra note 2. That transcript can be found at http://www.defenselink.mil/news/commissionsHicks.html.
44 The Military Commission regulations indicated that the notice was to be promulgated by the Department of Defense, not the officers serving on the Military Commissions. Dratel raised this objection which was dismissed by the Presiding Officer.
45 Transcript of Trial, supra note 2 at 27
functioning when I’m not entitled to do my job.” Because his disqualification occurred on the eve of the trial, and illustrated the lack of rules in the military commission system, Dratel’s actions received substantial media attention.47

Hicks’ lawyers were successful in drawing public attention to his case prior to trial as well. His detailed defense counsel, Dan Mori, gave numerous press conferences between the time Hicks was charged and his guilty plea, while Hicks’ civilian defense counsel mostly remained on the sidelines. “I think they wanted us to be good little boys and wait for the trial and make our objections so they could just go with the process,” Mori told an Australian news program in 2006. “But, you know, in a rigged system . . . all you can do sometimes is just to try to let people know what’s going on and why it’s unfair.”48 Mori traveled to Australia several times to advocate for Hicks and to put pressure on the Australian government to negotiate his release.

While publicizing Hicks’ case, Mori made numerous statements about the unfairness of the tribunals using strong language. At one point, the chief prosecutor for the commissions accused Mori of violation of Article 88 of the Uniform Code of Military Justice, which makes it a crime for a military officer to use “contemptuous words” about the President, Vice President, Secretary of Defense and other high public officials.49 Mori responded in anger, asking “Are they trying to intimidate me?”50 In the end, Mori’s efforts spurred a plea deal and achieved his client’s relatively quick release.

2. The Case of Salim Hamdan

Salim Hamdan’s case involved both an appeal to the court of public opinion and to higher tribunals, but the latter strategy had more impact. Although Hamdan’s lawyers used the court of public opinion to great effect, their primary strategy was participation in the legal system. Hamdan’s lawyers filed numerous appeals, one of which resulted in the Supreme Court ruling holding the military commissions unconstitutional.51 Their great hope was the federal court system.

At the very beginning of the representation, Neil Katyal, a Georgetown law professor now famous for his representation of Hamdan before the Supreme Court, suggested to defense counsel – who did not yet have clients – that they file an amicus brief in the Supreme Court case Rasul v. Bush, which was to decide whether the federal courts had habeas

46 Id. at 29.
48 Michael “Dan” Mori speaking to Andrew Denton on the Australian talk show “Enough Rope” (date unknown) available on www.youtube.com/watch?v=Jsw3Dx49NA (last viewed March 21, 2007).
50 Id.
jurisdiction over non-citizen detainees held in Guantánamo.\textsuperscript{52} He first suggested that the military lawyers file a lawsuit on their own behalf, arguing that “you shouldn’t be made to participate in an unconstitutional proceeding, that doing so contradicts your oath to uphold the Constitution.”\textsuperscript{53} The lawyers refused, arguing that without clients they could not file any briefs. As one of them explained “My entire professional career I’ve worked with the understanding that a defense counsel has no stake in any case unless he represents a client with an interest, and I can’t see a way around that now.”\textsuperscript{54} In the end, the military defense lawyers agreed to file an amicus brief arguing that nobody was speaking for their future clients, who were the only detainees that both parties in the \textit{Rasul} litigation agreed were not entitled to immediate access to habeas corpus.\textsuperscript{55} That marked the beginning of a long fight in the federal courts.

In Hamdan’s case, lawyers also faced the tension between loyalty to their client and the integrity of the legal system. For example, like all detainees, Hamdan was required to undergo a hearing before a Combatant Status Review Tribunal (CSRT) to determine whether he was an unlawful combatant who could be held indefinitely.\textsuperscript{56} In these hearings the detainee is not permitted to have a lawyer and instead was appointed a “personal representative” by the military to guide them through the hearing (although not to provide legal advice).\textsuperscript{57} Charles Swift, who represented Hamdan, believed the CSRTs to be sham hearings where the outcome was predetermined. He nevertheless asked to be present as Hamdan’s lawyer, a request that was denied. In order to attend the hearing, Swift asked to be called as a witness to testify about exculpatory information he had gathered while investigating Hamdan’s case. Twenty four hours before the CSRT hearing, Swift was informed that the request had been granted.\textsuperscript{58} For personal reasons and because he believed the CSRT hearing was a charade, Swift decided not to attend the hearing. It is probably true that his testimony would not have altered the result.\textsuperscript{59} His absence was nevertheless devastating to his client. “Where were you?” asked Hamdan “Why did you leave me?” According to one report: “Swift tried to explain that the hearings were a joke, the verdicts a forgone conclusion, that at least the military commissions, with all their flaws, were trying to pass themselves off as legitimate courts. The distinction was meaningless to Hamdan.”\textsuperscript{60}

\textsuperscript{52} 542 U.S. 466 (2004).
\textsuperscript{54} \textit{Id.} at 69 (quoting email from Lt. Cmdr. Philip Sundel to Neil Katyal).
\textsuperscript{55} \textit{Id.} at 69-70.
\textsuperscript{56} \textit{Id.} at 153-154.
\textsuperscript{58} MAHLER, \textit{supra} note 52 at 153-154.
\textsuperscript{59} Being a potential witness could have disqualified Swift from serving as trial counsel. \textsc{Model Rules of Prof’l Conduct} R. 3.7 (barring lawyers from acting as advocates in trials where they would be necessary witnesses).
\textsuperscript{60} MAHLER, \textit{supra} note 52 at 154.
II. Lawyer Complicity and Resistance

The role of the lawyer in unjust tribunals such as those described above is seldom addressed in the scholarly literature. Meanwhile, the question of judicial participation and complicity in unjust legal regimes has received much more attention. This is likely because judges are generally considered the protectors of the legal system, while lawyers are relegated to be merely adversarial players. Yet lawyers play a critical role in resisting injustice by choosing how and when to present the cases and arguments to the judge. Lawyer resistance can (although it does not always) have powerful effects on legal systems.

Some literature on resistance suggests that submission and resistance are on opposite poles of human behavior within organizational systems. As John Rawls explained, “The persistent and deliberate violation of the basic principles of [the public conception of justice] over any extended period of time, especially the infringement of the fundamental equal liberties, invites either submission or resistance.” But the relationship between submission, complicity and resistance are more complex than this. Submission can render an actor complicit in injustice when he is coopted by the tribunal and contributes to its perpetuation. So too can resistance undermine justice. Acts that initially appear to be resistance can be coopted by the unjust regime; acts appearing to be complicit can become powerful forms of resistance. The yin-yang relationship between the concepts of complicity and resistance is critical to understanding the role of the lawyer in defending the rule of law and his client in the face of injustice.

This Part discusses lawyer responsibility and moral agency. The first section develops the concept of lawyer complicity in unjust tribunals.

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61 The rare exception is WEISBERG, supra note 7. Weisberg demonstrates that the interpretive approaches of French lawyers under the Vichy regime increased injustices against Jews and that in that case less unjust interpretations were available. This is a rather different instance of complicity from the incidents I am discussing here because the lawyers did not resist injustice but instead submitted to it wholeheartedly. Weisberg provides a sophisticated, contextually specific theory of why these lawyers chose submission over resistance. For a more positive example of the potential for lawyers to transform unjust regimes see ABEL, supra note 7 at 549 (arguing in favor of lawyer participation in the legal regime in Apartheid South Africa on the theory that their work eroded the dominant power structure).

62 See COVER, supra note 10 (analyzing the forms of legal reasoning marshaled by judges deciding cases under the Fugitive Slave Act); DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY (1991) (arguing that the application of Ronald Dworkin’s theory of law by South African judges enabled them to ameliorate racially restrictive laws, whereas positivist theories did not).


and its relationship to professional identity. The second section analyzes
the concept of resistance in the context of lawyer participation and non-
participation in unjust tribunals. The third section presents a novel schema
of lawyer resistance to injustice. This schema illustrates the dualistic
relationship between resistance and complicity in lawyer action. Some
strategies lawyers adopt to ameliorate unjust proceedings are not the most
beneficial for their clients. In attempting to achieve some moral purity by
refusing to participate, lawyers may abandon their clients to the tribunal’s
injustice. The decision not to participate in order to avoid complicity in
injustice can be considered a self-regarding grasp at moral purity that, in
the end, is not laudable because lawyers owe a duty to their clients. On the
other hand, refusal to participate or withdrawal can be considered other-
regarding in the sense that it is directed at ameliorating the system, even
though the lawyer abandons his client. These issues of professional
responsibility and moral agency are inextricably intertwined and affect
lawyers both individually and collectively.

A. Complicity

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

The dominant view of complicity is that it requires intent. Under
this view, lawyers are complicit in the injustice of the tribunal if they
intended the outcome. What I mean by complicity here is somewhat
different. A lawyer may be complicit in the injustice of the tribunal when
his participation in the tribunal lends that tribunal the appearance of
credibility even if the lawyer disapproves of the tribunal. Consider the
following story from the South African experience in the late 1960’s,
recounted by the lawyer Jules Browde:

I acted for two black communities on the West Rand
which had brought an application for an interdict
restraining the police from harassing them by various
means in their townships. In opening the case, I set out
in broad terms the allegations which we intended to

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65 Cover, supra note 10 at 159.
66 For example, the philosopher Christopher Kutz states the “complicity principle”
as follows: “I am accountable for what others do when I intentionally participate in
the wrong they do or the harm they cause.” Christopher Kutz, Complicity: Ethics and Law for a Collective Age 122 (2000).
prove and I enunciated the evidence that we proposed bringing in order to substantiate those allegations. At the first tea break when I was still addressing the Court in opening, I was approached by one of the spectators, a visitor to South Africa, who introduced himself to me as Mr. Griffin Bell, the Attorney General of the United States during the Carter Administration. He told me that while he was horrified at the allegations that were made against the police, he nevertheless was impressed with the fact that these allegations could be aired in open court. He assured me that South Africa was the only country on this continent – and as he put it, I daresay on some other continents that I could mention – in which this could take place. Unfortunately, that is the last time I saw Mr. Griffin Bell and, consequently, I have been unable to tell him that that case was ended by the declaration of the state of emergency and the arrest and detention without trial of most of the important witnesses for the applicants.67

The lawyer in this case lent respectability to an unjust system despite the fact that his subjective intent was not to support that system at all.

Can the lawyer be responsible for an outcome that he did not intend or for a process of which he disapproves? A lawyer may be held responsible or may hold himself responsible when such participation forms part of his professional identity. For a lawyer who participates in an unjust tribunal, even if he resists the tribunal in the course of participation, that act of participation becomes a formative part of the lawyer’s personal and professional identity. If participation lent credibility to the tribunal, that is, if it made observers believe that the tribunal was fair, then the experience of having lent credibility to the tribunal becomes part of who that lawyer is. He becomes the lawyer who made the tribunal appear to be fair when it was not. Thus a lawyer who attempts to defend his client against injustice, but in the process affirms the tribunal through the adversarial role, can be held responsible for his part in creating the perception of credibility.68

While intent is relevant to the question of blame, it does not absolve the lawyer of responsibility. Even the defense lawyer who objects to the tribunal in the course of participation may bear some responsibility for lending credibility to injustice.69

68 For a philosophical discussion of this idea, see MEIR DAN-COHEN, Responsibility and the Boundaries of the Self in HARMFUL THOUGHTS 204-205, 222 (2002).
69 As Dan-Cohen explains “One bears collective responsibility even with respect to objects and events toward which one has a negative attitude and despite one’s efforts to prevent them. Indeed, such efforts may be motivated precisely by the individual’s awareness of responsibility he or she will ineluctably bear if the object or event materializes.” DAN-COHEN, supra note 67 at 223.
A lawyer’s work can lend credence to an unjust tribunal when the lawyer’s participation creates the appearance of an adversarial system. An adversarial system is central to our collective conception of procedural justice. In our legal culture, adversarialism sends a signal of fairness, particularly for those observing the system from afar rather than directly. The presence of adversaries may hide the fact that the decision-maker is not neutral and cannot hear the other side.

Lawyer participants in unjust tribunals worry about lending credibility, demonstrating that this is a live issue. Charles Swift explained: “We were concerned, that fighting would serve to validate the system.” Another defense lawyer stated: “…there are all these times that you throw up your hands and say that this is impossible, it can never be fair, its a sham, I’m participating in a charade, I’m only adding to it, I’m only making it look like its real.”

The majority’s refusal to look beyond the formal trappings of the courtroom to the reality of the political situation in Walker demonstrates how the existence formal court proceedings can lend credibility to injustice. The Court held that it would only consider whether the Alabama state court had jurisdiction to issue the injunction, not whether the underlying injunction was constitutional. There is no hint in the opinion that the Alabama court would offer anything other than “orderly judicial review” despite evidence to the contrary. The marchers were required first to attempt to be heard, regardless of the fact that the tribunal would not fairly or timely hear their case. In that case, the existence of formal courtroom proceedings at the state level was a dispositive factor for the majority’s decision.

Similarly, the work of defense lawyers on behalf of Guantánamo detainees was used to support the proposition that the military commissions were governed by fair procedures. Responding to the accusations from a defense lawyer that the military commissions were unfair, the spokesman for the Pentagon’s tribunal office stated: “His job as defense counsel is to zealously defend people who may be tried before military commissions. I expect him to raise issues in his client’s interest.” By invoking the principle of zealous advocacy to describe the resisting lawyers’ conduct, these statements communicate that the lawyers’ protests are merely hyperbole or grandstanding, a reflection of the lawyer’s duty to provide

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71 Quoted in William Glaberson, An Unlikely Antagonist in the Detainees’ Corner, N.Y. TIMES (June 19, 2008).
72 Interview #1 (confidential interview with defense lawyer conducted September 2007, transcript on file with author).
73 388 U.S. at 315.
74 Id. at 320. The majority supported its position by noting that White supremacists had been subject to the same Alabama rule, the idea being that the rules are applied the same to all, regardless of political context. The court ignored the fact that in this case the judge was a moderate segregationist and therefore likely biased, and that the litigants had not had an opportunity to be heard before the court issued the injunction.
75 John Mintz, Lawyer Criticizes Rules for Tribunals, WASH. POST, Jan. 22, 2004 at A03.
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zealous representation rather than a considered assessment. Such statements also tap into the general perception that adversarial procedures are fair, and elide the other aspects of the tribunal which undo the shield of adversarial representation.76

During and in the immediate aftermath of the Hamdan’s trial, military commission supporters similarly used the presence of defense counsel, and specifically defense counsel resistance, as proof that the trial was fair. In an opinion piece in the Wall Street Journal, two prominent Washington attorneys stated “The real question, of course, is whether Hamdan is getting due process, and whether his trial is fair. The answer is yes. Hamdan has an able team of defense lawyers determined to squeeze from the system every drop of procedural advantage.”77 Even though the Presiding Authority had held that the Fifth Amendment’s due process clause does not apply to the military commissions, defenders of the commission process used this concept (and its connotations of adversarialism) to support their position.78 In sum, although defense lawyers intend for their actions to have one effect – resistance – their actions instead are used to affirm the very fact they are attempting to disprove. Their resistance was thereby transformed into a sign of credibility and fairness.

If the end result of the process seems relatively equitable, this fact further diminishes the power of the lawyer’s argument against the unjust procedure. The result is good for the client, but perhaps less so for the legal institutions that have now entrenched unfair processes because in isolated cases they lead to acceptable results. For example, both Hicks and Hamdan received relatively short sentences. As Morris Davis, the former chief prosecutor of the military commissions explained: “… in the end losing may equate to winning. It remains to be seen whether the administration intends to keep Hamdan past the end of his sentence; doing so begs the question of why we even bother to hold trials. If you look at Hicks (9 months) and Hamdan (<6 months) it suggests the best way to win at Gitmo is to lose.”79

Holding a lawyer responsible for lending credibility to unjust tribunals can cut both ways. Even if lawyer participation lends credibility to injustice, we might not want to hold lawyers who participate in unjust tribunals responsible for the outcomes of those tribunals in order to encourage lawyer participation and resistance. This is the same reason that the Rules of Professional Conduct absolve lawyers of responsibility for

76 In re Yamashita, 321 U.S. 1, 45 (1946) (Rutledge, J. dissenting).
78 See U.S. v. Hamdan, Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices and on Motion to Suppress Statements Based on Fifth Amendment, July 20, 2008 (available at http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%20209%20and%20D-044%20Ruling%201%20(2).pdf)
their client’s point of view. If we retain the hope that the lawyer can bend injustice through the various forms of resistance described in the remainder of this analysis, then we will want to free him of responsibility in order to encourage participation. On the other hand, if we want lawyers to resist the tribunal rather than submit to it, there must be some sense of professional responsibility not their clients within the confines of the tribunal, but to the larger ideals of legality. Finally, stressing the lawyers’ responsibility for the normalization or acceptance of unjust procedures may encourage lawyers to withdraw collectively and thereby stop the tribunal. These choices are discussed at greater length below.

B. Resistance

A lawyer facing an unjust tribunal may naturally consider whether and how to resist injustice. Resistance comes in many forms and expressions. It can involve speech or silence, participation or refusal to participate. It can manifest within the system being resisted or outside of that system. The following discussion illuminates these different concepts. Two distinctions are fundamental to understanding the concept and manifestations of resistance. The first is the distinction between voice and exit. This distinction encompasses the decision to participate in a tribunal that is procedurally unfair or to refuse to participate. The second distinction is that between internal and external resistance. Resistance can be manifested in the language of the legal system that is being resisted (“internal” resistance) or in speech that engages the world beyond that system (“external” resistance). The two sections below address the concept and forms of resistance that lawyers adopt in the face of injustice.

1. The Forms of Resistance: Exit and Voice

The two basic forms of resistance are exit and voice. Exit is characterized by a refusal to participate or a decision to leave the entity in question. Voice is characterized by the communication of dissatisfaction or resistance. Although the categories of exit and voice are simplistic, they provide a good starting point for understanding resistance. This section will define the concepts of exit and voice, discuss where these categories break down, and address the significance of the overlap between the two categories for thinking about resistance in the context of unfair hearings.

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80 See MODEL RULE OF PROF’L CONDUCT R. 1.2(b) (2002) (“A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”).
81 Albert Hirschman developed these categories initially to apply to firms or organizations in decline, but they are also useful for clarifying types of reactions to injustice in the political sphere, including unjust tribunals. In Hirschman’s view, management learns of failure either because of a significant defection of consumers (exit) or expressions of dissatisfaction (voice). ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES 4 (1970).
Exit is a strategy for spurring change usually associated with economic rather than political life. The emblematic example of exit is the consumer’s decision to buy a product from a different manufacturer. The right of the lawyer to refuse to take a client or withdraw from representation is a function at least in part of the lawyer’s autonomy as an economic actor. The exercise of this economic liberty can cause harm, such as when a client is unable to obtain legal representation or a lawyer withdraws from representation in a way that harms the client. To prevent the latter outcome, the Rules of Professional Conduct set limits on lawyer withdrawal.

Voice is the more articulate feedback mechanism. Voice involves an attempt to “change, rather than escape from, an objectionable state of affairs” through petition, appeal to a higher authority, protests or other acts of vocal resistance. The political realm exhibits a bias towards voice as a means of registering discontent. Exit from the state, by contrast, is branded as defection, treason or desertion. The unjust tribunal provides numerous opportunities for the lawyers to exercise voice. Lawyers for the civil rights movement exercised voice when they appealed to the higher authority of the federal courts. In the military commission context, Dratel petitioned the Convening Authority directly and negotiated to change certain rules. Similarly, Mori traveled to Australia in an attempt to reach the court of public opinion and spur the Australian government to assist his client.

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

Exit and voice are not mutually exclusive categories. They interact with each other, may be used as alternatives to one another or may overlap in a single course of action. In instances where exit is not available, voice becomes more important as a means of registering discontent. Similarly, when voice is limited, exit becomes the primary reaction. The stakes are high for lawyers before an unjust tribunal. Protest within the tribunal can result in the lawyer being held in contempt or even jailed. In the military

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82 Id at 16.
83 Id. at 15.
84 MODEL RULES OF PROF’L CONDUCT R. 1.16 (2002).
85 HIRSCHMAN, supra note 80 at 30.
86 Id. at 17.
87 See MODEL RULES OF PROF’L CONDUCT R. 1.16 (2002) (setting limits on the lawyer’s ability to withdraw when withdrawal will harm the client).
88 See United States v. Dellinger, 502 F.2d 813 (7th Cir. 1974) (upholding contempt charge against trial counsel). See generally Pnina Lahav, Theater in the Courtroom, the Chicago Conspiracy Trial, 16 LAW & LIT. 381 (2005).
context, voice may result in the threat of substantial discipline, as was the case with Mori’s statements about the military tribunals that the prosecutor characterized as a violation of the Uniform Code of Military Conduct.89

Some reactions to procedural injustice involve the overlap of exit and voice. Dratel’s refusal to sign the notice of appearance that he found objectionable was a form of protest (voice) which resulted in his disqualification (exit). His further decision to leave the courtroom (exit) rather than remain as a counselor not permitted to address the tribunal, increased the effectiveness of his message. At the same time, it meant abandoning his client to face the tribunal without him. The fact that in that case a plea deal had already been reached mitigates the wrong that Dratel committed towards his client, but one can imagine a situation where a lawyer would follow the same course of action even though the trial was set to go forward.

Similarly, when the NACDL issued the ethics opinion urging civilian criminal defense lawyers to boycott the military commissions, this constituted a form of “exit with the promise of reentry.”90 That collective protest was a communicative act that bears more weight than exit undertaken on an individual basis. The detail of the opinion in delineating the organization’s opposition to the military commission system demonstrates that the boycott was intended to increase the volume of the organization’s voice within the larger political debate about the legality of the military commissions.

The concept of loyalty helps to understand the functioning of exit and voice in legal representation.91 A person who is loyal will seek to make him or herself more influential in an organization, and a person who holds power in an organization is more likely to be loyal.92 Having some loyal participants prevents “deterioration from becoming cumulative” so that the organization can have an opportunity to improve its functioning.93 Loyalists may use the threat of exit as means of increasing the power of their voice.94 Ease of exit can affect the development of loyalty because members may have a hard time gaining power within the organization. It is simpler to evade or postpone change when exit is free and easy.95

Attorney loyalty can operate on several levels. It can include loyalty to the individual client, loyalty to a particular conception of the professional role, loyalty to legal institutions and to the liberal legal regime. For example, the lawyers representing King were arguably loyal both to the client, who wanted to participate in the contempt proceeding, and to the

89 See discussion accompanying supra note 48 (describing Mori’s publicity campaign in Australia and its repercussions).
90 HIRSCHMAN supra note 80 at 86.
91 Id. at 77.
92 Id. at 78.
93 Id. at 79.
94 Id. at 82-83.
95 Hirshman notes that “the greater the opportunities for exit, the easier it appears to be for organizations to resist, evade and postpone the introduction of internal democracy even though they function in a democratic environment.” Id. at 84.
ideal of the pursuit of justice in the federal courts, which they hoped would be able to fairly resolve the case.

If lawyer participation is left to individual choice, there is a greater chance that those most likely to argue against the tribunal will opt out, leaving more submissive participants in place. On the other hand, participation, even by vocal opponents, enables the tribunal to mete out injustice. In the context of the military commissions, the decision of some lawyers to continue participating was a critical factor in keeping the commissions operating even as they were under substantial political pressure. Military lawyers appointed to serve as defense counsel do not seem to have had a robust right of exit, and therefore their loyalty to the military paradoxically spurred resistance through voice. The nature of loyalty in the military commission context is multifaceted. Was loyalty to the United States government or to the armed services, to their roles as defense lawyers, or to their clients that kept lawyers from withdrawing? The answer is likely to be a mixture of all of these and different for each lawyer.

2. The Expression of Resistance: External and Internal

As a component of resistance, voice can find expression internally to the tribunal or externally. This section defines internal and external resistance and considers the extent to which the two categories overlap to expand our view of what “representation” means. The section ends by noting the limits of both internal and external expressions of resistance.

By internal resistance, I mean resistance within the confines of the unjust tribunal. Internal resistance is shaped by the faith articulated by Lon Fuller that “when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are.” When an advocate appearing at an unfair hearing uses the legal tools available, such as reasoned arguments based on procedural or substantive legal rules, motions, briefs, presentation of evidence and appeals, he is engaging in internal resistance.

There are several reasons why a lawyer might engage in internal resistance. He may believe legal argument will lead to greater procedural justice, on a large or small scale, in the short or long term. This approach in a sense uses “the master’s tools to dismantle his house.” Second, he may believe that he is building a record of injustice so that he can appeal to a higher authority. Each of these approaches is discussed at greater length in the next section, which schematizes acts of resistance. What is important to note here is that these are both forms of internal resistance.

96 While JAG lawyers were permitted to volunteer for duty as defense counsel for the military commissions, they do not have the unencumbered right to withdraw at will. Doing so would require them to disobey orders. See Luban, Lawfare, supra note 7 at 2011 (describing the potential consequences of a JAG defense lawyer’s decision to disobey a judge’s order in a military commission proceeding).

97 Lon L. Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 Harv. L. Rev. 630, 636 (1958).
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External resistance is communicated to the world outside of the unjust tribunal. It puts the tribunal on trial in the court of public opinion. External resistance is shaped by an assumption that legal change is best achieved in the realm of politics where moral arguments ought to hold more sway. Lawyers may engage in external resistance whether they participate in the tribunal or refuse to participate. They may draw on legal language or broad political or moral principles. Lawyers who have chosen exit as the form of their resistance will only be able to express their opposition externally. A lawyer who tries the tribunal in the court of public opinion in order to affect political change or to make a record of injustice for posterity by bearing witness is practicing external resistance. Here the lawyer’s role requires calling upon outsiders to recognize injustice. For example, when Mori traveled to Australia to bring attention to his client’s plight, he was engaging in external resistance. He hoped that his actions would help spur political will on the part of the Australian government to liberate Hicks, overriding the legal structure established by the Department of Defense.

Internal and external resistance can be practiced in the same case by the same lawyers. Hicks’ defense team called press conferences, participated in rallies and gave speeches, but they also engaged in every legal strategy available within the confines of the military commission system. The end product of their external resistance was a political intervention in the military commission to reach a plea deal.

In the context of unjust tribunals, external resistance can stand alone or supplement the political protest of the client. As we have seen, external resistance can also be a hindrance and distraction from the client’s political protest. When the lawyers representing the SCLC decided not to bring public attention to the injustice of the Alabama court that was trying the movement’s leadership for contempt, they did so because their clients believed that the focus should remain on the protests against segregation in Birmingham, not on the injustices perpetuated by Southern state courts.

Further complicating the internal/external distinction are strategies that are internal to the broader liberal legal system but external to the unjust tribunal. When lawyers for Guantanamo detainees filed habeas corpus petitions in federal court, in addition to appealing within the commission process, they were seeking review external to the Department of Defense. Similarly, when the lawyers for the SCLC appealed the conviction of Dr. King to the federal courts, their resistance was external to the Alabama court system. These appeals to the federal system are still internal to the larger legal system. Appeals may be filed in conjunction with an attempt to

98 See H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 73 (1983). Hart writes: “If laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience.” He explains that “laws may be law but too evil to be obeyed.” Ibid.

99 See Morris Davis, AWOL Military Justice, LOS ANGELES TIMES, Dec. 10, 2007 (accusing military commissions of being politicized); Josh White, From Chief Prosecutor to Critic at Guantanamo, WASHINGTON POST, April 29, 2008 (reporting that “When Hicks struck a secret plea deal that brought his release, Davis said he was not a party to it.”).
engage the public at large, but are nevertheless distinctively legal arguments that are deployed within the courts. In this sense both arguments to the unjust tribunal and to reviewing courts are internal.

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

Both legal and practical considerations impose limits on the ability of lawyers to engage in internal and external acts of resistance. Lawyers may be held in contempt of court and even face jail time for engaging in acts of resistance in the courtroom. Additionally, lawyers’ public speech about a case may be curtailed by the court under certain circumstances, even absent national security concerns. Finally, the client’s goals and needs affect the lawyer’s ability to utilize particular strategies of resistance and political action. Often lawyers will argue that there is harmony between the lawyer’s duty to zealously represent the client and his duty to uphold the rule of law. As one military defense lawyer explained: “If we’re not advocating against the process, we’re not competently representing our clients.” Yet situations may arise where the client is not better off if the lawyer withdraws or resists in some other way, but the lawyer believes his duty to legality nevertheless requires resistance.

C. Acts of Resistance

This section presents an original schema of actions lawyers have undertaken when facing unjust proceedings. There are five forms of resistance available to lawyers facing procedural injustice: (1) lawyers may boycott the proceedings collectively, (2) each decide individually not to participate, (3) utilize existing law to ameliorate the procedural regime, appeal to a higher, (4) external authority to correct injustice, or (5) appeal to present or future members of the public. Each of these strategies may involve exit or voice and employ internal or external resistance. Lawyers use these strategies of resistance simultaneously or one after another. By setting out these strategies, I hope to spur a much needed conversation.

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101 Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (holding that local ethics rules may regulate extrajudicial lawyer speech regarding pending cases when the attorney knows or reasonably should know his statements will have “substantial likelihood of materially prejudicing” the proceeding).
about appropriate lawyer reactions to crises such as that posed by an unjust proceeding.

1. Organized Boycott

Imagine that every bar association in the United States had issued an ethics opinion prohibiting lawyers from participating in the military commissions in Guantánamo Bay on the grounds that they failed to provide sufficient procedural protections and violated fundamental principles of the rule of law.\(^{103}\) The 2003 ethics opinion issued by the NACDL holding that the military commissions violated the rules of professional ethics was a failed attempt to start such a boycott movement. Because a boycott would require all members of the bar to refuse to participate in the unjust tribunal, it would effectively shut down the adversarial process. The tribunal could not continue to function because no lawyer would be able to argue before it, and presumably if the judge were a member of a state bar, she would not be able to serve in that role. The tribunal might continue in an inquisitorial form, but it could not provide the type of adversarial trial that is commonly associated in the United States with fair process. The government’s insistence on an adversarial process in the military commissions, as opposed to the inquisitorial process provided in the Combatant Status Review Tribunals, indicates that such a change would have come at a cost to the government, at least from a public relations perspective.

There are two practical reasons why a boycott is unlikely to be a successful strategy for combating procedural injustice in the context of the American legal regime. First, the political ideologies of members of the legal profession are heterogeneous. For this reason agreement among members of the bar or bar committees in individual states, a prerequisite to implementing a total boycott, will be difficult or impossible to attain. Yet only a total boycott would be able to shut down the unfair tribunal. If individual lawyers were merely encouraged to withdraw, there would always be some lawyers who agree to participate. This is what occurred after the NACDL issued its ethics opinion.

Second, because lawyers traditionally have autonomy to choose their own clients, it is difficult to imagine them agreeing to a complete bar to representation. This is also evident in the 2003 NACDL ethics opinion. Although it stated that participation was unethical, the opinion went on to explain that the “NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so.”\(^{104}\) It then recommended a course of internal resistance to those lawyers who felt an obligation to represent detainees.\(^{105}\)

\(^{103}\) This Article does not address the question of whether such a scenario would violate the antitrust laws. See F.T.C. v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411 (1990) (holding that a boycott by public defenders to increase their pay violated the Sherman Act).

\(^{104}\) NACDL Ethics Advisory Committee, Opinion 03-04 (August 2003) at 1.

\(^{105}\) “If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise . . . every conceivable good faith argument concerning
Even if a boycott were feasible and consistent with the traditions of lawyer self-governance and pluralism within the legal profession, there is a strong principled argument against adopting this strategy. Boycotts are coercive. A boycott would force the tribunal to shut down, not through a judicial or democratic political process, but as a result of concerted action of a minority. That minority is only able to shut down the tribunal because lawyers play a necessary role in its functioning, not because lawyers have a monopoly on righteousness.

The argument that a boycott is coercive is similar to objections to civil disobedience. Some philosophers have argued that civil disobedience can cross the line to coercion when disobedience forces the majority to choose between accepting the position of the disobedient and doing something it abhors. In such a case “the dissenters cross the line that separates civil disobedience from those forms of action that attempt to paralyze the majority’s will or the government’s ability to act.” This is the difference between speech and reason on the one hand and coercion on the other. Whereas a legal or other rational argument may convince the polity or the tribunal to repair the procedural injustice or voluntarily shut down the tribunal, refusal to participate forces the government’s hand. A boycott of legal services is coercive in this sense. If a defense counsel boycott of the military commissions had succeeded, then the detainees would have had no representation at all. A boycott would have forced the government to decide between forgoing the illusion of an adversarial proceeding and accepting the attorney’s demands for reform.

Another way of looking at the coercion problem is that the absence of attorneys brings into relief the injustice already present in the system. The tribunal is already coercive; the government has already chosen an abhorrent course of action by setting up unfair rules. Lawyers are in any event functionally absent even if they appear in court. A boycott by defense counsel is merely a physical manifestation of the fact that the government is denying counsel the ability to meaningfully represent their clients.

Should attorneys nevertheless have a duty to participate in the unfair tribunal in order to ameliorate the government’s perpetuation of injustice? One argument is that the attorneys’ duty to uphold the rule of law requires participation in any tribunal where there exists the possibility – however slight – of improving unjust conditions. Even if the attorney had a duty not only to operate within the bounds of the law but also to the jurisdiction of the military commission, the legality of denial of application of the Uniform Code of Military Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.”

107 Ibid.
108 Complicating this issue is the fact that some detainees have refused counsel. This issue is not addressed here. See William Glaberson, *9/11 Suspects Arraigned at Guantanamo*, N.Y. TIMES, June 5, 2008 (describing the refusal of Khalid Sheik Mohammad to be represented by his attorneys at arraignment).
improve the law, it still would not be the case that the best way of doing so was participation. An attorney may legitimately think that the speediest and most effective way to ameliorate injustice is through a boycott. Whether this prediction is in the end correct depends on the course of history, which the attorney cannot know in advance.

The coercion argument is of a piece with the arguments favoring role morality for lawyers. Advocates of role morality believe that lawyers have a professional morality that is different than that of ordinary citizens. They object to the idea that lawyers ought to exercise their own moral judgment with respect to a client’s goals, so long as those goals are within the bounds of legality. This position is based on the view that zealous advocacy promotes democracy by maintaining the integrity of the adjudicative process.109 In the adversarial model of adjudication, each party presents his case to a neutral arbiter, who listens to both sides and reaches a just outcome. A lawyer in an adversarial setting must represent his client zealously in order for that system to work properly.

Proponents argue that role morality is necessary even outside the narrow confines of an ongoing adversarial proceeding. If lawyers decline to pursue their client’s rights on the basis of their own morality, they substitute their judgment for that of the legislature, judge and jury; they create an “oligarchy of lawyers.”110 The problem with a boycott from this perspective lies in the lawyer’s independent judgment and concerted action to halt the proceedings. If the democratically elected government created an unjust tribunal, that decision deserves the respect of lawyers who value democratic decision-making processes.111 In such a case, the only appropriate avenue for change is for lawyers to take political action as citizens or to resist internally through argument to the tribunal.

One problem with this approach is that political action can be unavailing. The strategy adopted by Hamdan’s lawyers was based on this faith in democratic decision-making and separation of powers.112 The Supreme Court adopted this reasoning, and Congress immediately set about authorizing the military commissions. The lawyers were then in the position of shifting their argument to one of fundamental rights. It is hard to avoid the conclusion that in the context of the unfair tribunal (even one created by a democratic process), the lawyer may need to substitute his or her judgment for that of the unjust tribunal in some cases.113

111 The case of the military commissions as constituted in 2001 might be distinguished here because they were originally created solely by executive order. The passage of the Military Commissions Act of 2006 gave them a congressional imprimatur.
112 For discussions of this decision see Neil Kumar Katyal, Hamdan v. Rumsfeld: The Legal Academy Goes to Practice, 120 HARV. L. REV. 65, 84-97 (2005); MAHLER, supra note 52 at 227.
113 I do not assume here that all democratic processes are in fact legitimate, either as a legal, sociological or moral matter. See generally Richard Fallon, Legitimacy and the Constitution, 118 HARV. L. REV. 1787 (2005); Alan Hyde, The Concept of
In addition to the coercive aspect of boycotts in the political sphere, a boycott may have a devastating effect on potential clients. In the process of deciding to boycott the proceedings, the consequences for the accused must be taken into account. One prominent military lawyer advocating against boycott of the Military commissions analogized a boycott of civilian lawyers to “doctors refusing to perform lifesaving surgery because of sub-standard hospital conditions.” The impact of the boycott on clients is unclear, however. The accused may not achieve a better outcome with a lawyer present because the tribunal is rigged against them. The absence of counsel does not matter to the outcome of the trials; the patient cannot be saved. On the other hand, if there is a small possibility, however remote, that advocacy will affect the tribunal’s decisions and may lead to fairer results, then lawyers as a group arguably have a duty to improve the system both for their clients and for the larger democracy.

A boycott is a strategy for lawyers (and clients) without hope for change within the system and who are willing to pay a bitter price. For the leaders and lawyers affiliated with the civil rights movement, for example, hope was a reason to pursue a legal strategy even in venues that were completely inhospitable, such as Alabama state courts presided over by segregationist judges. Dr. King held out hope that civil rights demonstrators might get a fair shake in Southern courts, although many other members of the movement disagreed. This seems to be the reason that lawyers pursuing justice in apartheid South Africa continued to return to the court system. In this view, legal victories, however small, “demonstrate [the regime’s] vulnerability and erode its will to dominate.” Participation can therefore be an effective strategy for reform. And in some cases a second-best solution is better than none. In the Hicks case, a plea deal could not have been reached in the absence of attorney involvement, and he would likely still be held in Guantánamo.

Even if the result is not inevitable, perhaps a boycott is warranted because it is better for the client that the lawyers collectively boycott, and thereby stop the injustice, than continue to provide the cover of adversarialism to an unjust process. If the argument is made that boycott is the best result for the client (rather than for society), then this would seem to require client agreement to a lawyer boycott. The need for client consent raises the same concerns about pluralism and autonomy with respect to clients that was raised earlier with respect to lawyers. Not all clients will agree with this strategy, even if their lawyer believes it is in the client’s long-term self-interest. The process of convincing the client itself can turn

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*Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379, 407-418 (critiquing the concept of sociological legitimacy and arguing that legitimacy is an inaccurate description of why people obey the law).


115 See *ABEL*, supra note 7 at 549.

116 Ibid.
Portraits of Resistance

from reason to coercion, since the lawyer is in a position of power and wields the threat to withdraw.

A boycott is a risky strategy. In response the government may decide to conduct inquisitorial tribunals without defense counsel present. Or it may decide to postpone acting until the boycott ends, detaining the client for an indefinite period and thereby holding the client hostage to force the lawyer to acquiesce to participation. To the extent that the boycott is unsuccessful, then the participating lawyers have abandoned the accused to a trial without a lawyer and achieved no systemic changes.

2. Individual Refusal

In keeping with our individualistic tradition, the response of the profession to procedural injustice is to require each lawyer to decide for himself whether or not to participate in an unfair hearing, just as each lawyer chooses his own clients. As one public defender said of the military commissions, “You wonder whether you’re doing more harm than good when you insert yourself into a system you don’t agree with and find morally repugnant. We all have our breaking point where a system is so fundamentally flawed, we can’t justify participating in it.”117 The tactic of individual refusal recognizes that this breaking point is different for different people.

Individual refusal can consist of refusal to participate in the first instance, a quiet withdrawal and a public withdrawal. The decision not to participate at all or to privately withdraw is analogous to conscientious objection. The decision to publicly withdraw can be analogized to civil disobedience.118

The analogy between lawyer resistance and other forms of resistance such as conscientious objection and civil disobedience sheds some light on the choices lawyers face. The key distinctions between the two categories involve public as opposed to private resistance and the utilization of political justifications for resistance as compared with private or personal moral considerations. These distinctions are not stable, but they nevertheless help in understanding the complexity of individual resistance. That said, the analogy is only an analogy – lawyers who individually resist unjust tribunals are not always engaged in formal law breaking, although they are engaged in some form of transgression.

Civil disobedience is “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a

118 Several philosophers have discussed the distinction between conscientious objection and civil disobedience. I rely (in broad strokes) on the distinction as drawn by John Rawls. See JOHN RAWLS, A THEORY OF JUSTICE 363-391 (1971) (discussing civil disobedience, conscientious objection and their role in a just society). See also HANNAH ARENDT, CRISIS OF THE REPUBLIC: LYING IN POLITICS, CIVIL DISOBEDIENCE, ON VIOLENCE, THOUGHTS ON POLITICS AND REVOLUTION 49-102 (1972).
change in the law or policies of the government.” 119 It is a fundamentally public act and comparable “to public speech, and being a form of address, an expression of profound and conscientious political conviction, it takes place in a public forum.”120 In other words, civil disobedience is an exercise of communication through law breaking. This exercise of communication is analogous to the decision of the lawyer to withdraw publicly from representation. Consider Joshua Dratel’s refusal to sign the notice of appearance. Although Dratel did not break the law, he publicly refused to comply with the requirements of the tribunal just as a civil disobedient refuses to comply with the law. His refusal resulted in his public disqualification, which served as a tool to communicate of the depth of his opposition to the tribunal’s injustice. This was an example of exit with maximum voice.

By contrast, “conscientious refusal is noncompliance with a more or less direct legal injunction or administrative order.”121 Familiar examples of conscientious objection include the refusal to pay a tax or to serve in the armed forces. The two principal differences between conscientious objection and civil disobedience are that conscientious objection is not a form of address to the larger public and it need not be based on political principles, but can be based on personal morality, religious conviction or any other source.122 Civil disobedience, on the other hand, is always addressed to the public and “guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally.”123

Conscientious objection is analogous to the individual refusal to represent the client before the tribunal in the first place or to withdraw from representation without taking a public stand. If the lawyers for the SCLC had refused to participate in King’s contempt trial, that would have been a form of conscientious objection. It would be a private decision, not a public spectacle. Similarly, the recognition that different people have different breaking points with respect to when a tribunal is so unfair that withdrawal becomes necessary requires a rejection of universal norms of fairness and dictates that decisions regarding participation be made individually. For these reasons, individual refusal of this kind is private, personal and is the closest form of resistance to pure exit.

Both civil disobedience and conscientious objection consist of the refusal to obey a law enacted by the legislature.124 For this reason both pose a threat to democracy and the rule of law. Nevertheless, it is important to recall that “there are limits to the injustice that is compatible with political obligation.”125 There are some injustices that are

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119 RAWLS, supra note 117 at 364.
120 Id. at 366.
121 Id. at 368.
122 Id. at 369.
123 Id. at 365.
124 Whether such processes are truly democratic or legitimate I leave as an open question.
incompatible with the rule of law and with democratic principles and demand extra-legal action. Likewise, there are limits to the procedural injustice that a lawyer can tolerate as consistent with his professional responsibility not only to his client, but to the concept of rule of law.

The costs of individual resistance are substantial. Both the quiet refusal to participate and public withdrawal have the practical effect of abandoning the client, who is left to fend for himself. Where withdrawal of individuals critical to the representation can halt the proceeding, this course of action may be justified on grounds that it will benefit the client. But if the client is left to defend himself, the lawyer’s moral purity comes at the client’s expense. What at first appears to be an other-regarding act of selflessness in the name of liberal legal principles is also a self-regarding act of moral purity that, in the end, is sullied by the harm done to others.

Where the client can be represented by another lawyer, the coercive power of the lawyer’s decision to refuse to participate or withdraw is limited. A lawyer who refuses to participate in the first instance will be replaced by another, with little effect on the tribunal. Such withdrawal, followed by replacement with substitute counsel, may be detrimental to the client. In Hicks’ case, the tribunal intended to go forward with the trial even after the withdrawal of the defendant’s most experienced counsel. The secret plea agreement appears to have been reached prior to the lawyer’s withdrawal, and therefore the harm to the client was minimal. Hicks continued to be represented by able, but less experienced, detailed military counsel. Nevertheless, the harm to the client of losing lead counsel so late in the proceedings could have been severe. The story of Salim Hamdan’s CSRT hearing illustrates the symbolic importance of the lawyer’s continuing presence. Although Swift tried to explain that his presence would have changed nothing, Hamdan still felt abandoned.

A decision to withdraw and refusal to represent the accused share some basic qualities. If the lawyer stays, his presence lends credibility to a system that violates basic fairness. If he leaves, he abandons his client, to whom he owes a fiduciary duty, and gives up the potential to ameliorate injustice through internal resistance. The lawyer may experience this crisis most acutely in the act of withdrawal, having already developed a relationship with and duty of loyalty to this particular client. But the problem is equally present when the lawyer not to participate in the proceeding. He may hope to rely on other lawyers to fulfill the duty of representation, thereby alleviating some of the burden, but he knows that these lawyers will face the same crisis. This lawyer essentially passes the problem to another, rather than facing it himself. But the next lawyer asked to represent a defendant before the unfair tribunal faces the same choice. For this reason, individual autonomy in the decision to withdraw can come at the expense of the possibility of large scale resistance to injustice. It may result in the loss of an opportunity to effect substantial change.

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126 Such as when one group bears the brunt of injustice systematically. See Rawls, supra note 117 at 355.

127 Cf. Model Rules of Prof’l Conduct R. 1.16 (governing withdrawal of counsel and requiring that upon withdrawal “a lawyer shall take steps … to protect a client’s interests”).
3. Using the Master’s Tools to Dismantle His House

A third avenue available to lawyers facing procedural injustice is to participate in the tribunal. Participating lawyers hope to import principles of procedural justice from the larger liberal legal regime into the unjust tribunal. This approach can be summed up in the phrase “using the master’s tools to dismantle his house.” The underlying idea is to appeal to fundamental principles of justice already existent in the law in order to make changes to unjust conditions. As one military officer said about the involvement of civilian lawyers in the military commissions: “…having civilian attorneys involved is good for the system. If they think the system is wrong, go prove its wrong.”

Participation may result in large-scale or incremental changes. For example, the state court judge presiding over the King trial could have ruled that the underlying injunction was invalid. A judge in the military commissions could find that due process protections apply to non-citizen detainees. Then the attorney’s advocacy will have had the direct and immediate effect of eradicating injustice. For this approach to work, the lawyer must believe that there are fundamental legal principles, found in universally recognized texts, which through legal interpretation and reason lead to the just result. Furthermore, the lawyer must believe that the judge is sufficiently neutral or at least sufficiently steeped in the liberal legal tradition that she will be able to hear these arguments. Whether the lawyer’s evaluation is correct as an empirical matter will become clear only after the judge has made her determination. Evaluating the success of this strategy is only possible in hindsight.

The most well-known example of using legal strategies to create large-scale change was the appeal to the equal protection clause to undo the legal regime of segregation in the American South. Yet even the desegregation example is not clearly one of large scale change. The initial judicial pronouncements eliminating de jure segregation were powerful, but it took many years, substantial political agitation and legislative action to effect change. Moreover, the agents of change in the courts were not Southern state court judges, but instead federal judges who were both outside and inside the system perpetuating the injustice. They were outside the system because they were part of the federal, not state, judiciary. But they were inside the system in the sense that many of them were citizens of the Southern states in which their courts were located.

Incremental change is a tactic for optimists. In his book on lawyers in apartheid South Africa, Richard Abel concludes: “The legal battles described in this book did not win the war by themselves. But they empowered the masses while offering some protection from state retaliation.” In their study of law in everyday life, Susan Silbey and Patricia Ewick present a similar argument in favor of small-scale resistance

\[128\] Quoted in Vanessa Blum, Tribunals Put Defense Bar in a Bind, Legal Times (July 15, 2003).
\[130\] ABEL, supra note 7 at 549.
from the scholar’s perspective: the “study of small resistance reveals ‘a particular social organization of power’ because ‘individuals identify the cracks and vulnerabilities of organized power’ in the acts of resistance.”\textsuperscript{131}

The jurisprudential theory embedded in this tactic might be best characterized as pragmatic – taking advantage of the possibilities for justice wherever they can be found.\textsuperscript{132} Incremental changes and small victories in the courtroom may open the door for more substantial changes.\textsuperscript{133} For example, once Dratel obtained a concession from the tribunal with regard to client monitoring, every civilian lawyer could demand this concession as well. Such incremental changes may alter the law through internal logic or external pressure.

This is the strategy advocated by the Supreme Court to the civil rights movement in \textit{Walker}. The Court stated that the litigants had an obligation to challenge the injunction before the Alabama courts and could only choose to disobey the injunction if they met with “delay or frustration.”\textsuperscript{134} This statement is an affirmation of the particular strategy of internal resistance through the court system. As commentators have pointed out, however, the opinion delegitimizes the petitioners claim to civil disobedience that is respectful of the rule of law expressed in their argument that the underlying injunction was clearly unconstitutional.\textsuperscript{135}

Audrey Lorde, had quite the opposite in mind when she wrote that “the master’s tools will never dismantle the master’s house.”\textsuperscript{136} Genuine change, she argued, needs to come from outside the system because the system will only give outsiders momentary victories limited by the master’s tools themselves. For this reason some believe that unjust legal regimes can only be resisted extra-legally; external resistance is the road to progress. In the context of the civil rights movement and King’s trial for contempt, the focus of the movement was the protest outside the courts rather than achieving justice within the Southern court system. The court system was secondary to King’s larger political strategy.

Some might argue that lawyerly internal resistance is merely “individualistic, self-interested, and inconsequential, as opposed to collective, principled and effective.”\textsuperscript{137} Even worse, individual actions may sufficiently ameliorate conditions for a brief time to make insufferable situations tolerable, and in doing so “actually inoculate power from

\textsuperscript{131} EWICK & SILBEY, supra note 63 at 187.
\textsuperscript{133} ABEL, supra note 7 at 549; EWICK & SILBEY, supra note 63 at 187 (arguing that study of small resistance reveals “a particular social organization of power” because “individuals identify the cracks and vulnerabilities of organized power” in the acts of resistance.)
\textsuperscript{134} 388 U.S. at 318.
\textsuperscript{135} This point is made in an excellent article by David Luban, \textit{Difference Made Legal: The Court and Dr. King}, 87 MICH. L. REV. 2152, 2174-75 (1989).
\textsuperscript{137} EWICK & SILBEY, supra note 63 at 186 (the authors critique the position presented above).
sustained and collective challenge."138 When Dratel negotiated in 2003 to obtain access to his client without monitoring as a condition of participating in the military commission process, he achieved a significant victory. But it was fleeting. In 2006, the Presiding Officer reasserted the arbitrary power of the tribunal by requiring that Dratel sign the notice of appearance. Although the compromise initially allowed Dratel to agree to represent Hicks, it did nothing to alter the basic unfairness of the tribunal, including the absence of rules set in advance, the potential for the introduction of coerced evidence and the fact that his client would still likely not be released absent a guilty plea. It is not clear whether the lawyers would have been in a stronger position to resist injustice had they refused to participate as an initial matter.

4. Making a Record for a Higher Tribunal

A fourth strategy for lawyers facing procedural injustice is to participate in order to make a record for another court, one that they have greater faith will be neutral, fair and just, and that has the power to undo the wrongs of the unjust tribunal. It is necessary to make a record of injustice to demonstrate to the higher court the importance of intervening. Both the lawyers defending Martin Luther King in his contempt trial and the lawyers seeking habeas relief for detainees held in Guantanamo Bay adopted this strategy. These lawyers turned to the federal courts believing that these courts will stay true to the principles invoked by the petitioner: due process, equal protection of the laws, and separation of powers.

Lawyers for the civil rights movement tried their case in the Alabama trial court under the assumption that they would not get a fair trial in that court, but with the intent of making a record that would permit the reviewing federal court to find in their favor. As part of their strategy, they introduced evidence of the mistreatment of members of the SCLC in trying to obtain a permit to march. That evidence was not relevant to the contempt proceeding and unlikely to sway the state court judge. Nevertheless it deeply affected the dissenting justices.139 Only the dissenters were willing to acknowledge that the defendants could not have gotten a fair hearing in the Alabama state court.

A track record of injustice is sometimes necessary to highlight the reality of unjust rules. But it can only be established through lawyer participation in the first instance. In Hamdan the record below was also a critical component of the appeals strategy. During voir dire before the military commission in 2004, Hamdan was excluded from the proceedings.140 Again and again as they made their way up the federal court hierarchy, the lawyers used the fact of Hamdan’s exclusion to prove that the commissions were unfair.141 The fact of his exclusion seemed more offensive to fundamental ideas of due process than a discretionary rule that permitted exclusion. A track record of injustice is sometimes

138 Id. at 187.
140 See MAHLER, supra note 52 at 133-137.
141 Id. at 159 (describing oral argument before Judge Robertson in October 2005).
necessary to highlight the reality of unjust rules. That track record can only be established through lawyer participation in the first instance.

The practical problems with appeal to a higher tribunal as a strategy are twofold. First, the higher court may not agree that the unjust tribunal is indeed unjust. This was the case in *Walker*. Furthermore, even if the higher tribunal does ameliorate the injustice, it may do so in a way that ultimately does not lead to reform. Hamdan’s lawyers turned to the federal courts to avoid an unfair trial. But even their success in *Hamdan v. Rumsfeld*, ruling that the military commissions as then existing were unconstitutional,\(^{142}\) did not spell the end of the military commissions.\(^{143}\) While there is an argument that the Military Commissions Act ameliorated the grossest injustices, there remained substantial criticisms of the military commission process that called its fairness into question.\(^{144}\)

5. Appealing to the Court of Public Opinion

A final strategy of resistance is to participation in the tribunal in order to spur political action outside the courts. There are three ways lawyers might appeal to public opinion. First, lawyers might put the tribunal on trial in the court of public opinion in the course of their participation in the tribunal. A related, but somewhat different, tactic involves creating a “theater of the absurd” in the tribunal. Third, lawyers may participate in order to make an historical record and to bear witness for posterity.

A trial in the court of public opinion requires the lawyer to participate in the unjust tribunal. Participation gives the lawyer ammunition against the tribunal, direct proof of unfairness that he would otherwise lack. In the course of his participation, the lawyer gathers evidence of injustice to bring to the public.

Not only does representation create the opportunities for injustice that the lawyer can point to, but it permits access to the client. Access allows the lawyer to speak for the victim of injustice with credibility the ordinary observer lacks. This was the strategy adopted by Mori in his representation of Hicks. The Department of Defense denied Hicks contact with the outside world, so Mori spoke for him. The lawyer’s avowed purpose was to sway public opinion in Australia and to put pressure on the Australian government to act on behalf of his client as the British government had acted on behalf of its own citizens.\(^{145}\) Being Hicks’ lawyer gave Mori credibility; being a *military* lawyer even more credibility. Had


\(^{144}\) Neither does the more recent decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), which permitted habeas petitions to proceed in the lower federal courts, address these questions.

\(^{145}\) *See Leigh Sales, Detainee 002: The Case of David Hicks* 220-221 (2007) (describing the nature and success of Mori’s public relations efforts in Australia).
Mori been merely a person concerned about Hicks, or a person who thought that the military commission process was unjust, but without any other connection, his protests would not have been meaningful. Many individuals have spoken out against the military commissions, but few have had the impact that Mori did on the public consciousness.

Contrast this strategy with that adopted by the civil rights movement with respect to King’s contempt trial. Lawyers for the movement, including Jack Greenberg, adopted a purely legal strategy and ruled out suggestions to put the Southern courts on trial, because they thought that such action would be counterproductive given the movement’s reliance on federal injunctions for desegregation. Furthermore, the lawyers and clients both agreed that trying the Southern courts in the court of public opinion would detract attention from the Birmingham protests. They did not want the contempt trial to overshadow the client’s larger purpose. Procedural injustice was merely a symptom of the disease of segregation. By contrast, in the military commissions context the client’s larger purpose is consistent with turning public attention to the injustice of the tribunal procedures. The tribunal’s injustice is the problem that the client faces.

A second use of the trial for political action is to treat the courtroom as a theater of the absurd. This is the tactic adopted by the defendants in the Chicago Conspiracy Trial in 1968 and their lawyer, William Kunstler. The fascinating story of the way these defendants, with their lawyer’s assistance, turned the courtroom into a circus is told in detail elsewhere. There were many theatrical moments at various points in the trial. One defendant, Bobby Seal, protested to such a degree that he was bound and gagged in the courtroom. Two other defendants, Abbie Hoffman and Jerry Rubin, arrived in judges’ robes affixed with a yellow Jewish star. Hoffman then removed his robe to reveal the shirt of a Chicago police officer. Judge Julius Hoffman was at one point prompted to say “We are not running a circus. This happens to be a court.” William Kunstler called the proceedings a “legal lynching.” At the end of the trial, the judge summarily convicted all the defendants and their attorneys of contempt of court. The defense’s purpose in deploying these tactics seems to be at once to get personal attention, to bring attention to the absurdity of the justice system and to aggravate the judge and force him to act in ways that demonstrate his lawlessness, although he was cloaked in the mantle of law. From the public perspective, these types of

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146 See Westin, supra note 12 at 94.
147 See Lahav, supra note 87 at 385, n. 19 (citing studies).
148 Id. at 387.
149 Id. at 389-90.
150 Id. at 381.
152 Lahav, supra note 87 at 390.
153 Id. at 447 (“From the perspective of the defense, the trial was about showing how…leviathan harbors and often deploys lawlessness, thereby threatening ordered liberty.”).
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spectacles can spur insight or revulsion. And they arguably violate the Rules of Professional Conduct.\textsuperscript{154}

Sometimes the lawyer may not have the option of trying the tribunal in the court of public opinion. The lawyer may not be permitted to speak about what happens in the tribunal for national security reasons. Or the public may not be ready to listen. In that case, the lawyer may in any event continue representation in order to bear witness. One detailed military defense lawyer appearing before the military commissions sat at the defense table and declined to advocate under instructions from his client, who was boycotting the proceedings.\textsuperscript{155} There are two possible purposes to the lawyer’s presence in such a case. First, the lawyer may adopt the passive role of creating an historical record so that he might serve as a witness to the injustice at another time. Second, the lawyer may stay in order to be a witness in the present moment, on the theory that the presence of a witness will shame or otherwise affect the tribunal into recognizing the injustice being perpetuated. This role of observer is different than the role of a lawyer making legal arguments to the tribunal. The presence of a witness sitting by the side of the defendant seeks to effect a change within the tribunal, creating a self-awareness that may lead to greater fidelity to the rule of law.

Even if the lawyer has no role other than to bear witness, that limited role may have great value. Hamdan excoriated his lawyer for failing to attend his CSRT hearing despite the fact that the hearing was a sham. Perhaps the lawyer’s presence could have ameliorated the feeling of abandonment before a hostile tribunal, even if neither the procedures nor the outcome could be changed. In that case, Swift had quite literally prepared to be a witness solely in order to be by his client’s side. At the same time, that position involves to a large degree abandoning the role of lawyer as advocate and becoming something else entirely – an observer, supporter, conscience or, perhaps, a friend. This may seem like pretense. Furthermore, it may create the appearance that the client has meaningful representation when he does not. As Dratel explained to the tribunal when offered the opportunity to remain by his client’s side without the ability to advocate on his behalf, “I’m not going to pretend that I’m here functioning when I’m not entitled to do my job.”\textsuperscript{156}

III. The Lawyer’s Role and Procedural Injustice

The analysis so far raises two fundamental questions. First, can the lawyers’ crises be resolved by reference to a shared understanding of the lawyer’s role in society and particularly in the adversarial process?

\textsuperscript{154} See Model Rules of Prof’l Conduct R. 3.5, cmt. 4 (2002) (“An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”).

\textsuperscript{155} See William Glaberson, Detainee Convicted on Terrorism Charges, N.Y. Times, Nov. 3, 2008.

\textsuperscript{156} Transcript of Trial, supra note 2 at 27.
Second, what is procedural injustice and how can lawyers know that the tribunal they face is sufficiently unjust to merit resistance?

A. The Lawyer’s Role

Recourse to our traditional, and ultimately rather thin, conception of the lawyer’s role does not dictate the answer to what the lawyer ought to do in the case of the unjust tribunal. There are two clichéd views of the lawyer: as a client-centered agent or an “officer of the court.” Each of these relationships is important and, indeed, central to our understanding of lawyers. Scholars often point to a tension between the lawyer’s role to serve his client and his fidelity to the tribunal. But in the case of the unjust tribunal, the crisis facing the lawyer manifests as a tension between service to the client and the more abstract concept of procedural justice. That tension implicates deep jurisprudential questions about the rule of law.

The rules of professional ethics and the legal standards developed to govern lawyers generally reflect an understanding of the lawyer as a fiduciary to his client. For example, the Model Rules of Professional Conduct require the lawyer to abide by his client’s decisions regarding the goals of representation as well as the choices made in the course of representation. The Rules limit the extent to which the lawyer can represent clients with conflicting interests and emphasize the necessity of client consent to any conflict. They require the lawyer to maintain his loyalty to the client even after the relationship has terminated. When considering motions to disqualify counsel, judges will look not only to actual conflicts, but also to the appearance of impropriety, demonstrating the importance of lawyers being perceived as loyal. The Rules further limit the lawyer’s ability to withdraw from representation in cases where withdrawal will harm the client. This ideal of lawyer responsibility is sometimes referred to as “neutral partisanship,” by which scholars mean that the lawyer is to be neutral to his client’s ends and partisan in helping the client to achieve his goals. It is popularly thought of as “zealous advocacy,” words that appear in the preamble to the Model Rules as well as in some of the commentary.

Participants in the legal system justify a robust version of the principle of neutral partisanship by arguing that access to lawyers in our

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159 Model Rules of Prof’l Conduct R. 1.9 (2002).
163 See Model Rules of Prof’l Conduct, preamble (2002) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); Model Rule of Prof’l Conduct R. 1.3, cmt. (“A lawyer must also act . . . with zeal in advocacy upon the client’s behalf.”).
society often is the only means of access to justice. If lawyers were to withhold their representation, particularly (although not exclusively) in the criminal context, the lawyer would serve as “judge and jury” rather than leaving this function to the courts. Second, the lawyer’s loyalty affirms the values of respect for the autonomy and dignity of the individual, his ability to make his own decisions and set his own goals. Some scholars make the broader argument that fidelity to client goals is a political necessity. Finally, there is also the argument that in the absence of the promise of loyalty, clients might not seek legal representation and both the clients and the bar would suffer as a result.

A countervailing principle governing lawyer conduct is the conception that the lawyer is an officer of the court. The Preamble to the Model Rules states that a lawyer is “an officer of the legal system and a public citizen having special responsibility for the quality of justice.” To further this goal, the rules require candor to the tribunal, and explicitly forbid the lawyer from presenting testimony he knows to be false, bringing frivolous lawsuits, and “conduct intended to disrupt the tribunal.”

The crisis created by the unjust tribunal is different than that considered by most scholars of professional responsibility. Often the discussion of legal ethics centers on the tension between the requirements of service as an officer of the court and the duty of loyalty to the client. The paradigmatic case is one where the client expresses his intent to commit perjury. Another common debate surrounds the gap between the lawyer’s personal morality and service to his client, or the tension

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164 See Stephen L. Pepper, The Lawyer’s Amoral Ethical Role: A Defense, A Problem and Some Possibilities, 1986 AM. BAR FOUND. RES. J. 613, 617 (arguing that subordination of the lawyer’s own moral views to the client’s goals is required to maintain client autonomy and provide access to justice); Lon L. Fuller, The Adversary System in TALKS ON AMERICAN LAW 36-37 (H. Berman, ed. 1961) (arguing that the lawyer must represent even the client he thinks is guilty in order for the adversarial system to work); Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV. 1469, 1482 (1966) (arguing that loyalty is required to realize the policies of “the maintenance of the adversary system, the presumption of innocence, the prosecutions burden to prove guilt beyond a reasonable doubt, the right to counsel, and the obligation of confidentiality between lawyer and client.”).

165 George Sharswood wrote: “The lawyer who refuses his professional assistance because in his judgment the case is unjust and indefensible usurps the function of both judge and jury.” Quoted in David Luban, Legal Ethics and Human Dignity 20 (2007).

166 This is the moral basis of Pepper’s theory of “first class citizenship.” See Pepper, supra note 163.


169 Model Rules of Prof’l Conduct R. 3.3 (candor toward the tribunal); 3.1 (meritorious claims); 3.5 (impartiality and decorum of the tribunal) (2002).

between a lawyer’s identification with an affinity group and client
loyalty. The tension here is among three components of the lawyer’s
role: the duty of loyalty to the client, the duty to the tribunal, and the duty
to uphold fundamental legal norms. This third duty is rarely discussed but
underlies the basic conception of what it means to be a lawyer.

To understand the lawyer’s duty to uphold fundamental legal
norms, it is first necessary to have a more nuanced understanding of the
lawyer’s role in society than that offered by the Model Rules. The Model
Rules tend to assume that the law is preexisting to the lawyer’s decision to
act. But the lawyer’s relationship with legal institutions is more than just
that of a subject. The lawyer is also an “architect of social structures” and
the edifice of legal institutions is one of these structures. One of the
definitions of architect is “a builder-up.” Lawyers build up legal
institutions and in the process they influence and reform them. They
participate in designing and framing legal institutions in a variety of ways,
such as in bringing lawsuits and framing legal arguments, which are then
adopted (or rejected) by judges and become precedent. This role of
architect (in collaboration with other legal and non-legal actors) extends to
all aspects of legal institutions, which are constantly being made and
remade by the lawyers who participate in them. For this reason, as David
Luban explains “the ordinary law practice of ordinary lawyers deserves
attention because it is central to the rule of law.” A lawyer is not merely
a legal technician hired to serve his client, he is also part of a legal
community and is a crucial participant in the maintenance and formation
of legal institutions and laws. His actions may seem small, but they are part
of a very large, important project that structures our lives.

The tradition of seeing law as a “public profession” is disputed, but
it runs deep. Lawyers were seen by prominent leaders in the revolutionary
period as a “separate estate of society, committed by professional instincts
and habits to serving as a balance wheel in political life.” This separate

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171 See David Wilkins, Identities and Roles: Race, Recognition and Professional
Responsibility, 57 MD. L. REV. 1502 (1998) (discussing the relationship between
professional identity, race and morality in legal representation).
172 The best argument that the Model Rules incorporate a positivist view of law is
William H. Simon, The Ideology of Advocacy: Procedural Justice and
173 Lon L. Fuller, The Lawyer as Architect of Social Structures in The Principles
174 OXFORD ENGLISH DICTIONARY (2008) (Definition 3 of the word “architect”
states: “One who so plans, devises, contrives, or constructs, as to achieve a desired
result (especially when the result may be viewed figuratively as an edifice); a
builder-up.”)
175 DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 6 (2007).
176 This role is virtually ignored by the Model Rules. Cf. MODEL RULES OF PROF’L
CONDUCT, Preamble (2002) (“Lawyers play a vital role in the preservation of
society.”).
David Luban similarly writes: “Historically, an independent bar, like an active and
free press, has often formed an important counterweight to arbitrary authority.”
LUBAN, LEGAL ETHICS, supra note 174 at 5.
estate could be obstructionist, preserving the status quo in the face of “any attempted domination of the legal apparatus by executive tyrants, populist mobs, or powerful private factions.” 178 But it could also be constructionist, “[repairing] defects in the framework of legality, [serving] as a policy intelligencia, recommending improvements in the law to adapt it to changing conditions, and [using] the authority and influence deriving from their public prominence and professional skill to create and disseminate, both within and without the context of advising clients, a culture of respect for and compliance with the purposes of the laws.” 179

Understanding the lawyer’s relationship with legality as that of a builder of legal institutions and an upholder of cherished legal values is not merely an historical artifact. It is an empirical fact and an ideal. Lawyers build legal institutions. Even the lawyer who “merely” represents his client’s interest participates in building up this edifice. The normative question is what kind of legal institutions lawyers choose to build. In other words, what is the obligation of the lawyer created by the relationship between the lawyer and legal institutions? The failure to build just institutions is often the object of criticism and the subject of lament. 180

One of the problems with the normative argument that law is a public profession is that in our pluralist society we have substantial disagreement on what good institutions should look like. It is impossible to say that a particular legal rule or institution is in the “public interest” because the concept is so thoroughly contested. 181 One sociological theory put forth in defense of the law as a public profession is that precisely because we are a pluralist, secular society we need a common language of shared legal norms. Robert Gordon explains that for this reason “One function of lawyers, therefore, in addition to pursuing their client’s interests is to give advice that will help align those interests with the set of general social norms.” 182

I would go a step further: the function of lawyers who are each engaged in the building-up of legal institutions is to build them in ways that are consistent with aspirational legal norms. In doing so, they participate in the creation of those norms. This is the obligation created by the relationship between lawyers and legal institutions. But it is a difficult obligation to live up to because in any particular situation, norms that seem unassailable at the level of generality become contested in application.

178 Gordon, Independence, supra note 176 at 14. But see Norman Spaulding, The Discourse Of Law In Time Of War: Politics And Professionalism During The Civil War And Reconstruction, 46 WM. & MARY L. REV. 2001 (2005) (disputing Gordon’s historical claims and arguing that the zealous advocacy model was quite strong during the antebellum period).
179 Ibid.
181 See Austin Sarat, The Profession versus the Public Interest: Reflections on Two Reifications, 54 STAN. L. REV. 1491, 1497 (2002) (“The public interest is a notoriously slippery concept that generally does little or no analytic work.”).
That brings us to a critical issue for lawyers facing injustice: how can they know that the tribunal is in fact unjust such that resistance is appropriate?

B. Identifying Injustice

The lawyer’s role before the unjust tribunal is complicated by the fact that although there are some widely recognized principles of procedural justice, they are contested in application. Views about procedural justice are both the subject of disagreement and subject to change. This combination leaves open the possibility for lawyers to act as builders-up or, alternatively, as dismantlers of fundamental values. Ultimately, the evaluation falls to individual lawyers put in the position of making hard choices.

The difficulty of identifying procedural injustice is further complicated by the presence of substantive injustice. Here we are concerned with situations where injustice of the proceedings before the tribunal are at issue, while recognizing that procedural injustice is often linked with substantive injustice and that the distinction between the two is oftentimes difficult to draw.

1. The Contested Concept of Procedural Justice

Delineating the point at which procedural rules violate fundamental norms is difficult. On the one hand, procedural justice is contested. On the other, there must be a line beyond which injustice in intolerable. There are instances in which tribunals violate the basic principles of procedural justice. Lawyers are in a position to evaluate whether those violations are fundamental, and it is furthermore part of their duty as builders-up of legal institutions and the rule of law to make this evaluation. This Article recognizes the potential for political disagreement and focuses instead on the following question: Once a lawyer has determined that a proceeding is procedurally unjust, how can the lawyer react to this injustice?

While there are some basic principles of procedural justice that are generally agreed upon in our society, in the application of these principles underlying disagreements surface. We cannot agree on whether some procedural requirements are absolute or whether (and when) they may be weighed against other considerations, such as national security or efficiency. Fundamental to the principles of procedural justice, many would agree, is that the tribunal should “hear the other side” or in the latin maxim “audi alteram partem.” From this arguably flow the requirements


185 See Caritativo v. People of State of California, 357 U.S. 549, 558 (1958) (Frankfurter, J. dissenting) (“Audi alteram partem – hear the other side! – a demand made insistently through the centuries, is now a command, spoken with
that the decision-maker be impartial, \(^\text{186}\) the procedures for trial and the elements of the crime be set in advance, \(^\text{187}\) and that the accused be permitted access to the evidence against him and an opportunity to rebut that evidence. \(^\text{188}\) These principles could be derived from the due process clause of the Fifth Amendment (which, even if held to apply to a given case, does not tell us \textit{how much} process is due). \(^\text{189}\) Or they may be derived from the more fixed provisions of the original Constitution and the Bill of Rights providing for procedural protections in criminal trials. \(^\text{190}\)

the voice of the Due Process Clause of the Fourteenth Amendment, against state governments and every branch of them – executive, legislative, and judicial, whenever any individual, however lowly and unfortunate, asserts a legal claim.

For a philosophical discussion see Luban, \textit{Lawfare}, supra note 7 at 1984-85 (describing the work of the philosopher Stuart Hampshire).

\(^\text{186}\) “No man is allowed to be judge in his own case, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” \textit{FEDERALIST NO. 10} (Madison). \textit{See also} Martin Redish & Lawrence C. Marshall, \textit{Adjudicatory Independence and the Values of Due Process}, 95 \textit{Yale L. J.} 455 (1986) (arguing that the most basic due process requirement is an unbiased judge).

\(^\text{187}\) \textit{See LON L. FULLER, THE MORALITY OF LAW} 38-39, 46-81 (1969). Fuller articulated eight requirements for the rule of law to be achieved: rules must be (1) general rules, rather than ad hoc decisions; (2) promulgated and publicized; (3) prospective, rather than retroactive; (4) clear and understandable; (5) not contradictory; (6) may not command the impossible; (7) not changed too frequently; and (8) there exists a congruence between the rules and their actual administration. \textit{Ibid}.

\(^\text{188}\) Hamdan, 126 S. Ct. at 2792, 2798, n. 67 (citing cases holding that the right of the accused to know and dispute the evidence against him is fundamental).

\(^\text{189}\) \textit{U.S. CONST. AMEND. V} (“No person shall … be deprived of life, liberty, or property, without due process of law; ….”).

\(^\text{190}\) \textit{See Medina v. California}, 505 U.S. 437, 443 (1992) (holding that the due process calculus articulated in \textit{Mathews v. Eldridge}, 424 U.S. 319 (1976) does not apply in the criminal context); Martinez, supra note 141 at 1048. For specific provisions that might be applicable, see \textit{U.S. CONST. ART. I, SEC. 9} (prohibiting ex post facto laws); \textit{ART. III, SEC. 2} (providing for trial by jury in all criminal cases), \textit{ART. III, SEC. 3} (procedural requirements for crime of treason); \textit{AMEND. V} (requiring indictment by a Grand jury for capital crimes, prohibiting double jeopardy, and providing for a right against self-incrimination); \textit{AMEND. VI} (providing for the right to a speedy trial, by impartial jury, to know the accusations in advance, to confront witnesses, and for the assistance of counsel). International laws and norms may also play a role. In the context of the military commissions, some have argued that these principles are embodied in the Geneva Convention requirement that individuals be provided “all the judicial guarantees which are recognized as indispensable by civilized peoples.” \textit{Hamdan v. Rumsfeld}, 126 S. Ct. 2749, 2797-98 (2006) (quoting Protocol I to the Geneva Convention of 1949). The United States is not a signatory to this Protocol but recognizes it as a part of international customary law. Martinez, \textit{Process and Substance}, at 1057-58 (2008). In \textit{Hamdan}, the Court stated that these rights include the right to be tried in one’s presence and to defend himself in person or through legal assistance. 126 S. Ct. at 2798, n.66. \textit{See also} David Glazier, \textit{Full and Fair by What Means? Identifying the International Law Regulating Military Commission Procedure}, 24 \textit{B.U. INT’L L. J.} 55 (2006).
In the abstract, we might all agree that these principles are sound and consistent with our tradition. But once we look at their application in particular cases, disagreement surfaces, proving Holmes’ well-worn maxim that general propositions do not decide concrete cases.\textsuperscript{191} This is especially true in cases implicating our concept of due process. As Justice Frankfurter famously explained, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.”\textsuperscript{192} Due process is instead a malleable concept that can accommodate very broad or very minimal procedural protections.

Consider as an illustration of the contested nature of procedural justice the case of \textit{Hamdan v. Rumsfeld}.
\textsuperscript{193} The reasoning of the opinions illustrates just how contested fundamental principles of procedural justice can be in practice. The justices disagreed on the basic question of whether structural indicia of bias rendered broad judicial discretion unjust. One of the issues raised by the defendant’s lawyers in \textit{Hamdan} was that the accused could be excluded from his trial and in fact had already been excluded during voir dire. The plurality opinion called the right to be present at one’s trial “one of the most fundamental protections” and stated that “the jettisoning of so basic a right cannot lightly be excused as ‘practicable.’”\textsuperscript{194} In his concurrence, Justice Kennedy conceded that the provision of the Executive Order creating the military commissions that permitted the accused to be excluded from his trial was “troubling.”\textsuperscript{195} He found solace in the provisions of the military commission regulations which “bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a ‘full and fair trial.’”\textsuperscript{196} Yet Justice Kennedy also recognized that the structure of the military commission process created concerns that the decision-maker would not be neutral – the very decision-maker who was to make the determination that excluding the accused would deprive him of a full and fair trial.\textsuperscript{197} This demonstrates the extent to which even the fundamental concepts of procedural justice are contested in application.

This disagreement was further reflected by participants in the commissions and observers. While many, including some prosecutors, deplored the commissions as unfair, others took the opposite view. Administration and Department of Defense Officials, prosecutors in the military commission system and the Presiding Authority often affirmed their commitment to providing full and fair trials, and furthermore insisted that the procedures they created were fair. As Army Col. Robert L. Swann,

\begin{itemize}
  \item \textsuperscript{191} Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J. dissenting). Justice Holmes exempted from his general approach “fundamental principles as they have been understood by the traditions of our people and our law” when the violation meets with “universal condemnation.” \textit{Ibid.} Condemnation of the tribunals in the case studies presented here was not \textit{universal}, although arguably widespread.
  \item \textsuperscript{192} Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring).
  \item \textsuperscript{193} 126 S. Ct. 2749 (2006).
  \item \textsuperscript{194} 126 S. Ct. at 2792.
  \item \textsuperscript{195} 126 S. Ct. at 2809.
  \item \textsuperscript{196} \textit{Ibid.}
  \item \textsuperscript{197} 126 S. Ct. at 2807.
\end{itemize}
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the chief prosecutor of the military commissions, stated: “More than anyone in the courtroom, I want a full and fair process. If there is a case on appeal, I want it sustained on appeal.”

*Hamdan* was framed in terms of separation of powers and the correct processes for convening military commissions rather than in terms of fundamental rights. The Court on the one hand encouraged the executive to return to Congress to authorize the military commissions explicitly, which Congress immediately did, and on the other set no constraints on those commissions once ratified by Congress. This framing was controversial. As one of the litigators on the case, Neil Katyal, explained, “Many organizations did not like this approach and wanted me to argue that the military commissions were unconstitutional. But such claims seemed quite premature.”

In July 2008, days before he was set to be tried by military commission, Salim Hamdan appealed to the D.C. District Court to stay of his trial and to determine whether the trial comported with due process. The court declined to hear the case, pointing to Hamdan’s right to appeal after the military commission trial had been completed. The court recognized that judges might differ on the requirements of procedural justice and left the determination up to the appellate process.

The judge then pointed out the importance of the appearance of fairness. “The eyes of the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially.”

One reading of this statement is that the judge equates the importance of justice being done and justice seen to be done. He could have meant only that a public trial, rather than a secret one, was critical to procedural justice. But he could also mean that the appearance of procedural justice is just as important as the just outcome. This is consistent with social-psychological studies showing that processes perceived to be fair ameliorate perceptions of unjust outcomes.

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199 *See* Martinez, *supra* note 141 at 157-58.
200 *See* Hamdan, 126 S. Ct. at 2799 (Breyer, J. concurring) (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”)
202 Similarly, the Justices disagreed widely about whether a citizen detained as part of the “War on Terror” was entitled to a hearing, and what that hearing should require. Hamdi v. Rumsfeld, 452 U.S. 507 (2004). Likewise, when the Court held that non-citizen detainees are entitled to habeas corpus rights in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), it gave little guidance about what would inevitably be the subject of those habeas petitions: what procedural protections ought to apply to the Combat Status Review Tribunals at issue in that case.
203 *Katyal, supra* note 11 at 95.
205 *See id.* The Military Commission judge held that the Fifth Amendment did not apply to the military commission proceedings, but did exclude some evidence he found was obtained by coercion. *See supra* note 77.
206 Hamdan, 565 F.Supp.2d at 137.
207 *See* Tyler, *supra* note 69 at 79-80.
There is a risk that people might attach too much importance to procedures which will distract them from unjust substantive outcomes. But there is another concern, which is that the appearance of certain types of procedures, such as an adversarial adjudication, may serve to signal procedural justice when it is in fact absent. Social psychological studies show that Americans perceive adversarial proceedings as fairer than other types of processes. Adversarial adjudication is one of the signposts of our collective conception of procedural justice, even if it is only perceived as a necessary but not sufficient condition. This increases the responsibility of lawyers, whose participation in the adversarial proceeding is part of the presentation of justice being seen to be done.

Consider in this context the words of Justice Rutledge, dissenting in *In re Yamashita*. That case concerned a Japanese General tried by a military commission on the field of battle in the Philippines in 1945 for not preventing terrible atrocities committed by the Japanese Army during that time. Yamashita applied to the Supreme Court for a writ of habeas corpus and the Court denied the petition. Justice Rutledge wrote an impassioned dissent. One passage in his dissent concerns the lawyers who represented Yamashita, and thus this is particularly relevant to our inquiry:

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

Justice Rutledge recognized the two responsibilities of being a lawyer: fidelity to the accused and to the system of laws. He further pointed out the importance of justice in the legal institutions in which lawyers do their work. No lawyer can by his own hand alone make an unfair tribunal fair. Yet each lawyer has a role the creation and maintenance of legal norms.

2. The Dynamics of Procedural Change

Not only is procedural justice contested, but procedural rules, like any rules, are dynamic. Procedures change over time. Change can be slow, such as when a set of rules that appear procedurally unjust are (re)interpreted over time. Or change can be fast, such as when a procedural rule is repealed or when a court holds that a particular rule violates due

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208 See Martinez, *supra* note 141 at 1027.
209 See *Tyler*, *supra* note 69.
211 321 U.S. at 45 (Rutledge, J. dissenting).
process or fundamental conceptions of the rule of law. Moreover, change is not a one way ratchet. Procedural regimes can change for the better or for the worse and lawyer actions may increase or decrease injustice. Richard Abel and David Dyzenhaus have both shown that litigation strategies in apartheid South Africa had a positive, if not always entirely successful, effect of mitigating injustice.\footnote{See Abel, \textit{supra} note 7 at 549 (describing how legal battles against racially restrictive laws “empowered the masses while offering some protection from state retaliation.”); Dyzenhaus, \textit{supra} note 61 (arguing that the application of Ronald Dworkin’s theory of law in South Africa enabled judges to ameliorate racially restrictive laws).} By contrast, Richard Weisberg has demonstrated how the interpretive strategies of lawyers in Vichy France increased injustice and enabled the persecution of Jews.\footnote{See generally Weisberg, \textit{supra} note 7.}

The fact that procedural regimes are dynamic will affect the choices lawyers make. The lawyer’s prediction of the efficacy of different strategies for resisting procedural injustice depend on his prediction of the direction that judges and legislators are likely to take in developing the procedural rules. This should include an evaluation of the intent of the rule-makers, the discretion available within the system, and of the political and cultural context in which the rules are made and promulgated.

The procedurally unjust tribunal in an otherwise liberal legal regime, such as the military commission system in Guantánamo Bay and local courts in the Jim Crow South, presents a different permutation of the problem from totalitarian legal regimes. The lawyer in a totalitarian regime must draw on principles external to the regime in arguing for justice. By contrast, the lawyer litigating the context of a liberal democracy may access the domestic legal context to make his case. This access may be jurisdictional or invoke substantive ideals. Both lawyers representing SCLC leaders and lawyers filing habeas corpus petitions in the federal courts on behalf of Guantánamo detainees sought and received federal court review of the unjust systems they faced.

Lawyers may also access to the larger liberal legal context by reference to broader principles within the confines of the unjust tribunal. Dratel used the NACDL ethics opinion in negotiating with the Appointing Authority to ameliorate the burdens the government imposed on the attorney-client relationship. That opinion was a product of the NACDL’s interpretation of the relationship between constitutional requirements and duties of professional responsibility.\footnote{See discussion accompanying \textit{supra} note 40.} The ethics rules enabled the lawyer to import constitutional and other principles of legal liberalism into the military commissions. This demonstrates the importance of collateral institutions in influencing unjust tribunals.

The lawyer’s evaluation of the possibility of ameliorating procedural injustice is a function of his optimism, which in turn is related to his theory of law. The type of optimism that dictates engagement with an unjust tribunal is expressed in Dr. King’s words, although he was not a lawyer: “Not every judge will issue an injunction; we can’t assume that.”\footnote{Westin, \textit{supra} note 12 at 62.}
This optimism is largely based on a faith in the ability of judges to do justice even under conditions of apparent procedural injustice. What theories of law are or ought to be adopted by judges to best promote justice is beyond the scope of this Article, although there are many fine book length studies of the question.216

What a lawyer thinks judges will do is one of the primary motivators for lawyer action. But the lawyer’s prediction of judicial response alone does not dictate the strategy he will adopt. For example, imagine a lawyer believes a judge is a strict positivist who will not access fundamental principles from the larger legal regime. That lawyer may try to organize a collective boycott of the proceedings or individually refuse to participate. Or he may nevertheless choose to participate in order to make a record for a higher tribunal, bring pressure to bear through the court of public opinion or bear witness to injustice for some future proceeding or for posterity. If a lawyer believes a judge will be willing to access principles from the broader liberal legal system, by contrast, he may think he can persuade the judge to rule fairly. The lawyer’s evaluation of the judge’s openness to argument is contextual. For example, when Dratel failed to obtain adherence to fundamental legal principles from the tribunal, he withdrew. In that case, reference to liberal legal principles was unavailing and led the lawyer to opt out of the tribunal proceedings entirely.

Arguing by reference to fundamental principles requires faith both that there are fundamental principles that the lawyer can access and that the judge can do justice despite systemic injustice. A lawyer who espouses a theory of law that is closer to the “natural law” tradition will have an easier time arguing for fundamental principles within the tribunal than a lawyer who is closer to the positivist school.217 For example, in the Hamdan litigation Neil Katyal decided to focus on separation of powers issues rather than fundamental rights. This decision must have been deeply influenced by the lawyer’s strongly held jurisprudential views about judicial minimalism.218 Katyal’s legal strategy calls into question the presumed harmony between the lawyer’s jurisprudential views and the needs of the client.219 That legal argument opened the door to legislative action without court guidance as to fundamental requirements of justice; the result was Congressional ratification of the tribunal. Katyal’s jurisprudential

216 See, e.g., COVER, supra note 10; DYZENHAUSE, supra note 61; RONALD DWORKIN, LAW’S EMPIRE (1986).
217 The debate between Lon Fuller and H.L.A. Hart regarding the concept of law, in particular with respect to the Nazi regime, sheds some light on these differences. For a very useful discussion of Fuller’s theory in the context of lawyering see LUBAN, LEGAL ETHICS, supra note 174 at 99-130. See also H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958).
218 See Katyal, supra note 111.
219 Another way of thinking about this is that Katyal’s decision calls into question the separation between the goals of the representation, which are supposed to be controlled by the client, and the strategies adopted to achieve those goals, which are ordinarily assumed to be controlled by the lawyer.
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philosophy deeply influenced his decisions on behalf of his client, closing some avenues of relief, at least for that moment.

Conclusion

The most prevalent approach among American lawyers facing crises of the kind discussed in this Article has traditionally been either participation with an eye towards appeal to a higher tribunal or individual refusal to participate. For example, participation was the approach of the American Civil Liberties Union and National Association of Criminal Defense Lawyers when they formed the “John Adams Project” to retain lawyers to represent Guantánamo detainees in military commission proceedings. But this decision has spurred little public debate about the role lawyers ought to play in these tribunals. It is worthwhile to reflect on the assumptions behind these choices, and what they say about law, our legal culture and professional identity.

Lawyers who participated in the military commissions were worried about the effects of participation. They were “concerned, that fighting would serve to validate the system.” But at the same time, as this analysis has attempted to show, their strategy – “Attack the system” – also has its complications. Lawyers who resist injustice by attacking a sham system are not guaranteed to be absolved from responsibility for injustice. Neither are lawyers who refuse to participate absolved by keeping their hands clean while letting others get theirs dirty. Many lawyers facing procedural injustice have adopted risky and brave strategies of resistance. In many cases, these are the lawyers we hear about in the media. Others have pursued silent acts of resistance. All these decisions have their pitfalls; none offer moral purity.

This Article has considered the dilemma and the strategic options for lawyers facing unjust tribunals. It has shown the difficulty of identifying injustice, and analyzed the complex set of choices lawyers have in facing injustice. What is most surprising is not the diversity of approaches to injustice, or the difficulty of the problem it poses for lawyers who want to represent their clients and uphold the rule of law, but the fact that the bar has barely engaged in a discussion of which approach is best for our democracy. This conversation is critical because of the lawyer’s special role as a builder-up of legal systems.

The portraits of resistance presented here do not represent the first time, nor will they be the last, that the American legal system has been

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220 The name of the project is meant to evoke John Adams’ representation of British soldiers accused of murder for their role in the Boston Massacre. The name is inapt because the trials of these soldiers were “conspicuously fair,” and Adams himself believed them to be so. See David McCollough, John Adams 67-68 (2001). By contrast, the John Adams Project will fund lawyer participation in trial that the funding organizations say are unfair.


222 See generally Luban, Lawfare, supra note 7.
accused of depriving judges of the curb of due process. The resistance that the military commission system has spurred in the legal community, for example, offers an opportunity to explore the strategies of resistance lawyers adopt in the face of injustice, the cost of submission and their meaning. This study is just the beginning of such an exploration. It begs many questions, such as how a lawyer can know when a tribunal is truly unjust so that resistance is justified, whether resistance is as appropriate in cases of isolated injustice as it is in cases of systemic injustice, whether lawyer participation actually legitimates or at least lends credibility to injustice as an empirical matter, and which forms of resistance (if any) are most compatible with the lawyer’s responsibility to the rule of law, legal institutions and his client. This analysis therefore calls for further empirical study of how lawyers in real situations think about and respond to injustice and an evaluation of their justifications for these responses.223

223 The author is in the process of conducting a qualitative research study collecting and evaluating the justifications for and arguments against lawyer participation in unfair hearings and to learn how lawyers on the front lines have answered some of the questions raised by this Article.