

**CAGING CARELESS BIRDS: EXAMINING DANGERS POSED
BY THE WILLFUL BLINDNESS DOCTRINE IN THE WAR ON
TERROR**

SHAWN D. RODRIGUEZ*

TABLE OF CONTENTS

1.	INTRODUCTION.....	692
2.	THE WAR ON TERROR.....	696
2.1.	<i>9/11 as a Catalyst for Change in Policy</i>	696
2.2.	<i>Detainment Centers and Extraordinary Rendition</i>	699
2.3.	<i>Military Commissions</i>	701
2.3.1.	<i>Prosecutions of Detainees Accused of Planning the 9/11 Attacks</i>	709
2.4.	<i>Domestic Terror Trials</i>	711
2.5.	<i>Foreign Criminal Indictments and Domestic Civil Suits Involving U.S. Officials</i>	712
3.	WILLFUL BLINDNESS AND KNOWLEDGE.....	713
3.1.	<i>Theory of Willful Blindness in U.S. Criminal Law</i>	714
3.1.1.	<i>Knowledge and Understanding</i>	715
3.2.	<i>U.S. Legal Rule on Willful Blindness</i>	717
3.2.1.	<i>Willfulness Versus Negligence</i>	719
3.2.2.	<i>Increasingly Frequent Use and Expansion of the Doctrine in U.S. Law</i>	720
3.3.	<i>Willful Blindness in International Criminal Law: Joint Criminal Enterprise</i>	721

* J.D. Candidate, University of Pennsylvania Law School, May 2009. I would like to thank Professor William Burke-White for his invaluable advice regarding the content and organization of this Comment. I also would like to thank former colleagues Richard J. Schaeffer, Hillary Schaeffer, and Brian Rafferty for their supervision and guidance regarding much of my early research on willful blindness. Finally, I owe many thanks to the editorial staff of the University of Pennsylvania's Journal of International Law, specifically including Anya Grossmann, Rushmi Ramakrishna, and Jonathan Fortney, for their hard work and patience. All errors are my own.

4.	CRITICISM AND IMPROPER USE OF THE WILLFUL BLINDNESS DOCTRINE.....	727
4.1.	<i>Confusion Between Willfulness/Knowledge and Negligence</i>	727
4.1.1.	<i>Complexity of Willful Blindness Jury Instructions</i>	729
4.2.	<i>Court Criticisms and Suggested Reforms</i>	733
5.	SPECIFIC DANGERS OF THE WILLFUL BLINDNESS DOCTRINE IN THE WAR ON TERROR.....	736
5.1.	<i>Overinclusiveness</i>	736
5.2.	<i>Limitations of Knowledge and Understanding by Factfinders</i>	739
5.3.	<i>The Finality of Execution as Punishment</i>	742
5.4.	<i>Threats of Coercion</i>	743
5.5.	<i>Critical Responses</i>	744
5.5.1.	<i>Regarding Practicality</i>	748
6.	Conclusion	749

1. INTRODUCTION

The United States-led War on Terror¹ has reignited a fierce normative debate between advocates of the potentially competing interests of civil rights and national security. On one hand, some argue that using the broadest measures available to capture and prosecute alleged terrorists around the world is either advisable or necessary in order to protect national security.² Under this view, the interest in capturing and neutralizing potential threats to public safety outweighs the interest in protecting the civil and

¹ The terms "War on Terror" or "war on terrorism" are used in the 2002 U.S. National Security Strategy to define the current U.S.-led set of military campaigns relating to combating terrorism. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, *Introduction*, 27, 30, 31 (2002), available at <http://www.whitehouse.gov/nsc/nss/2002/nss.pdf> [hereinafter 2002 NATIONAL SECURITY STRATEGY]. As the term "War on Terror" is the most commonly used, this Comment will use that term throughout.

² See, e.g., *Ashcroft Eager to Expand Police Powers*, NEWSMAX.COM WIRES, Oct. 26, 2001, <http://www.newsmax.com/archives/articles/2001/10/25/160238.shtml> (quoting then Attorney General John Ashcroft: "Let the terrorists among us be warned . . . [w]e will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.").

procedural rights of the accused. On the other hand, some argue that prioritizing the accused's civil rights throughout their capture and prosecution is both advisable and necessary in order to protect national security and values.³ Under this view, the interest in maintaining procedural integrity or legitimacy of the legal system in dangerous times outweighs the interest in a potentially overinclusive prosecutorial policy.

This Comment takes the latter view with specific regard to the issue of the appropriate parameters of the mens rea requirements used to prosecute and convict accused terrorists, narrowly focusing on the doctrine of willful blindness. Willful blindness⁴ as a concept has long been a part of U.S. criminal law as a valuable means to convict those accused of committing offenses requiring a mens rea of knowledge who deliberately act to avoid inculpatory knowledge. Recently though, the willful blindness doctrine has grown dangerously overinclusive, resulting in a highly increased risk of convicting defendants who have not acted willfully. Many thinkers have questioned logical inconsistencies in the current doctrine, and courts have struggled to formulate clear and proper jury instructions on willful blindness due to confusion over the doctrine's proper scope. Additionally, courts and scholars have increasingly criticized the doctrine's tendency to convict defendants for mere negligence, or at worst, for mere guilt by association. With most terror charges requiring a mens rea requirement of "knowledge" or "willfulness" (particularly

³ See generally William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 280 (2004) (arguing that a reconceptualization of the relationship between human rights and national security, including adherence to procedural safeguards relating to human rights, may yield innumerable social, legal, and political benefits).

⁴ "Willful blindness" is perhaps the most common term for the concept discussed in this Comment, and will be used throughout for the sake of consistency. However, the same concept is alternatively referred to by numerous equivalent terms, such as "deliberate ignorance," "deliberate blindness," "willful (or wilful) ignorance," or "conscious avoidance," to name a few. Some also refer to willful blindness jury instructions as "ostrich" instructions, for example, see *United States v. Alston-Graves*, 435 F.3d 331, 338 (D.C. Cir. 2006), or "Jewell instructions," after the Ninth Circuit's ruling approving such an instruction in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976). These terms are used interchangeably by both courts and scholars. For discussion of the multiplicity of terms used by courts and scholars for the willful blindness concept, see Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 222 n.62 (1997) and Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1352 n.1, 1354 n.8 (1992).

conspiracy charges, for example), the dangers of the doctrine of willful blindness become highly relevant. These dangers are particularly acute when applied to the context of those accused of acts of international terrorism⁵ in U.S. courts and in military tribunals, where many defendants may face execution upon a guilty verdict.

In short, this Comment argues that dangers posed by misconstruing and misapplying the willful blindness doctrine create a lurking problem of overinclusive prosecution. These dangers have heightened significance in the context of those accused of acts of international terrorism, who may be subject to execution if convicted. In light of this context, this Comment argues that a reexamination of the willful blindness doctrine is necessary to prevent its improper and overinclusive use. This is not at all to say that prosecutions of accused terrorists should be limited in any way from ordinary prosecutions, or that any special protections should be afforded to such defendants beyond such ordinary paradigms. Rather, the argument is premised more narrowly on the idea that sufficient legal avenues to convict terror suspects exist such that an overbroad construal of willful blindness is neither necessary nor advisable to effect such prosecutions. Thus, expressed most basically, this Comment contends that the willful blindness doctrine should not be misused to improperly convict defendants of crimes that they did not commit, yet flaws in the current doctrine create the potential for just that risk.

This Comment maintains that legal, political, cultural, and foreign policy interests support a narrower construction of the willful blindness doctrine, and that such interests are heightened with regard to those accused of international terrorism. This Comment further argues that reexamination and properly narrow application of the doctrine as a whole are small but necessary steps to improve the procedural integrity of the U.S. legal system, particularly the prosecutorial scheme for terror defendants. Regard for propriety in the legal structure and process—

⁵ The precise definition of acts of international terrorism is the subject of voluminous debate. *See, e.g.*, CHRISTOPHER L. BLAKESLEY, *TERROR AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT* 19-43 (2006) (discussing national and international definitions of terrorism, and the need to arrive at a consensus); Thomas H. Mitchell, *Defining the Problem*, in *DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM* 9, 16 (David A. Charters ed., 1991) (discussing the quest for a proper definition of international terrorism, and settling on a generalized definition).

augmented by well-founded criticisms concerning the basis for, and misunderstanding of, the willful blindness doctrine as a whole—supports a careful reexamination of the use of the doctrine in light of its currently overbroad scope.⁶ Moreover, a reexamination and narrower tailoring of the willful blindness doctrine would be a small but valuable step toward improving the procedural integrity of the U.S. legal system, with regard to both the prosecution of terror detainees and U.S. criminal law as a whole. This step may also contribute to legitimizing the U.S. government's terror prosecutions in the eyes of the international community, which would be of significant political benefit to the United States. In a larger sense, this benefit could serve the interests of the War on Terror, by promoting both civil rights and national security.

The Comment proceeds as follows: Section 2 discusses the context of the War on Terror by way of background, and the procedures used to prosecute and detain those accused of acts of international terrorism, including detainees. This Section sets the stage for arguing that abrogating the mens rea requirements used to convict terror defendants by applying an overbroad view of willful blindness would undermine the legitimacy of such convictions, and potentially exacerbate existing domestic and international hostility toward the War on Terror's means and ends. Section 3 analyzes the concept of willful blindness and the current doctrine, looking particularly at the relationship between willful blindness and knowledge to focus the reader's understanding on the doctrine's proper purpose. Section 3 further examines willful blindness in domestic U.S. law and then discusses the superseding international criminal law doctrine of "joint criminal enterprise," to illustrate how far the willful blindness doctrine can reach if unchecked. Section 4 examines some criticisms of the current scope and improper applications of the willful blindness doctrine, including some suggested limitations that may help to properly confine it. Section 5 argues for reexamining and reining in the willful blindness doctrine, specifically in the context of prosecutions of those accused of acts of international terrorism, while acknowledging competing policy interests and critical responses. The Comment concludes that a reexamination of the willful blindness doctrine will be a small but valuable step toward

⁶ See generally *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("When structure fails, liberty is always in peril.").

increasing the procedural legitimacy of U.S. terror prosecutions, thus improving the integrity of the U.S. legal system while promoting significant foreign policy interests.

2. THE WAR ON TERROR

To understand why an overinclusive willful blindness doctrine poses special dangers to those accused of international terrorism, it is necessary to examine the context of the U.S.-led War on Terror. By way of background, this Section discusses some of the most salient (and criticized) aspects of the U.S. terror prosecution scheme. This background of existing erosions in terror defendants' and detainees' legal procedural protections suggests that improper use of the willful blindness doctrine poses a unique risk of contributing to or exacerbating such problems. Similarly, a discussion of the domestic and international community's generally hostile response to such erosions helps to introduce some of the foreign policy issues at stake. Together, this background serves to bring the roots and scope of the problem into focus for the specific discussion of willful blindness later in this Comment.

To clarify, this Section is *not* intended to serve as a partisan political diatribe, or to endorse any particular political view. The purpose instead is to outline some of the domestic and international criticisms that the United States has incurred as a result of the policies and procedures undertaken in the War on Terror. The Section particularly focuses on those related to perceived failures in legal procedural fairness. This focus on criticism of the war is not intended to be political in nature, but rather to highlight the kinds of procedural improprieties—both actual and perceived—that, if reformed, could improve the perceived legitimacy of U.S. terror prosecutions. Specifically, this Comment, in examining the dangers of misuse and misapplication of the willful blindness doctrine, argues that improving and fairly applying the willful blindness doctrine where it ought to be applicable (rather than applying it over-broadly) will be a small but useful step in responding to such criticism. Doing so, it argues, would accordingly be a small but useful step in reforming the actual and perceived procedural integrity of the United States legal scheme for prosecuting those accused of international terrorism.

2.1. 9/11 as a Catalyst for Change in Policy

The international community scrambled to address the threats posed by international terrorism following the attacks of September 11, 2001.⁷ For the United States in particular, the attacks served as a catalyst for an abrupt and dramatic change in domestic and foreign policy.⁸ One of the principal elements of this change was a new policy of proactive enforcement⁹ and preemption,¹⁰ commonly referred to as the War on Terror.¹¹ Beyond a distinctly proactive military strategy,¹² the policy shift also manifested itself in a broad range of social and adjudicative mechanisms to address threats posed by international terrorism. These controversial latter mechanisms¹³ are the most relevant to this discussion; specifically,

⁷ See J. Craig Barker, *The Politics of International Law-Making: Constructing Security in Response to Global Terrorism*, 3 J. INT'L L. & INT'L REL. 5, 5 (2007) (characterizing the international community's response to the problem of global terrorism as an "apparent rush to law").

⁸ See 2002 NATIONAL SECURITY STRATEGY, *supra* note 1, at 28 ("The events of September 11, 2001, fundamentally changed the context for relations between the United States and other main centers of global power, and opened vast, new opportunities.").

⁹ *Id.* at *Introduction* ("To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing. . . . [A]s a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best. . . . In the new world we have entered, the only path to peace and security is the path of action.").

¹⁰ *Id.* at 15 ("To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.").

¹¹ Some have questioned the propriety of defining such a conflict as one of "war." See Brien Hallett, *Dishonest Crimes, Dishonest Language: An Argument about Terrorism*, in UNDERSTANDING TERRORISM: PSYCHOLOGICAL ROOTS, CONSEQUENCES, AND INTERVENTIONS 49, 56 (Fathali M. Moghaddam & Anthony J. Marsella eds., 2004) ("The problem is that terrorists are not waging a 'war'; they are committing crimes. . . . [I]f 'war' is the positive image of 'political violence,' then terrorism is its negative image.").

¹² 2002 NATIONAL SECURITY STRATEGY, *supra* note 8, at 29 ("The major institutions of American national security were designed in a different era to meet different requirements. All of them must be transformed. It is time to reaffirm the essential role of American military strength.").

¹³ While criticism of the breadth of such a preemptive approach to foreign policy relating to international terrorism has proliferated, some prominent defense lawyers have indicated a limited ideological support of such a strategy, finding it necessary to combat the terrorist threat effectively. See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 27 (2002) ("An act of terrorism should be the occasion only for punishment and incapacitation, not for negotiation and consideration of root

the means by which those suspected of acts of international terrorism have been arrested, detained, and prosecuted.

2.2. Detainment Centers and Extraordinary Rendition

The use of detainment centers has been one controversial aspect of the U.S. strategy in prosecuting terror suspects. These detainment centers have been severely criticized on numerous grounds, including for reportedly limiting detainees' access to legal counsel and limiting their ability to confront evidence against them.¹⁴ Additionally, prisoner abuses at detainment centers such as Abu Ghraib¹⁵ have been the subject of extensive media coverage, resulting in increased public disapproval of U.S. approaches to terror prosecution.¹⁶ Such abuses have also resulted in strong rebukes from human rights advocacy organizations.¹⁷ In addition,

causes. The message must be that nothing will be gained by terrorism, and much will be lost. . . . This would seem an obvious and simple first principle in dealing with terrorism. . . . [However,] the international community has responded in precisely the opposite manner.”).

¹⁴ See William Glaberson, *Court Tells U.S. to Reveal Data on Guantánamo*, N.Y. TIMES, July 21, 2007, at A1 (“Advocates for detainees have criticized the tribunals since they were instituted in 2004 because the terror suspects held at Guantanamo have not been permitted lawyers during the proceedings and have not been allowed to see much of the evidence against them.”).

¹⁵ See *Torture in Abu Ghraib*, in THE PHENOMENON OF TORTURE: READINGS AND COMMENTARY 60, 60–62 (William F. Schultz, ed. 2007) (providing a sworn statement from an Abu Ghraib detainee which details extensive physical, psychological and sexual abuse at the hands of U.S. interrogators).

¹⁶ See H. L. POHLMAN, TERRORISM AND THE CONSTITUTION 117 (2008) (describing television reports of abuses of Iraqi prisoners at Abu Ghraib broadcasting graphic photos, noting, “The parade of depressing photos contributed to the declining popular support for the Iraq war. [President] Bush’s job approval rating dropped to 46 percent—the lowest up to that point in time.”) (citations omitted); Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT’L L. 427, 427 (2006) (“The greatest contemporary challenge faced by liberal democratic societies in confronting terrorism is the dilemma of balancing the legitimate national security interests of the State and the civil liberties of the individual. Perhaps no issue represents that tension more than the dilemma faced by democratic societies about how to conduct interrogation of suspected terrorists in custody. Accounts of abuses that have occurred at Abu Ghraib, Guantanamo Bay, and Bagram have served to bring the balancing issue to the forefront of the debate of how the United States . . . reacts to terrorism.”).

¹⁷ See World Org. for Human Rights USA, *Update to the 87th Session of the United Nations Human Rights Committee* (June 15, 2006), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICCPR_shadow_report.pdf (outlining concerns regarding torture, extraordinary rendition, indefinite

the secrecy surrounding detention centers such as those in Guantanamo Bay have incurred similar suspicion and criticism.¹⁸ Others have claimed that mistreatment of detainees in U.S. custody may violate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁹

In response to this international criticism, some U.S. officials have argued that protections enumerated in the Geneva Conventions²⁰ do not apply to detainees who are deemed to be unlawful enemy combatants.²¹ While this argument has been weakened both by scholars²² and recent Supreme Court holdings,²³ it has persisted.²⁴

detention and claims of exemption from human rights standards by the U.S. government with regard to treatment of detainees).

¹⁸ See Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* (Seton Hall Public Law Research Paper No. 46, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885659 (analyzing declassified information about detainees at Guantanamo).

¹⁹ See, e.g., *Torture and Inhumane Treatment: A Deliberate U.S. Policy*, HUMAN RIGHTS WATCH WORLD REPORT, Jan. 2006, <http://www.hrw.org/wr2k6/introduction/2.htm>. For the text of the Convention itself, see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, 1465 U.N.T.S. 85, June 26, 1987, available at <http://www2.ohchr.org/english/law/pdf/cat.pdf>, prohibits torture and obligates state signatories to take various measures to ensure compliance. Office of the High Commission for Human Rights, Declarations and Reservations (Apr. 23, 2004), For the U.S. reservations to that Convention, see <http://www.unhcr.ch/html/menu2/6/cat/treaties/convention-reserv.htm> which limits the Senate's advice and consent to ratification of the Convention and specifies particular understandings of relevant terminology.

²⁰ Specifically, this refers to rights provided by the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

²¹ Remarks by Vice President Dick Cheney to the U.S. Chamber of Commerce (Nov. 14, 2001), available at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114-1.html> ("The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women, and children, is not a lawful combatant. They don't deserve to be treated as a prisoner of war. They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process. . . . [T]hey will have a fair trial, but it'll be under the procedures of a military tribunal and rules and regulations to be established in connection with that. We think it's the appropriate way to go.") [hereinafter Cheney remarks].

²² See BLAKESLEY, *supra* note 5, at 231 ("Today, common Article 3 to the Geneva Conventions of 1949 provides minimum protections for all persons

Additionally, vociferous critique has centered on the practice of extraordinary rendition—where suspected terrorists have been taken overseas and allegedly tortured—in CIA “black sites.”²⁵ Such foreign locations—the identities of which have been withheld from the public, as well as many members of both U.S. and foreign host governments²⁶—are reportedly used for indefinite detention to obtain information from alleged terrorists beyond the scrutiny of U.S. law.²⁷ These practices, instituted shortly after the September 11, 2001 attacks,²⁸ have incurred the ire of domestic and

captured in any armed conflict. These protections include basic due process guarantees.”) (citations omitted).

²³ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that military commissions at Guantanamo Bay violated Common Article 3 of the Third Geneva Convention, while noting that the legislature may be able to grant the executive branch power statutorily to use military commissions under domestic law).

²⁴ See Stuart Taylor Jr., *Overplaying Its Hand*, NEWSWEEK, June 23, 2008, available at <http://www.newsweek.com/id/141509> (“[A]fter 9/11, hard-liners in the administration decided that terror suspects brought to Guantánamo and various secret prisons around the world lacked any of the protections of the Geneva accords because they were ‘unlawful combatants.’”).

²⁵ See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html> (drawing attention to so-called CIA “black sites” referenced in a variety of executive branch classified documents, as well as offering an overview of the way these locations are used).

²⁶ *Id.* (“The hidden global internment network is a central element in the CIA’s unconventional war on terrorism. It depends on the cooperation of foreign intelligence services, and on keeping even basic information about the system secret from the public, foreign officials and nearly all members of Congress charged with overseeing the CIA’s covert actions. The existence and locations of the facilities—referred to as ‘black sites’ in classified White House, CIA, Justice Department and congressional documents—are known to only a handful of officials in the United States and, usually, only to the president and a few top intelligence officers in each host country. . . . The Washington Post is not publishing the names of the Eastern European countries involved in the covert program, at the request of senior U.S. officials. They argued that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation.”).

²⁷ *Id.* (“Although the CIA will not acknowledge details of its system, intelligence officials defend the agency’s approach, arguing that the successful defense of the country requires that the agency be empowered to hold and interrogate suspected terrorists for as long as necessary and without restrictions imposed by the U.S. legal system or even by the military tribunals established for prisoners held at Guantanamo Bay.”).

²⁸ *Id.* (“The secret detention system was conceived in the chaotic and anxious first months after the Sept. 11, 2001, attacks, when the working assumption was that a second strike was imminent.”).

international authorities, in addition to human rights advocates.²⁹ The practices have also been the subject of foreign indictments of CIA operatives.³⁰ While these practices have been defended by the CIA as essential information gathering tools,³¹ their moral and legal legitimacy reportedly have also been internally hotly debated according to reports.³²

In sum, concerns over the procedural mechanisms used to prosecute terror defendants, particularly Guantanamo detainees, are particularly acute in light of the such defendants' uniquely compromised situation as previously described. Moreover, because the willful blindness doctrine requires a mens rea of knowledge—as do most charges against those accused of acts of international terrorism—the propriety of its use and application is of paramount importance in the context of that debate.

2.3. Military Commissions

Trials for those accused of acts of international terrorism in the current War on Terror may be conducted in specialized tribunals known as military commissions.³³ Military commissions have a

²⁹ *Id.* (“[R]evelations of widespread prisoner abuse in Afghanistan and Iraq by the U.S. military—which operates under published rules and transparent oversight of Congress—have increased concern among lawmakers, foreign governments and human rights groups about the opaque CIA system.”).

³⁰ See Devika Bhat et al., *Italian Judge Orders First ‘Rendition’ Trial of CIA Agents*, TIMES ONLINE, Feb. 16, 2007, <http://www.timesonline.co.uk/tol/news/world/europe/article1395637.ece> (describing the first criminal court case regarding extraordinary rendition, indicting twenty-six Americans and five Italians over the abduction of Abu Omar in Milan and his alleged torture in Egypt).

³¹ Priest, *supra* note 25 (“Although the CIA will not acknowledge details of its system, intelligence officials defend the agency’s approach, arguing that the successful defense of the country requires that the agency be empowered to hold and interrogate suspected terrorists for as long as necessary and without restrictions imposed by the U.S. legal system or even by the military tribunals established for prisoners held at Guantanamo Bay.”).

³² *Id.* (“Since then, the arrangement has been increasingly debated within the CIA, where considerable concern lingers about the legality, morality and practicality of holding even unrepentant terrorists in such isolation and secrecy, perhaps for the duration of their lives. Mid-level and senior CIA officers began arguing two years ago that the system was unsustainable and diverted the agency from its unique espionage mission.”).

³³ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b, 120 Stat. 2600 (2006) [hereinafter MCA] (establishing “procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission”); William Glaberson, *Portable Halls of*

long history in United States law as a response to extraordinary national security threats such as war.³⁴ In that context, their use has been deemed constitutional in certain limited circumstances.³⁵ These circumstances originally included situations where the defendant is connected with the military or is a prisoner of war; where the offense charged dealt with a violation of the law of war; where domestic courts were insufficient or inoperative; and where some governmental “necessity” could be demonstrated.³⁶

Justice Are Rising in Guantánamo, N.Y. TIMES, Oct. 14, 2007, at A1, available at <http://www.nytimes.com/2007/10/14/us/14gitmo.html?fta=y> (“If and when the trials begin, they will be held under a set of rules created especially for trying terrorism suspects. And now they will be held in a setting created especially for terrorism suspects.”).

³⁴ See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (discussing the use of a military tribunal to try a civilian U.S. citizen arrested in Indiana for planning to raid a federal arsenal and use the weapons obtained there to free Confederate prisoners); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); (dismissing an appeal from a trial by military commission of a civilian U.S. citizen for charges relating to publishing libelous news articles for lack of jurisdiction); *Ex parte Quirin*, 317 U.S. 1, 18 (1942) (affirming conviction in trial by military commission for seven German nationals and a dual U.S.-German nationals accused of sabotage, espionage, and “violations of the law of war”).

³⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 592–601 (2006) (finding that while the particular military commissions at Guantanamo Bay violated Common Article 3 of the Geneva Conventions, Congress may grant the President power to use military commissions under domestic law).

³⁶ See, e.g., *Milligan*, 71 U.S. at 121–22 (“[Military commissions] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. . . . Why was [Milligan] not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment. . . .”); *Quirin*, 317 U.S. at 29 (“Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so

Currently, while particular military commissions' procedures have been deemed illegal domestically and internationally,³⁷ use of military commissions in general has been authorized by legislation.³⁸

Charges brought in trials by military commissions deal with violations of the laws of war³⁹ and other related matters.⁴⁰ However, many of the charges retain similarities to more

whether the Constitution prohibits the trial... [A]s we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.”).

³⁷ See *Hamdan*, 548 U.S. at 634–35 (holding that military commissions at Guantanamo Bay violated Common Article 3 of the Third Geneva Convention and constitutional boundaries of Executive power); see generally *id.* at 641 (“If the military commission at issue is illegal under the law of war, then an offender cannot be tried ‘by the law of war’ before that commission.”).

³⁸ See MCA, *supra* note 33 (authorizing the use of military commissions to try unlawful enemy combatants); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005 (2005) (establishing procedural requirements for Combatant Status Review Tribunals (“CSRTs”)); see also *Hamdan*, 548 U.S. at 636 (2006) (“The dissenters say that today’s decision would ‘sorely hamper the President’s ability to confront and defeat a new and deadly enemy.’ They suggest that it undermines our Nation’s ability to ‘preven[t] future attacks’ of the grievous sort that we have already suffered. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” (internal citations omitted)).

³⁹ See JENNIFER ELSEA, CONG. RESEARCH SERV., TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 1–2 (Dec. 11, 2001) available at <http://www.fpc.state.gov/documents/organization/7951.pdf> (discussing that classifying terrorist acts as violations of the international law of war rather than criminal acts permits trials by military commissions rather than in federal courts); see also William Glaberson, *Court Advances Military Trials For Detainees*, N.Y. TIMES, Sept. 25, 2007, at A1, available at <http://www.nytimes.com/2007/09/25/washington/25gitmo.html> (indicating that as many as eighty detainees may eventually face war crimes charges according to chief prosecutor, Col. Morris D. Davis).

⁴⁰ See, e.g., Charge Sheet, *United States v. Hamdan*, (Apr. 6, 2007), available at http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf (charging Hamdan with conspiracy and providing material support for terrorism); Charge Sheet, *United States v. Khadr* (Apr. 6, 2007) [hereinafter *Khadr Charge Sheet*] available at <http://www.defenselink.mil/news/Apr2007/Khadrrreferral.pdf> (charging Omar Ahmed Khadr with “murder in violation of the law of war” amongst other charges); Charge Sheet, *United States v. Jawad*, (Apr. 6, 2007) available at <http://www.defenselink.mil/news/Oct2007/Jawad%20Charge%20Sheet.pdf> (charging Mohammed Jawad with “attempted murder in violation of the law of war” amongst other charges).

recognizable domestic charges, including, for example, murder and conspiracy allegations.⁴¹ Some of the most frequent current charges include conspiracy and material support for terrorism, both of which generally require a mens rea of knowledge, thus implicating the problems posed by overinclusive use of the willful blindness doctrine.⁴² Defendants convicted in military commissions for terror charges may include any range of sentences, including life imprisonment⁴³ or execution.⁴⁴

Military commissions offer a level of efficiency to prosecutors that exceeds that of domestic courts. In light of this function, the U.S. Department of Defense has touted the usefulness and practicality of employing military commissions rather than federal courts for trying terror cases.⁴⁵ Some, however, have questioned the propriety of the military commissions' approach to achieving justice,⁴⁶ while others have criticized the choice to employ them in the current context of the War on Terror.⁴⁷

⁴¹ See, e.g., Khadr Charge Sheet, *supra* note 40.

⁴² See, e.g., *id.* at 5–6 (charging that Khadr “knowingly committed overt acts” in furtherance of the conspiracy and “intentionally [provided] material or resources” to groups “known by the accused to be an organization that engages in terrorism”).

⁴³ E.g., *Detainee Dragged to Gitmo War Crimes Court*, ASSOCIATED PRESS, May 21, 2008, available at <http://www.msnbc.msn.com/id/24758702/> (discussing life imprisonment as one possible sentence in tribunals).

⁴⁴ E.g., William Glaberson, *U.S. Said to Seek Execution for 6 in Sept. 11 Case*, N.Y. TIMES, Feb. 11, 2008, at A1, available at http://www.nytimes.com/2008/02/11/us/11gitmo.html?_r=1&hp=&adxnnl=1&oref=slogin&adxnnlx=1202742208-Y3V09jempSONrvusn64lpw (discussing execution as a potential punishment).

⁴⁵ Press Release, U.S. Dep't. of Defense, *Detainee Convicted of Terrorism Charge at Guantanamo Trial* (Mar. 30, 2007), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10678> (announcing conviction of David Matthew Hicks for material support to terrorism, stating: “Military commissions provide a mechanism to serve justice to those accused of law of war violations while keeping the United States, friends and allies safe from those bent on carrying out attacks on civilian populations and coalition forces.”).

⁴⁶ See DERSHOWITZ, *supra* note 13, at 217 (“[T]he military approach to justice . . . will encourage many Americans to view the military approach to trials—which favors efficiency and certainty over fairness and the resolution of doubts in favor of the accused—as the norm rather than the exception. This must never be allowed to happen, if our liberties are to be preserved.”).

⁴⁷ See, e.g., BLAKESLEY, *supra* note 5, at 230–31 (referring to the current use of secret military commissions to try accused terrorists as a “sad prospect” and calling the Supreme Court’s decision in *Quirin* as “embarrassing”); RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 5 (2008), <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>

Much of the criticism regarding the current use of military commissions has centered on their procedural and substantive differences from regularly constituted American courts.⁴⁸ Procedurally, military commissions differ sharply from ordinary U.S. courts⁴⁹ in numerous ways that some argue may compromise their legitimacy.⁵⁰ For example, military commissions have endured criticism for the secrecy of their proceedings,⁵¹ on the

(concluding that “contrary to the views of some critics, the [federal courts are] generally well-equipped to handle most terrorism cases”).

⁴⁸ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 (prohibiting state parties from engaging in “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).

Whether the military commissions currently employed by the U.S. government qualify as regularly constituted courts—or, alternatively, whether they are required to comply with that requirement at all—has been the subject of debate. However, several U.S. courts have indicated that military commissions are not to be considered traditional regularly constituted courts under the Geneva Conventions or the Constitution. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–32 (2006) (discussing the unresolved questions regarding the “regularly constituted” requirements of Common Article 3, and finding that the military commissions at issue do not qualify); see also *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (“[M]ilitary tribunals, which are not courts in the sense of the Judiciary Article, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures.” (citations omitted)).

Congress attempted to resolve the question definitively by statute in 2006. See MCA, *supra* note 33, § 948b(f) (“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”). However, the provision carries little to no weight as a matter of international law. See Vienna Convention on the Law of Treaties art. 27, Jan. 27, 1980, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

⁴⁹ See *supra* citations and discussion in note 48. But see Glaberson, *supra* note 39 (citing the United States Court of Military Commission Review’s opinion that Congress intended Guantanamo tribunals to apply usual procedures of military courts).

⁵⁰ See generally Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 97 (2005) (“[P]roceedings perceived as illegitimate are not likely to foster peace and reconciliation.”).

⁵¹ See DERSHOWITZ, *supra* note 13, at 214 (“Another important check on governmental overreaching is trial by jury and open trials. That check was substantially undercut by President George W. Bush’s authorization of military tribunals to try noncitizens suspected of ties to terrorism.”); see generally N.Y.

grounds that such secrecy may offend the constitution's provisions regarding public trials.⁵² Military commissions also depart from the practices of ordinary courts in several other controversial ways, including that they: allow classes of evidence ordinarily deemed inadmissible;⁵³ restrict the kinds of legal counsel available to an

Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas J., concurring) ("Secrecy in government is fundamentally anti-democratic."); John F. Kennedy, Address to the American Newspaper Publishers Association, (Apr. 27, 1961), reprinted in JOHN F. KENNEDY: IN HIS OWN WORDS 91 (Eric Freedman & Edward Hoffman eds., Kensington Publishing Corp 2005) ("The very word 'secrecy' is repugnant in a free and open society, and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it. And there is very grave danger that an announced need for increased security will be seized upon by those anxious to expand its meaning to the very limits of official censorship and concealment. And no official of my administration, whether his rank is high or low, civilian or military, should interpret my words here tonight as an excuse to censor the news, to stifle dissent, to cover up our mistakes or to withhold from the press and the public the facts they deserve to know.").

While measures have been suggested that would add transparency to these proceedings, such measures nonetheless allow for a degree of anonymity greatly exceeding that of regularly constituted U.S. courts. See Glaberson, *supra* note 33 ("One new feature for trials expected to involve classified evidence is a plexiglass window separating the small press and spectator gallery from the floor of the courtroom. At the touch of a button, the military judge will be able to cut off the sound in the spectator section."); see also Sara Moore, *Defense Department Seeks Death Penalty for Six Guantanamo Detainees*, AMERICAN FORCES PRESS SERVICE NEWS ARTICLES, Feb. 11, 2008, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=48930> (stating that "the Defense Department will make the hearings as open as possible").

⁵² See *United States v. Moussaoui*, 382 F.3d 453, 488 (4th Cir. 2004) (Gregory, J., concurring in part) ("The entire process is cloaked in secrecy, making it difficult, if not impossible, for the courts to ensure the provision of Moussaoui's rights. . . . Moussaoui has constitutional rights, not extended to the prosecution, that are implicated by this procedure [of permitting only redacted summaries of witness testimony to be entered by the government rather than allowing the defendant to confront and cross examine such witnesses directly]. . . . [T]oday justice has taken a long stride backward.").

⁵³ See, e.g., *id.* (describing the use of redacted witness statements against the accused without cross-examination); Kelli Arena & Carol Cratty, *Lawyer Fears 9/11 Mastermind Trial will be "Insanity"*, CNN.COM, Apr. 24, 2008, <http://www.cnn.com/2008/CRIME/04/23/ksm.attorney/index.html> (quoting a defense lawyer as arguing: "Even the greenest deputy sheriff or rookie police officer in Skunk Hollow County knows that if you rough up a defendant, anything he says after that is not going to be admitted into court The officer might not like those rules, but he understands them and will abide by them. . . .

accused;⁵⁴ abrogate confidentiality protections between the accused and his counsel;⁵⁵ and severely limit defendants' appellate rights.⁵⁶

We have created a system under the military commissions that says in essence, 'if he was roughed up, but what he says still seems reliable, we'll accept it any way.' And that's just wrong."); Editorial, *Restoring American Justice*, N.Y. TIMES, Sept. 17, 2007, at A18 (criticizing the MCA for allowing "the introduction of evidence tainted by coercion" and permitting the creation of "kangaroo courts in Guantanamo Bay that declare prisoners enemy combatants without a real hearing or reliable evidence."). *But see generally* MCA, *supra* note 33, § 948r(b) ("A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.").

⁵⁴ See MCA, *supra* note 33, § 948k(b) (providing qualification requirements for defense counsel, including requiring that any civilian counsel be "otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense."). If civilian counsel is not deemed "otherwise qualified," (due to lack of security clearance, for example) the defendant may be represented by military counsel known as a judge advocate. MCA §§ 948k(b)(1), (c) (providing prerequisites for trial counsel, including judge advocates); *see also* Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 801 art. 1(13) (2006) *available at* <http://www.jag.navy.mil/documents/UCMJ.pdf> (indicating that qualified judge advocates must be an officer of a branch of the armed services).

Additionally, the defendant in a CSRT proceeding—which determines whether or not he will be classified as an enemy combatant in the military commission—often is not provided with traditional legal counsel at all, but rather with a "personal representative" who is a member of the prosecuting military. *See* MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT'S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTANAMO 4 (2006) *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf ("The detainees were denied any right to counsel. Instead, they were assigned a 'personal representative' who advised each detainee that the personal representative was neither his lawyer nor his advocate, and that anything that the detainee said could be used against him. In contrast to the absence of any legal representative for the detainee, the Tribunal was required to have at least one lawyer and the Recorder (Prosecutor) was recommended to be a lawyer. The assigned role of the personal representative was to assist the detainee to present his case. In practice, any assistance was extraordinarily limited.").

⁵⁵ See Denbeaux & Denbeaux, *supra* note 54 at 15 ("At that initial meeting with each detainee, the personal representative had several tasks, including warning the detainee that the personal representative was not the detainee's lawyer and that nothing discussed would be held in confidence [by saying]: 'I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing. I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so.'" (citation omitted)).

⁵⁶ See MCA, *supra* note 33, § 950j(b) (stripping appellate rights for those tried by military commission); *see generally* *In re Yamashita*, 66 S. Ct. 340, 353 (1946)

Defendants, however, are permitted to challenge their detention in U.S. federal courts.⁵⁷ In particular, the lack of evidentiary disclosure requirements in cases where the government cites classified national security interests⁵⁸ has been a flashpoint of criticism. Finally, some scholars have alleged that military commissions unjustly pursue guilt by association in a manner evocative of the oft-criticized international criminal liability theory of joint criminal enterprise (which is discussed below).⁵⁹

As a result of these erosions of defendants' procedural protections, concerns have been raised regarding whether defendants are provided with an adequate opportunity for a fair trial before military commissions.⁶⁰ Specifically, some have suggested that the use of military commissions and related aspects of the U.S. terror prosecution scheme may violate the U.S. Constitution or the International Covenant on Civil and Political

(denying writ of habeas corpus for defendant Japanese general convicted of violations of the law of war in a trial by military commission).

⁵⁷ See *Boumediene v. Bush*, 128 S.Ct. 2229, 2275–76 (2008) (finding § 7 of the Military Commissions Act unconstitutional, and affording habeas rights to detainees); see also Bill Mears, *Justices: Gitmo Detainees Can Challenge Detention in U.S. Courts*, CNN.COM, June 12, 2008, <http://www.cnn.com/2008/US/06/12/scotus/index.html> (last visited Oct. 10, 2008) (discussing the *Boumediene* ruling).

⁵⁸ See UCMJ, § 801 art. 1(15)–(16) (broadly defining “classified information” as “any information or material that has been determined by an official of the United States pursuant to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security” and defining “national security” as encompassing both “the national defense” and “foreign relations” of the United States); Mil. R. Evid. 505(a) (“Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege this rule applies to all stages of the proceedings.”); see also *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 650 n.2 (6th Cir. 2007) (discussing the “State Secrets Doctrine”).

⁵⁹ See Danner & Martinez, *supra* note 50, at 80 (“The military commissions instituted by the U.S. government to try suspected terrorists include both command responsibility and a liability theory that closely resembles joint criminal enterprise, and the first indictments of Guantanamo detainees implicitly rely on this joint criminal enterprise theory of liability.” (citation omitted)); see also *infra* Section 3.3.

⁶⁰ See HUMAN RIGHTS FIRST, ANALYSIS OF PROPOSED RULES FOR MILITARY COMMISSIONS TRIALS, <http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf> (arguing that “key flaws” in the procedural and evidentiary systems used in military commissions undermine defendants' right to a fair trial); see generally *Detainee Dragged to Gitmo War Crimes Court*, ASSOCIATED PRESS, May 21, 2008, available at <http://www.msnbc.msn.com/id/24758702/> (describing a detainee “boycott” of the military commissions rooted in perceived inequities in trial procedures).

Rights.⁶¹ These procedural erosions create a risk of overinclusive convictions and executions, which are augmented by the overinclusive risks inherent in the present willful blindness doctrine.

2.3.1. *Prosecutions of Detainees Accused of Planning the 9/11 Attacks*

The U.S. government has recently sought to try several Guantanamo detainees for alleged involvement in planning the September 11, 2001 terrorist attacks.⁶² Many of the trials will likely be held by military commission.⁶³ Some have criticized the decision to have the trials conducted by military commission rather than in domestic courts on the grounds discussed above, while others have suggested critiques on more naked political grounds.⁶⁴ Such criticism is amplified by the CIA's admission that at least some of these defendants were subject to harsh interrogation methods such as waterboarding to obtain information which may be used against them at trial.⁶⁵ The defendant detainees at such trials, if found guilty, would likely face execution.⁶⁶

⁶¹ See John Cerone, *The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law*, ASIL INSIGHTS, Nov. 13, 2006, available at <http://www.asil.org/insights/2006/11/insights061114.html> (arguing that the MCA may violate both constitutional law and international law, specifically Article 15 of the International Covenant on Civil and Political Rights); see also World Organization for Human Rights USA, Office of the High Commissioner for Human Rights, *Update to the 87th Session of the United Nations Human Rights Committee*, (June 15, 2006) http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICCPR_shadow_report.pdf (arguing that various aspects of the U.S. terror prosecution scheme, including detention centers and the use of rendition violate the ICCPR).

⁶² Glaberson, *supra* note 44 (discussing the U.S. government's intention to try six former detainees accused of involvement in the 9/11 attacks by military commission).

⁶³ *Id.*

⁶⁴ See Adam Zagorin, *Gitmo Trials: The Political Agenda*, TIME, June 8, 2008, available at <http://www.time.com/time/nation/article/0,8599,1812705,00.html> (examining the political ramifications of the Guantanamo trials of Khalid Sheikh Mohammed and four alleged co-conspirators).

⁶⁵ Glaberson, *supra* note 44.

⁶⁶ *Id.*; see also Adam Zagorin, *Alleged 9/11 Plotter Holds Court*, TIME, June 5, 2008, available at <http://www.time.com/time/nation/article/0,8599,1812114,00.html> ("Confessed terrorist mastermind Khalid Sheikh Mohammed told U.S. military judge Ralph Kohlman on Thursday that he would represent himself at his [trial by military commission], and that he welcomed the death penalty that would make him a 'martyr.'").

This Comment does not take a position on the appropriateness of a retributivist attitude toward such defendants,⁶⁷ as such a question is beyond this Comment's scope. Rather, this Comment argues simply that the dangers of misunderstanding and misapplying the willful blindness doctrine may undermine the appropriateness and effectiveness of the procedural and structural mechanisms used to prosecute such defendants. On a general level, as suggested above, many have posited that military commissions are inherently unable to deal with such trials adequately because of systematic procedural infirmities.⁶⁸ On a specific level, improper or overbroad interpretation of the "knowledge" mens rea requirement—necessary to convict defendants at such trials, including those based on the theory of willful blindness—is one particular potential procedural infirmity on which this Comment focuses. As argued above, this potential problem has special importance in such trials, where the consequences are particularly serious and various other procedural protections are limited.

In one such case, the U.S. government has recommended trying defendant detainees jointly.⁶⁹ This result would be desirable for government prosecutors but highly disadvantageous to the defendants, increasing the risk that a guilt-by-association concept will be used to convict them. The conspiracy charge—one among the 169 charges against the detainees—bears out this concern, as the government contends that the defendants participated in "a long-term, highly sophisticated, organized plan by al-Qaeda to attack the United States."⁷⁰ As this latter charge in particular requires a mens rea of knowledge (which may be satisfied by willful blindness), concerns regarding the proper interpretation and application of willful blindness are of immediately acute

⁶⁷ See generally Glaberson, *supra* note 44 (quoting the spouse of a 9/11 victim as saying "if the death of 3,000 people isn't sufficient for a death penalty in this country, then why do we even have the death penalty?").

⁶⁸ *Id.* (discussing several critiques of the adequacy of military commissions to handle a death penalty trial of detainees, quoting a former Guantanamo military defense lawyer as saying that "[n]either the system is ready, nor are the defense attorneys ready to do a death penalty case in Guantánamo Bay, Cuba").

⁶⁹ Sara Moore, *Defense Department Seeks Death Penalty for Six Guantanamo Detainees*, AM. FORCES PRESS SERV. NEWS ARTICLES, Feb. 11, 2008, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=48930> (noting that the chief prosecutor recommended trying all six defendants jointly).

⁷⁰ *Id.*

importance to current and future terror prosecutions. However, it is important to reemphasize here that the dangers of overinclusive use of the willful blindness doctrine apply to *any* offense requiring a mens rea of knowledge, and not merely to conspiracy charges alone.

2.4. Domestic Terror Trials

In addition to the cases before the military commissions discussed above, several trials of those accused of acts of international terrorism have taken place in U.S. domestic courts. One of the most high profile of such cases occurring in a domestic court was that of Zacarias Moussaoui, the alleged would-be 20th hijacker in the 9/11 terrorist attacks).⁷¹ Notably, that trial also specifically involved multiple conspiracy charges,⁷² which required a mens rea of acting knowingly.⁷³

The Fourth Circuit's opinion affirming Moussaoui's conviction likewise indicates that some of the procedural erosions described earlier in this Section may also be implicated in domestic terror prosecutions. In Moussaoui's trial the government denied access to certain witnesses (other terror suspects in U.S. custody) whom Moussaoui sought to interview. The government claimed that provision of unfettered access to such witnesses would threaten national security. Instead, the Government provided redacted summaries of those witnesses' testimony over Moussaoui's objections that the summaries were unreliable, in part due to the interrogation tactics allegedly used to obtain such statements. In what has proven to be a controversial portion of the decision, the Fourth Circuit generally affirmed the use of such redacted witness statements, stating, "we are even more persuaded that the [Redacted] process is carefully designed to elicit truthful and accurate information from the witnesses. . . . [T]he jury should be

⁷¹ United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).

⁷² *Id.* at 457 (describing various conspiracy charges against Moussaoui, including "conspiracy to commit aircraft piracy; conspiracy to destroy air-craft; conspiracy to use weapons of mass destruction; conspiracy to murder United States employees; and conspiracy to destroy property" (citations omitted)).

⁷³ See generally MODEL PENAL CODE § 5.03(1)-(2) (1985) (Proposed Official Draft, 1962) (indicating that "[a] person is guilty of conspiracy with another person or persons to commit a crime if with the *purpose* of promoting or facilitating its commission" and "*knows* that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime" (emphasis added)).

informed that the circumstances were designed to elicit truthful statements from the witnesses.”⁷⁴ The deferential attitude of the Fourth Circuit to the Government’s national security assertions arguably indicates a continuing procedural erosion that those accused of international terrorism may experience in terror trials, including those before domestic courts. This kind of erosion highlights the importance of reexamining the willful blindness doctrine, so that its potentially overinclusive misuse does not exacerbate the problem.

Thus, because domestic terror trials also involve charges requiring a mens rea of knowledge, and because certain procedural erosions in the rights of the accused exist in domestic courts as well, they likewise implicate the lurking problems of overinclusive application of the willful blindness doctrine. In short, the problems implicated (or exacerbated) by abuse of the willful blindness doctrine exist in both military commissions and domestic courts.

2.5. *Foreign Criminal Indictments and Domestic Civil Suits Involving U.S. Officials*

Criticism of U.S. strategy and detainee treatment has inspired both domestic and international lawsuits launched against U.S. political figures. For example, in November 2006, former Secretary of Defense Donald Rumsfeld was indicted in Germany for war crimes for his role in formulating policies leading to the alleged

⁷⁴ *Moussaoui*, 382 F.3d at 478, n.31. To be clear, the Fourth Circuit found no problem with the general process of providing the summaries, stating: “Indeed, organizing and distilling voluminous information for comprehensible presentation to a jury is a hallmark of effective advocacy. In short, while there may be problems with the *manner* in which the Government organized the substitutions, the fact that the Government has attempted such organization is not a mark against it.” *Id.* at 479. However, the Fourth Circuit remanded the case because of the particular manner by which the summaries were organized, and the fact that the jury was not given certain information regarding them. Nonetheless, the Court noted that the District Court retained broad discretion regarding the summaries. *Id.* at 478 (“We agree with the district court that in order to adequately protect Moussaoui’s right to a fair trial, the jury must be made aware of certain information concerning the substitutions. The particular content of any instruction to the jury regarding the substitutions lies within the discretion of the district court. . .”). The Fourth Circuit did not however take issue with the alleged unreliability of the statements elicited through interrogation, stating broadly that “[t]he jury should also be instructed that the statements were obtained under circumstances that support a conclusion that the statements are reliable.” *Id.*

mistreatment and torture of some detainees in U.S. custody.⁷⁵ Other indictments were likewise sought for CIA members allegedly involved in the use of extraordinary rendition.⁷⁶

Similarly, a former detainee launched a civil complaint against current Berkeley law professor John Yoo—a former official in the U.S. Department of Justice—in San Francisco, alleging that he was tortured during his interrogations by the U.S. military.⁷⁷ In that suit, the former detainee claims that the torture he suffered was carried out pursuant to a policy that Yoo and then Assistant Attorney General Jay S. Bybee advocated to the U.S. government in a now infamous August 2002 memo.⁷⁸

Such indictments and civil suits likewise reflect the swell of criticism of U.S. terror prosecution policy in the War on Terror. As this Comment argues below, a reexamination of the willful blindness doctrine would be a valuable step in responding to and addressing such criticism, by helping to restore the procedural integrity of the U.S. terror prosecution paradigm.

3. WILLFUL BLINDNESS AND KNOWLEDGE

As previously alluded to, willful blindness is a theory of liability predicated on knowledge. Put another way, willful blindness is a way of convicting those accused of offenses

⁷⁵ See Adam Zagorin, *Exclusive: Charges Sought Against Rumsfeld Over Prison Abuse*, TIME, Nov. 10, 2006, available at <http://www.time.com/time/nation/article/0,8599,1557842,00.html> (describing charges against Donald Rumsfeld).

⁷⁶ See *id.* (discussing then-ongoing investigations in Germany, Italy and Spain).

⁷⁷ Complaint, *Padilla v. Yoo*, No. 08-0035 (N.D. Cal. Jan. 4, 2008); see also Adam Liptak, *Padilla Sues U.S. Lawyer Over Detention*, N.Y. TIMES, Jan. 5, 2008, at A9 (discussing Padilla's suit and its theoretical underpinnings attributing accomplice liability to Yoo for "[giving] the green light to clearly illegal conduct"); Mike Rosen-Molina, *Padilla Sues Law Professor Who Helped Frame Bush 'Torture' Policy* (Jan. 4, 2008), <http://jurist.law.pitt.edu/paperchase/2008/01/padilla-sues-law-professor-who-helped.php> (describing Padilla's lawsuit and Yoo's background).

⁷⁸ Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, Assistant Attorney General (Aug. 1, 2002), available at <http://f11.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> (examining standards for conducting interrogations under U.S. law implementing the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment). The memo was the subject of vociferous condemnation by human rights advocates. See, e.g., HUMAN RIGHTS FIRST, GONZALES ON TORTURE (Dec. 9, 2004), available at http://www.humanrightsfirst.com/us_law/etn/gonzales/briefs/brief_20041209_Gonz_%20Tort.pdf (criticizing the legal accuracy of the Bybee memo).

requiring a mens rea of knowledge. Thus, this Section begins by analyzing the concept of willful blindness as knowledge in U.S. criminal law, and introducing the potential problems the doctrine creates if abused. The Section continues by briefly examining the concept of knowledge from a philosophical perspective, also discussing its relation to understanding. In doing so, this analysis introduces one potential problem implicated by an overbroad willful blindness doctrine: the imputation of knowledge to a defendant without adequate understanding of the defendant (or that defendant's actual knowledge) by the factfinder. The Section concludes by examining the international criminal law concept of joint criminal enterprise liability—a doctrine which both encompasses and expands willful blindness—to demonstrate the dangerous extremes to which overinclusive interpretation of willful blindness can extend if left unchecked.

3.1. *Theory of Willful Blindness in U.S. Criminal Law*

Several theories have been posited as to the underlying roots of willful blindness.⁷⁹ Many have conceptualized willful blindness as a theory of knowledge in itself.⁸⁰ In this view, some conceive of the willfully blind defendant as having deliberately avoided knowledge of a fact or circumstance in a conscious effort to avoid liability for having such knowledge.⁸¹ Others offer a similar yet distinct interpretation, conceiving of the willfully blind defendant as actually *knowing* of at least a strong probability that the given

⁷⁹ See *United States v. Alston-Graves*, 435 F.3d 331, 338 n.3 (D.C. Cir. 2006) (discussing various theories for willful blindness liability).

⁸⁰ See, e.g., *United States v. Brodie*, 403 F.3d 123, 148 (3d Cir. 2005) (referring to the “willful blindness theory of knowledge”); *United States v. Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000) (stating that willful blindness is a “subjective state of mind that is deemed to satisfy the scienter requirement of knowledge”) (quoting *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 808 (3d Cir. 1994)).

⁸¹ See, e.g., *United States v. Heredia*, 483 F.3d 913, 917, 919–20 (9th Cir. 2007) (en banc) (clarifying the requirement of deliberate action for conviction under willful blindness theory, and approving the use of a two-factor test to determine when to issue a willful blindness instruction); *United States v. Barnhart*, 979 F.2d 647, 651–52 (8th Cir. 1992) (holding that a willful blindness jury instruction “should not be given unless there is evidence to support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.”) (quoting *United States v. Rivera*, 944 F.2d 1563, 1571 (11th Cir. 1991)); see also *United States v. Heredia*, 429 F.3d 820, 824 (9th Cir. 2005) (3-judge panel decision) (requiring that the government prove the required inferences with “specific evidence”).

inculpatory fact or circumstance exists, and then taking deliberate action to avoid confirming that strong probability.⁸² In other words, these latter theorists treat the willfully blind defendant as knowing that an inculpatory fact or circumstance is highly likely and taking conscious steps to avoid directly observing proof of it, in order to avoid making that likelihood a certainty.⁸³ Still others have conceptualized willful blindness slightly differently, by identifying willful blindness as a kind of substitute for knowledge.⁸⁴ A variation on this latter theme refers to willful blindness as a means by which knowledge is understood or implied.⁸⁵

For purposes of this Comment, though, willful blindness can perhaps best be sufficiently understood as the conscious or deliberate avoidance of culpable knowledge—an avoidance which is equally punishable for acquiring positive culpable knowledge.⁸⁶

3.1.1. *Knowledge and Understanding*

As it is in the law, the search for knowledge and truth is also an ageless philosophical pursuit.⁸⁷ The examination of the

⁸² *Heredia*, 429 F.3d at 824–25 (“The purpose of the *Jewell* [willful blindness] instruction is to correct for those cases of ‘willful blindness,’ where the defendant ‘suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended.’” (quoting *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992))).

⁸³ See, e.g., *United States v. Ramsey*, 785 F.2d 184, 190 (7th Cir. 1986) (stating that the “central point” of an ostrich instruction is that a person who has enough knowledge to prompt an investigation and then avoids further knowledge has sufficient knowledge to justify conviction).

⁸⁴ See, e.g., Barry Tarlow, *RICO Report: ‘Willful Blindness’ as an Alternative to Proving Knowledge*, 21 CHAMPION 45, 46 (1997) (criticizing a dissenting judge’s advocacy of using a willful blindness instruction in a case where no objective or subjective evidence of defendant’s guilt was presented as “dangerous reasoning [that] flies in the face of the realities in the legal tax and accounting fields”).

⁸⁵ See Edward J. Krauland and Aaron R. Hutman, *Money Laundering Enforcement and Policy*, 38 INT’L LAW. 509, 514 n.33 (2004) (“It is well established that U.S. courts, where necessary, may apply a conscious avoidance or willful blindness standard to the knowledge element under the U.S. criminal anti-money laundering statutes . . .”).

⁸⁶ See *United States v. Jewell*, 532 F.2d 697, 702–03 (9th Cir. 1976) (“‘[K]nowingly’ in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it.”).

⁸⁷ Some have gone so far as to claim the search for knowledge is rooted in natural law. See ARISTOTLE, *THE METAPHYSICS OF ARISTOTLE* 1 (John H. M’Mahon

components and limits of knowledge has consumed philosophers and scholars alike.⁸⁸ Numerous thinkers have stressed the importance of education and understanding in achieving knowledge,⁸⁹ a view that has become virtually axiomatic over time.⁹⁰ With relevance to the subject of this Comment, under this view, the relationship of knowledge to understanding may have particular salience, in that a factfinder may use willful blindness to determine that a defendant knew of an inculpatory fact or deliberately avoided knowing that fact, while the factfinder may arguably lack sufficient specific understanding of the defendant's background and belief system to impose such knowledge to him.

Alternatively, other thinkers have disagreed with the focus on education for achieving knowledge,⁹¹ stressing the importance of a more experiential basis for understanding.⁹² Similarly, some have posited that one's experiences are not simply the mechanisms by which one attains knowledge, but the endpoints of one's ability to know and understand.⁹³ Thus, this latter view likewise suggests a possible cultural obstacle to understanding and knowing another,⁹⁴

trans., H.G. Bohn 1857) ("All men by nature are actuated with the desire of knowledge . . .").

⁸⁸ See, e.g., DIOGENES LAËRTIUS, *THE LIVES AND OPINIONS OF EMINENT PHILOSOPHERS* 69 (Charles Duke Yonge trans., H.G. Bohn 1853) ("[Socrates] used also to say . . . that he knew nothing, except the fact of his ignorance.").

⁸⁹ See, e.g., Aristotle, *The Nicomachean Ethics*, in 2 *THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1729, 1730* (Jonathan Barnes ed., W. D. Ross trans., Princeton Univ. Press 198) (1984) ("Now each man judges well the things he knows, and of these he is a good judge. And so the man who has been educated in a subject is a good judge of that subject, and the man who has received an all-round education is a good judge in general.").

⁹⁰ See generally FRANK HERBERT, *GOD EMPEROR OF DUNE* 163 (Berkley Books, 1984) (1981) ("[T]he beginning of knowledge [is] the discovery of something we do not understand.").

⁹¹ See, e.g., Heraclitus, *Heraclitus of Ephesus on Nature*, fragment XVI, in *THE FRAGMENTS OF THE WORK OF HERACLITUS OF EPHEBUS ON NATURE* 84, 88 (W.H.S. Jones trans., Press of Isaac Friedenwald 1888) ("Much learning does not teach one to have understanding. . .").

⁹² See, e.g., JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 61 (J.F. Dove 1690) (1828) ("Let us then suppose the mind to be, as we say, white paper, void of all characters, without any ideas; how comes it to be furnished? . . . Whence has it all the materials of reason and knowledge? To this I answer, in one word, from experience; in that all our knowledge is founded; and from that it ultimately derives itself.").

⁹³ See *id.* at 68 ("No man's knowledge . . . can go beyond his experience.").

⁹⁴ See generally Brian Caterino, *Power and Interpretation in MAKING POLITICAL SCIENCE MATTER: DEBATING KNOWLEDGE, RESEARCH, AND METHOD* 137 (Sanford Schram & Brian Caterino eds., NYU Press 2006) ("Neo-Aristotelians limit the

which may limit the factfinder's ability to accurately impute culpable knowledge to a defendant. Such views, of course, do not necessarily indicate a dichotomy in the paths to knowledge; instead, it suffices for the purposes of this Comment to note that multiple avenues for attaining knowledge have been suggested, some focusing on education, and other focusing on the importance of direct experience. Both avenues are particularly relevant to the concept of willful blindness (and knowledge generally), as they highlight some potential limitations on U.S. factfinders' ability to adequately establish terror defendants' liability for offenses requiring a finding of knowledge.

3.2. U.S. Legal Rule on Willful Blindness

The legal rule governing when a willful blindness instruction may be given to a jury may be concisely summarized as follows: a willful blindness instruction is properly given when the jury could find a) that the defendant was subjectively aware of a high probability of the existence of a fact or circumstance, and b) that the defendant deliberately acted (or "closed his eyes") to avoid inculpatory knowledge of that fact or circumstance.⁹⁵

Courts have repeatedly made clear that willful blindness is to be evaluated from the subjective viewpoint of the defendant, rather than from the objective view of a reasonable person in the defendant's situation.⁹⁶ Courts similarly require evidence of the

horizon of the social world to the boundaries of a given culture or ethos shared by members of a community.").

⁹⁵ See *United States v. Leahy*, 445 F.3d 634, 652-54 (3d Cir. 2006); *United States v. Khorozian*, 333 F.3d 498, 508 (3d Cir. 2003) (noting that evidence supported a jury instruction on willful blindness in case where defendants sold repossessed vehicles at above market prices); *United States v. Stewart*, 185 F.3d 112, 126 (3d Cir. 1999) (supporting a willful blindness jury instruction); *United States v. Inv. Enters., Inc.*, 10 F.3d 263, 268 (5th Cir. 1993) (discussing when willful blindness applies).

⁹⁶ See, e.g., *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985) (stating that "the judge's version of the deliberate ignorance instruction must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." (internal quotations omitted)); *Khorozian*, 333 F.3d at 508 (willful blindness instructions are proper when the defendant was "subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." (quoting *Stewart*, 185 F.3d at 126)); *United States v. Oppong*, 165 F. App'x 155, 163 (3d Cir. 2006) (upholding drug trafficking conviction where "the District Court properly focused on the defendants' subjective awareness").

defendant's particularized deliberate avoidance before giving a willful blindness instruction to the jury.⁹⁷ Such evidence may take the form of "overt physical acts" or "purely psychological avoidance," the latter defined as "a cutting off of one's normal curiosity by effort of the will."⁹⁸ Perhaps predictably, courts have struggled to define the parameters for psychological acts of avoidance,⁹⁹ while others have resisted the physical/psychological dichotomization altogether.¹⁰⁰

However, the U.S. Supreme Court has made clear that this subjective awareness requirement is supplemented (or arguably undermined) by allowing juries to rely upon "reasonable inferences" from the evidence.¹⁰¹ Predictably, courts have struggled to define the boundaries of reasonable inferences, acknowledging the potential problems of their elasticity.¹⁰² Moreover, some courts' efforts to rein in the dangers of cascading inferences are frustrated by the settled principle that circumstantial evidence may also support a reasonable inference of knowledge.¹⁰³

⁹⁷ See, e.g., *United States v. Stout*, No. 89-317-1-2-3, 1990 U.S. Dist. LEXIS 12343, at *105-06 (E.D. Pa. Sept. 18, 1990) (holding ostrich instruction proper on remand for mail fraud defendant where evidence showed he acted willful by refusing to consider motions to limit his authority at executive board meetings and refusing to discuss certain expenditures, thus deliberately avoiding learning of his actual lack of authority).

⁹⁸ *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006). The Third Circuit has upheld ostrich instructions regarding deliberate ignorance based on the same two categories of evidence, but it has not specifically identified the categories as such. See, e.g., *United States v. Wasserson*, 418 F.3d 225, 237-39 (3d Cir. 2005); *United States v. Brodie*, 403 F.3d 123 (3d Cir. 2005).

⁹⁹ The Seventh Circuit attempted to clarify the contours of the psychological avoidance category by stating that the cutting off of one's "normal curiosity" must be a deliberate act rather than passive omission. See *Leahy*, 464 F.3d at 796 (acknowledging while there are difficulties in "distinguishing between the cutting off of one's curiosity and a simple lack of effort," the latter is not punishable).

¹⁰⁰ See, e.g., *Wasserson*, 418 F.3d at 237-39 (discussing the defendant's willful blindness as evidenced by physical acts and psychological avoidance without expressly defining each category as distinct).

¹⁰¹ See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 149 n.19 (1994) (stating that a jury may determine the defendant's culpable knowledge by "drawing reasonable inferences from the evidence of defendant's conduct").

¹⁰² See, e.g., *United States v. Bycer*, 593 F.2d 549, 550 (3d Cir. 1979) ("Inferences from established facts are accepted methods of proof when no direct evidence is available. It is essential, however, that there be a logical and convincing connection between the facts established and the conclusion inferred.").

¹⁰³ See, e.g., *United States v. Rahseparian*, 231 F.3d 1257, 1262 (10th Cir. 2000) (stating that circumstantial evidence may support a jury's inference of defendant's

Other courts, however, have been less reticent about expanding the doctrine's reach with regard to inferential proof,¹⁰⁴ arguably exacerbating the problem of the doctrine's current overbreadth.

3.2.1. *Willfulness Versus Negligence*

At its heart, liability under willful blindness requires a mens rea of willfulness or knowledge.¹⁰⁵ This requirement precludes liability for lesser mental states such as recklessness or negligence.¹⁰⁶ Thus, willful blindness requires that the accused be subjectively aware of the inculpatory fact or circumstance, rather than that an objective hypothetical "reasonable person" would have or should have known of the same.¹⁰⁷ Stated another way, merely showing that a defendant *should* have known a fact or

guilt, but that such an inference is reasonable only if the conclusion probably flows from facts, rather than where jury engages in speculation and conjecture leading to a mere guess or possibility).

¹⁰⁴ See, e.g., *United States v. Ramsey*, 785 F.2d 184, 191 n.1 (7th Cir. 1986) (expressing approval of a model jury instruction that includes the sentence: "[i]t is entirely up to you as to whether you find any deliberate closing of the eyes, and the inference to be drawn from any such evidence.").

¹⁰⁵ See generally MODEL PENAL CODE § 2.02(2)(b) (defining "knowingly" as a culpable mental state); *id.* § 2.02(8) ("Requirement of Willfulness [sic] Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully [sic] is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."); see also *id.*

¹⁰⁶ See Hagemann & Grinstein, *supra* note 4, at 223–24 ("As *Jewell* emphasized, however, the concept of willful blindness does not reduce the mens rea requirement of criminal offenses: 'The substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable.' To be convicted of a crime under a willful blindness theory, a defendant must still act consciously to evade conditions that might create criminal liability. Accordingly, willful blindness involves a higher level of criminal intent than mere negligence or recklessness. As the Third Circuit has explained: '[T]he mainstream conception of willful blindness [is that it is] a state of mind of much greater culpability than simple negligence or recklessness, and more akin to knowledge.' Therefore, when individuals are willfully blind, they can be said to have acted culpably, and to punish them for offenses requiring conscious criminal intent comports with the hierarchical design of scienter in the criminal law." (citations omitted)); see also Recent Cases, *Ninth Circuit Holds That Motive Is Not an Element of Willful Blindness*, 121 HARV. L. REV. 1245, 1249 (2008) (arguing that current willful blindness doctrine improperly "occupies a nebulous position between the mens rea standards of knowledge and recklessness"); see generally MODEL PENAL CODE § 2.02(2) (defining and separating four levels of culpability for those who act purposely, knowingly, recklessly, or negligently).

¹⁰⁷ See generally MODEL PENAL CODE § 2.02(5) (explaining that if a defendant satisfies a culpable mental state for an element of an offense, such a mental state also satisfies material elements requiring lesser levels of culpability).

circumstance at issue is insufficient to sustain a conviction for an offense requiring a mens rea of knowledge or willfulness, and thus the same showing is insufficient to permit convicting a defendant based on willful blindness. The same logic applies to the second element of willful blindness, requiring that the defendant act deliberately to avoid culpable knowledge.

3.2.2. *Increasingly Frequent Use and Expansion of the Doctrine in U.S. Law*

The use of willful blindness instructions has increased dramatically in recent years.¹⁰⁸ The increasingly frequent usage of the instructions augments the potential for misunderstanding or misconstruing the doctrine to have a wide impact. However, the problems with the willful blindness doctrine are not only quantitative, but qualitative as well, as courts have been willing to expand the reach of the willful blindness doctrine to both an increasing number and scope of crimes in recent years.

Perhaps the scope extension most salient to this Comment is the newly approved application of the doctrine to cases involving the crime of conspiracy,¹⁰⁹ a frequent charge in terror trials. While

¹⁰⁸ See, e.g., *United States v. Alston-Graves*, 435 F.3d 331, 338 n.2 (D.C. Cir. 2006) (listing numerous recent decisions using willful blindness instructions in a wide range of cases).

¹⁰⁹ For cases upholding the issuance of willful blindness instructions to the jury in conspiracy cases despite defense arguments regarding their logical inconsistency, see, for example, *United States v. Svoboda*, 347 F.3d 471, 479 (2d Cir. 2003); *United States v. Aulicino*, 44 F.3d 1102, 1115 (2d Cir. 1995); *United States v. Inv. Enters., Inc.*, 10 F.3d 263, 268–69 (5th Cir. 1993). For definitions of the crime of conspiracy, see 18 U.S.C. § 371 (1994) (defining the crime of conspiracy as follows: “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”); *United States v. Parks*, 68 F.3d 860, 866 (5th Cir. 1995) (holding that elements of conspiracy include proof of an agreement to commit a crime, knowing participation by the defendant, and an overt act committed in furtherance of the agreement); MODEL PENAL CODE § 5.03(1)–(2) (indicating that “[a] person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission” and “knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime”). See also Todd R. Russell & O. Carter Snead, *Federal Criminal Conspiracy*, 35 AM. CRIM. L.

the dangers of overbroad construction of the willful blindness doctrine extend to all charges requiring a mens rea of knowledge, the specific application to conspiracy charges poses special risks to defendants. Extending willful blindness to conspiracy charges exponentially increases the overbreadth dangers of willful blindness doctrine, as one may infer, *a priori*, the defendant's participation in the conspiracy by circumstantial evidence.¹¹⁰ This danger is heightened further by a widely appreciated prosecutorial affinity for conspiracy charges, and the relative ease with which prosecutors regard conspiracy convictions, as opposed to other charges.¹¹¹ Combined with the permissibility of inferring knowledge from circumstantial evidence, this presents a potentially crippling scenario for defendants. Thus, the expansion of willful blindness doctrine to conspiracy charges may compound the dangers of overbreadth by allowing for convictions based on a stream of cascading inferences which are improperly drawn by the factfinder.

3.3. *Willful Blindness in International Criminal Law: Joint Criminal Enterprise*

While this Comment has thus far discussed domestic law, the criminalization of knowing or willful participation in criminal activity is also common in international criminal law.¹¹² As such,

REV. 739, 741-42 nn.14, 15 (1998) (discussing elements of federal conspiracy in various circuits).

¹¹⁰ See, e.g., *Glasser v. United States*, 315 U.S. 60, 80 (1942) ("Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and collocation of circumstances.'" (internal quotations omitted) (quoting *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1938)).

¹¹¹ See, e.g., *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990) (arguing that the appearance of a conspiracy charge against the defendant "is inevitable because prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge"); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 948 (1987) ("[T]he procedural and evidentiary consequences directly or indirectly associated with a conspiracy charge make conspiracy charges attractive to prosecutors, and create possibilities of abuse."); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1310 n.4 (2003) (discussing the frequency of conspiracy charges being brought in criminal trials). See also Danner & Martinez, *supra* note 50, at 137 (describing conspiracy as the "darling of the U.S. prosecutor's nursery").

¹¹² A representative example of this may be found in the U.N. Convention against Transnational Organized Crime, which reads in relevant part as follows:

Article 5. Criminalization of participation in an organized criminal group.

international criminal law also tacitly accepts the theory of willful blindness as encompassing crimes for which acting knowingly or willfully is a material element of an offense. However, the concept of willful blindness itself is largely eclipsed in international jurisprudence by the more expansive doctrine of joint criminal enterprise liability¹¹³ [hereinafter "JCE"]. As the reader will quickly discern, the dangers of JCE—particularly its overbreadth—largely mirror the dangers of overbroad willful blindness jurisprudence. In this way, the discussion of JCE and its criticism will inform our understanding of willful blindness, and specifically will demonstrate how an extreme construction of willful blindness can endanger a defendant's right to a presumption of innocence.

Under the "implicit" theory of JCE,¹¹⁴ "an individual may be held responsible for all crimes committed pursuant to the existence

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime . . . ;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

United Nations Convention Against Transnational Organized Crime and the Protocols Thereto art. 5(1), *opened for signature* Dec. 12, 2000, S. Treaty Doc. No. 108-16, 2225 U.N.T.S. 209.

¹¹³ See generally Danner & Martinez, *supra* note 50 (discussing the joint criminal enterprise theory of liability and its prevalence in international law).

¹¹⁴ See *id.* at 103 ("The form of liability known as 'joint criminal enterprise' or 'common plan' is not explicitly described in the statute of the ICTY or ICTR,

of a common plan or design . . . if the defendant participates with others in the common design.”¹¹⁵ By way of explanation, three broad categories of JCE liability have been articulated: (1) acting with the same criminal intent pursuant to a common criminal design;¹¹⁶ (2) knowingly participating in a “system[] of ill-treatment” (such as a concentration camp);¹¹⁷ and, in the broadest and most controversial category, (3) common liability for acts by members of the enterprise which are “natural and foreseeable consequence[s]” of the common design.¹¹⁸ The first and second categories may be broadly analogized to a version of conspiracy in U.S. law.¹¹⁹ However, the third category has much more far-reaching consequences, extending liability to a defendant for activities by other members done without that defendant’s knowledge or consent, so long as the others’ activities or their consequences were foreseeable (rather than that they were actually foreseen, for example). Thus, whereas a proper construction of willful blindness theoretically enables liability only for knowledge and intent, JCE allows for liability for knowledge, recklessness,¹²⁰ negligence, or even mere *association*¹²¹ with those involved in a criminal enterprise. This latter scheme provides international

although the judges have found that it is implicitly included in the language of Article 7(1) of the ICTY Statute.”).

¹¹⁵ See *id.* (citing Prosecutor v. Vasiljević, Judgement [sic], ICTY Appeals Chamber, paras. 94–101, Case No. IT-98-32-A (Feb. 25, 2004)).

¹¹⁶ *Id.* at 105.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 106 (stating that a “defendant who intends to participate in a common design may be found guilty of acts outside that design if such acts are a ‘natural and foreseeable consequence of the effecting of that common purpose.’” (quoting Prosecutor v. Tadić, Judgement [sic], ICTY Appeals Chamber, para. 183, Case No. IT-94-1-A (July 15, 1999)).

¹¹⁹ For definitions of conspiracy, see sources cited in note 109, *supra*.

¹²⁰ See Danner & Martinez *supra* note 50, at 102 (stating that under Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR statute a defendant may be found liable for committing or planning to commit a crime if the defendant “intend[s] to plan or . . . commit the crime or [is] ‘aware[] of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.’” (citing Prosecutor v. Kvočka, Judgement [sic], ICTY Trial Chamber, para. 251, Case No. IT-98-30/1-T (Nov. 2, 2001))).

¹²¹ See *id.* at 137 (discussing the potential for JCE defendants to be convicted through guilt by association).

prosecutors with a remarkably powerful weapon which some have argued inequitably tips the scales against the accused.¹²²

Additionally, those convicted under the JCE theory are subject to punishment for all substantive acts of other members of the criminal enterprise.¹²³ Practitioners in the United States may liken this to the concept of *Pinkerton* liability,¹²⁴ whereby the U.S. Supreme Court held that each co-conspirator may be held criminally responsible for substantive criminal acts undertaken in furtherance of the conspiracy.¹²⁵ While such a framework of liability has been sharply criticized and largely rejected in U.S. law,¹²⁶ some have defended the usefulness of JCE's broader scope in the uniquely complex context of international criminal law.¹²⁷

¹²² *Id.* ("Joint criminal enterprise raises the specter of guilt by association and provides ammunition to those who doubt the rigor and impartiality of the international forum. If conspiracy is the darling of the U.S. prosecutor's nursery, then it is difficult to see how JCE can amount to anything less than the nuclear bomb of the international prosecutor's arsenal.") (citations omitted).

¹²³ *Id.* at 115.

¹²⁴ *See id.* at 115-16 (discussing the similarity of JCE to the rejected U.S. doctrine of *Pinkerton* liability); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1785-86 (2005) ("The final type of participation involves criminal acts beyond the common design, but a natural and foreseeable consequence of effecting it. This resembles U.S. rules on *Pinkerton* conspiracies and felony murder and is therefore the most controversial expression of the doctrine." (citations and internal quotations omitted)).

¹²⁵ *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) ("The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. . . . Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. . . . [T]he overt act of one partner in crime is attributable to all. . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense." (citations omitted)).

¹²⁶ The *Pinkerton* theory of liability for substantive acts of co-conspirators has been strongly criticized and rejected by many state courts. *See, e.g.,* *Bolden v. State*, 124 P.3d 191, 198-99 (Nev. 2005) (stating that "the *Pinkerton* rule has garnered significant disfavor" and describing rejection of the theory in several states); *see also* Danner & Martinez, *supra* note 50, at 115-16 ("Today, many U.S. states, as well as the influential Model Penal Code, have rejected *Pinkerton* liability, although it still plays a prominent role in federal prosecutions." (citing SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 693 (7th ed. 2001))).

¹²⁷ *See* Osiel, *supra* note 124, at 1786 ("Enterprise participation appeals to international prosecutors for its reach beyond the formal military hierarchy to civilian bosses and paramilitaries over whom no command is exercised. The doctrine will also be valuable in reaching the many new private armies to which states increasingly subcontract military work, including combat itself. The

Similarly to willful blindness in U.S. domestic courts, the use of and reliance on JCE by international courts is on the rise.¹²⁸

United States courts have not endorsed the concept of JCE specifically, and some state courts have rejected doctrinal variants of it.¹²⁹ However, some scholars have alleged that the theories of liability espoused in U.S. military commissions demonstrate striking similarity to the doctrine.¹³⁰ This alleged similarity should thus inform discussion of the prosecutorial scheme employed in the War on Terror against those accused of acts of international terrorism. While JCE may not be specifically used in military commissions, such criticism should cause us to examine the dangers of overbreadth and guilt-by-association techniques which may contribute to such prosecutions. Additionally, it is particularly poignant then that the JCE doctrine has been criticized on substantially similar grounds to that of the willful blindness doctrine,¹³¹ and likewise has been the subject of many calls for reform.¹³²

amplitude and elasticity of enterprise participation lets indictments transcend the confines of a bureaucracy to the informal networks connecting it to other individuals and organizations, often exercising greater power than many within." (citations omitted)).

¹²⁸ See Danner & Martinez, *supra* note 50, at 107 ("Joint criminal enterprise is becoming increasingly important at the ICTY. One indication of its centrality to contemporary ICTY practice is the frequency with which recent indictments have rested the accused's liability on this basis." (citation omitted)).

¹²⁹ See, e.g., *Oates v. State*, 627 A.2d 555, 559 (Md. Ct. Spec. App. 1993) ("Each joint participant in a crime enjoys a unique level of blameworthiness that neither controls nor is controlled by the level of blameworthiness of any other joint participant.").

¹³⁰ See Danner & Martinez, *supra* note 50, at 80 ("The military commissions instituted by the U.S. government to try suspected terrorists include both command responsibility and a liability theory that closely resembles joint criminal enterprise, and the first indictments of Guantanamo detainees implicitly rely on this joint criminal enterprise theory of liability." (citation omitted)).

¹³¹ Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 167-76 (2007) (discussing perceived conflicts in JCE doctrine, particularly with regard to the requisite level of culpability for conviction).

¹³² See Danner & Martinez, *supra* note 50, at 79 ("[I]f not limited appropriately, [the doctrine of joint criminal enterprise liability has] the potential to lapse into forms of guilt by association, thereby undermining the legitimacy and the ultimate effectiveness of international criminal law. Doctrinal reforms may help avoid this danger."). One of the most frequently suggested reforms includes adopting a substantial contribution requirement, thus requiring a stronger showing of intent on the part of the defendant member of the criminal enterprise, in order to minimize the risk of mere guilt by association. See, e.g., Jacob A. Ramer, *Hate by Association: Joint Criminal Enterprise Liability for*

In the broader scheme, the United States has shown ambivalence toward the applicability of international law concepts in domestic courts. While the Supreme Court noted many years ago that international law is part of U.S. law,¹³³ some courts have only recently embraced applying it in U.S. cases.¹³⁴ The current Supreme Court has been divided on the applicability of international law to domestic cases.¹³⁵ That division leaves the applicability of specific international law concepts such as JCE in flux going forward within the U.S. domestic prosecutorial scheme. However, as alluded to earlier, the specific dangers of overinclusive JCE jurisprudence internationally mirror the dangers

Persecution, 7 CHI.-KENT J. INT'L COMP. L. 31, 110-12 (2007) (recommending the addition of a substantial contribution requirement).

¹³³ See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

¹³⁴ See generally Associated Press, *Supreme Court Justices Spar over International Law*, Jan. 18, 2005, <http://www.law.com/jsp/article.jsp?id=1105364112559> (discussing Justice Scalia's critique of U.S. judges relying on international law to decide cases); BLAKESLEY, *supra* note 5, at 307 (discussing the Bush administration's antipathy toward customary international law and the International Criminal Court). *But see* *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (holding that military commissions at Guantanamo Bay violated Common Article 3 of the Third Geneva Convention).

¹³⁵ For an illustrative example of the competing arguments between Supreme Court justices on the issue within a single case, compare *Medellín v. Texas*, No. 06-984, 2008 WL 3821478 (U.S. Aug. 5, 2008) (per curiam) (arguing that Congressional failure to properly "implement" the Vienna Convention on Consular Relations—a treaty to which the U.S. is a party—renders U.S. courts free to disregard both it and an ICJ decision interpreting it in deciding whether a violation of it justifies granting a convicted defendants' request for a stay of execution in part because the treaty "does not itself have the force and effect of domestic law sufficient to set aside the judgment or the ensuing sentence") with *Medellín v. Texas*, No. 06-984, 2008 WL 3821478, *4 (U.S. Aug. 5, 2008) (Breyer, J. dissenting) (arguing that the Court's failure to grant the defendants' requested stay of execution "places the United States irremediably in violation of international law and breaks our treaty promises;" recommending that the Court seek the views of the Solicitor General to determine the proper resolution of the case). See also *Medellín v. Texas*, 128 S. Ct. 1346, 1359-67 (2008) (majority opinion) (arguing that ICJ judgments are not "automatically enforceable" in U.S. courts under the U.N. Charter, particularly where the underlying treaties giving rise to the cause of action are not "self-executing"); *id.* at 1389 (Breyer, J. dissenting) (arguing that "the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. . . . [T]he ICJ judgment before us is judicially enforceable without further legislative action.").

of overinclusive willful blindness jurisprudence domestically, and are useful to inform any discussion of willful blindness. Thus, while JCE is not specifically applied under the U.S. prosecution scheme against terror defendants, the concerns and critiques that have been lodged against the doctrine should inform our evaluation of the willful blindness doctrine and the latter's application to such defendants.

4. CRITICISM AND IMPROPER USE OF THE WILLFUL BLINDNESS DOCTRINE

Several arguments strongly criticizing the willful blindness doctrine exist, attacking it on multiple fronts. However, the central practical criticism of the doctrine as it exists today is rooted in a failure to properly explain its requirement of willfulness, and a concurrent failure to distinguish willfulness from the lesser mens rea of negligence. These failures have led to a confused doctrinal application and the real threat of overinclusive convictions. These critiques are relevant to one's understanding of what willful blindness is, how it may be improperly used, and how it ought to be properly applied. Additionally, these critiques highlight some of the problems and dangers of the willful blindness doctrine and why, as this Comment argues, a reexamination of the doctrine is essential to ensure that it is used properly, particularly in the cases of those accused of acts of international terrorism.

This Section examines the confusion in current willful blindness doctrine, focusing on the central problem of its failure to effectively distinguish willfulness from negligence. The Section then examines the related problem of overly complex jury instructions on willful blindness. It concludes with some courts' suggested approaches for reforming and limiting the willful blindness doctrine.

4.1. *Confusion Between Willfulness/Knowledge and Negligence*

Judge Richard Posner eloquently identified what many have found to be the central problematic issue posed by willful blindness instructions, stating:

The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent. The criticism can be deflected by thinking carefully about just

what it is that real ostriches do They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. A deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires.¹³⁶

As Judge Posner implies, while willful blindness is meant to permit convictions for those who make a “deliberate effort” to avoid inculpatory knowledge, if the factfinder does not properly appreciate the distinction between the deliberate actor and the negligent actor—the distinction between the ostrich who buries his head in the sand and the merely “careless birds”—that confusion may lead factfinders to convict the latter improperly. Posner also suggests that for a willful blindness conviction to occur, the factfinder must determine that the defendant is more like the ostrich—the defendant “takes steps” to deliberately avoid culpable knowledge—than a careless bird, who ought to have known the culpable fact or circumstance but did not. In short, a factfinder who misconstrues the proper meaning of willful blindness liability by failing to fully understand that distinction may improperly convict a defendant for a knowledge-based offense when the defendant was merely negligent. Numerous scholars have echoed this criticism.¹³⁷

¹³⁶ United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990) (citations omitted) (reversing gambling conviction in part due to an improper willful blindness instruction).

¹³⁷ See, e.g., *Ninth Circuit Holds That Motive Is Not an Element of Willful Blindness*, *supra* note 106, at 1249–50 (“An instruction that does not distinguish between more and less culpable forms of willful blindness lowers the underlying crime’s mens rea standard from knowledge to recklessness, potentially leading to unfair convictions.”); Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2248 (1993) (“[A] jury may indeed interpret deliberate ignorance to mean that the defendant may be convicted because she should have known the fact—i.e., a negligence standard [A]llowing a jury instruction that facilitates conviction only when the government presents a weaker case.” (emphasis omitted)); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 227–31 (1990) (criticizing willful blindness instructions’ tendency to permit convictions for offenses requiring willfulness with mere proof of negligence).

This confusion or conflation between knowledge and negligence is perhaps the central fault line demonstrating how the willful blindness doctrine, when misconstrued overbroadly, poses real dangers to defendants of overinclusive convictions. This concern is particularly heightened where the conviction of a terror defendant often results in execution. The consequences of improperly lowering the mens rea for an offense may be dire for defendants, who may be unjustly convicted of offenses based on that impropriety. What this means is that a misconstrual of willful blindness which does not clearly outline the requirements of willfulness versus negligence risks the conviction and subsequent execution of those who are merely negligent, but are charged with acts requiring knowledge. While this concern applies with special relevance to terror trials, it is clear that the problem of improper convictions based on misconstrual of doctrinal mens rea requirements is one that should be examined in other contexts as well.

4.1.1. *Complexity of Willful Blindness Jury Instructions*

Courts and scholars have identified numerous reasons for the problem of improperly overbroad and misunderstood application of willful blindness liability. One key factor contributing to this problem is undoubtedly that of virtually incomprehensible jury instructions on willful blindness. Often delivered in extraordinarily complex legalese, such jury instructions may often be of little use to a lay juror, who arguably cannot be expected to comprehend the subtle distinctions obscured by such language.

Two representative examples help illustrate this point. First, the Eighth Circuit's model jury instruction on willful blindness states in relevant part, "[t]he element of knowledge may be inferred if the defendant deliberately closed [his] eyes to what would otherwise have been obvious You may not find the defendant acted 'knowingly' if you find he/she was merely negligent, careless or mistaken."¹³⁸ Second, the Seventh Circuit's model instruction on knowledge tells jurors that to act "knowingly" means "that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act

¹³⁸ JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 7.04 (2006) [hereinafter 8TH CIR. INSTRUCTIONS] (citations and internal brackets omitted).

through ignorance, mistake or accident.”¹³⁹ The Seventh Circuit further instructs that a juror “may infer knowledge from a combination of suspicion and indifference If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly.”¹⁴⁰ Moreover, the Seventh Circuit instruction never mentions the phrase willful blindness or its equivalents; instead, it subsumes the concept into the general ambit of knowledge.

While such instructions mention the distinction between willfulness and negligence, it is at least doubtful that the lay juror will understand that distinction absent further explanation. Such obtuse language assumes knowledge of legal subtleties rarely shared by lay-jurors. Similarly, while the above instructions do mention the exceptions of negligence and mistake, they bury the concepts in jargon and the passive voice. As a result, the instruction may fail to convey the subtle distinction between inferential knowledge and negligence to lay jurors, thus rendering it largely ineffective in promoting a proper application of the willful blindness theory.¹⁴¹

One may take solace in the fact that judges have discretion in altering the language of a model jury instruction.¹⁴² Nonetheless, judges may be swayed by the legislature’s ironic commentary that model instructions are drafted with the intention of being “clear, brief and simple instructions calculated to maximize jury

¹³⁹ COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 4.06 (1998) [hereinafter 7TH CIR. INSTRUCTIONS].

¹⁴⁰ *Id.*

¹⁴¹ Some have gone so far as to argue that willful blindness instructions which are constructed or issued inappropriately may implicate violations of a defendant’s constitutional rights. See Linda S. Eads, *From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof*, 79 CAL. L. REV. 1421, 1482 (1991) (criticizing appellate courts that affirm convictions such as those with willful blindness instructions based on insufficient circumstantial evidence, saying, “[a]ffirming such convictions thus seems ‘fair’ in a moral sense. But it is not fair in a constitutional sense”).

¹⁴² See 8TH CIR. INSTRUCTIONS, *supra* note 138, at introductory note (“These are intended to be model, not mandatory, instructions and should be modified as appropriate to more clearly and precisely present issues to the jury.”); see also *United States v. Goldblatt*, 813 F.2d 619, 623 (3d Cir. 1987) (“It is . . . within the sound discretion of the trial judge to determine the particular language to be employed when charging the jury.” (citations omitted)).

comprehension.”¹⁴³ While some have scoffed at such an assertion,¹⁴⁴ evidence suggests that judges often rely upon model instructions.¹⁴⁵ Alternatively, some have argued the willful blindness doctrine has become so muddled that judges themselves confuse the mens rea requirement,¹⁴⁶ resulting in an ambiguous formulation of instructions designed at their discretion.¹⁴⁷ With these factors in mind, it is perhaps unsurprising that courts’ individualized instructions have done little to remedy the complexity problem.¹⁴⁸

Some courts have attempted to add clarity to jury instructions on willful blindness. One such example, upheld by the Third Circuit in 2006 in *United States v. Oppong*, stated:

[T]he element of knowledge may be satisfied by inferences from the proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.

¹⁴³ See 8TH CIR. INSTRUCTIONS, *supra* note 138, at introductory note (“We recognize that the manner of instructing a jury varies widely among judges, but these models are offered as clear, brief and simple instructions calculated to maximize jury comprehension.”).

¹⁴⁴ See Mark D. Yochum, *The Death of a Maxim: Ignorance of Law is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN’S J. LEGAL COMMENTARY 635, 665 (1999) (citing imprecise drafting as a principal cause of the confusion over proper application of the willful blindness doctrine).

¹⁴⁵ See, e.g., 7TH CIR. INSTRUCTIONS, *supra* note 139, § 4.06 committee comment (listing numerous cases approving the model instruction).

¹⁴⁶ See Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1382–90 (1992) (discussing confusion over the willful blindness doctrine and stating that “most definitions of wilful ignorance delineate a mens rea that is the equivalent neither of knowledge nor recklessness”).

¹⁴⁷ See Marcus, *supra* note 137, at 2257 (discussing courts’ confused understandings of the concept of knowledge as contributing to problematic application of the “vague and misleading notion of conscious avoidance”).

¹⁴⁸ See, e.g., *United States v. de los Santos*, 163 F. App’x 132, 135 (3d Cir. 2006) (“A finding beyond a reasonable doubt of an intent of defendants to avoid knowledge or enlightenment would permit the jury to find knowledge. Stated in another way, a person’s knowledge of a particular fact may be shown from a deliberate or intentional blindness to the existence of that fact.”); *United States v. Ramsey*, 785 F.2d 184, 191 (7th Cir. 1986) (affirming fraud conviction, while proposing that future Seventh Circuit juries be instructed that “[a] finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.”); *United States v. Whittington*, 26 F.3d 456, 461–62 (4th Cir. 1994) (“If you find that the defendant or defendants did not learn about the true nature of an existing fact . . . deliberately . . . for the very purpose of being able to assert ignorance at a later time, then you may infer and find that he had the full equivalent of knowledge because one’s self-imposed ignorance cannot protect him from criminal liability.”).

In other words, you may find such knowledge established if you find that the defendant was aware of the high probability of the existence of a fact and failed to take action to determine whether or not it was true. The defendant cannot be convicted for being stupid, negligent, or mistaken. More is required In short, if the evidence shows that the defendant did not know, then he must be acquitted. If the evidence indicates that he was very stupid . . . or ignorant, then he cannot be convicted. But if the evidence shows that there was a high probability that the defendant himself knew something was amiss and that he acted with deliberate disregard for a high probability that illegal activity was occurring, then you may find that the defendant had guilty knowledge¹⁴⁹

Here, the court makes a commendable effort to craft a legally sufficient instruction in plainer language which is more accessible to a juror, while clearly spelling out the necessary mens rea distinctions. While the instruction still maintains some complexity initially, it appears to make strong strides toward simplification in the end, thereby assisting the factfinder in understanding the issue.

Critics may argue, however, that countervailing problems are implicated by oversimplification; plainer language in a willful blindness instruction may obscure subtle distinction at the expense of general comprehensibility. For example, the *Oppong* instruction's sentence regarding the defendant's *failure* to take action may undesirably blur the distinction between acts and omissions. Similarly, some may argue that the instruction implicitly dilutes the knowledge requirement, holding the defendant liable simply for knowing "something was amiss" rather than for deliberately avoiding inculpatory knowledge.¹⁵⁰ While these criticisms are valid, the plain-language approach employed

¹⁴⁹ 165 F. App'x 155, 162 n.5, 163 (3d Cir. 2006) (upholding drug trafficking conviction based on willful blindness theory where "the District Court properly focused on the defendants' subjective awareness").

¹⁵⁰ The appellant in *Oppong* argued this very point. Nonetheless, the Third Circuit upheld the instruction, noting that it had previously upheld similar wording and related variations. *Id.* (citing *United States v. Titchell*, 261 F.3d 348, 351 (3d Cir. 2001) (wording the portion of instruction as "deliberate disregard of the truth"); *United States v. Caminos*, 770 F.2d 361, 366 (3d Cir. 1985) (wording the portion of instruction as "high probability that he knew something was amiss"))).

in the *Oppong* instruction is at least a small step forward in addressing the problem of comprehensibility.

4.2. Court Criticisms and Suggested Reforms

Some courts have resisted the trend of increased reliance on willful blindness instructions by questioning the doctrine or recommending reforms. While some of these courts have done little more than acknowledge skepticism regarding the doctrine,¹⁵¹ others have posited that logical inconsistencies in the theory and doctrine render it largely questionable.¹⁵²

Such arguments may prove instructive to a reexamination of the doctrine of willful blindness. However, it is important to note that these criticisms do not necessarily imply that the *concept* of willful blindness is inherently flawed. As this Comment argues, the need to provide a framework for liability for those who act deliberately to avoid culpable knowledge is real, but so too is the need to ensure that such a framework does not improperly ensnare those with lesser states of culpability.

Other courts have suggested broader limitations on willful blindness instructions which may potentially improve the doctrine going forward. Specifically, the Ninth Circuit in *United States v. Heredia*¹⁵³ acknowledged the “vexing thicket of precedent” regarding willful blindness and sought to clarify its scope.¹⁵⁴ As a

¹⁵¹ *United States v. Adams*, 63 M.J. 223, 265–66 (C.A.A.F. 2006) (referring to the willful blindness doctrine as a “legal fiction”).

¹⁵² *See, e.g., United States v. Alston-Graves*, 435 F.3d 331, 337, 337 n.1 (D.C. Cir. 2006) (“It makes obvious sense to say that a person cannot act ‘knowingly’ if she does not know what is going on. To add that such a person nevertheless acts ‘knowingly’ if she intentionally does not know what is going on is something else again. . . . [I]t is hard to see how ignorance, from whatever cause, can be knowledge.”); Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 52 (1994) (“[I]t is hard to see how ignorance, from whatever cause, can be knowledge. A particular explanation of why a defendant remains ignorant might justify treating him *as though* he had knowledge, but it cannot, through some mysterious alchemy, convert ignorance into knowledge.”); THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS, com. to instr. 5.06 (“Other circuits have recognized that the willful blindness instruction is problematic, because it seems inconsistent to say that awareness can be proved by evidence that the defendant avoided awareness . . .”).

¹⁵³ *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc).

¹⁵⁴ *Id.* at 919 (“Here, we recognize that many of our post-*Jewell* cases have created a vexing thicket of precedent that has been difficult for litigants to follow and for district courts—and ourselves—to apply with consistency. But, rather

preliminary matter, the court stated that willful blindness instructions should be given only rarely, and at a judge's discretion after a specific factual inquiry.¹⁵⁵ The court then distinguished the propriety of a willful blindness instruction versus an instruction on the defendant's actual knowledge, stating that a judge should only issue a willful blindness instruction where the jury has rejected the government's claim of actual knowledge, or where they could rationally distinguish between actual knowledge and willful blindness.¹⁵⁶ Additionally, the court stated that willful blindness instructions should only be used when the government presents evidence that: (1) the defendant had actual suspicion of involvement in a crime; and (2) the defendant deliberately avoided verifying such suspicions.¹⁵⁷

Curiously, however, the full Ninth Circuit appeared to minimize concerns raised by the previous panel decision regarding the risks of unjust convictions for negligence¹⁵⁸ and overinclusive

than overturn *Jewell*, we conclude that the better course is to clear away the underbrush that surrounds it.”).

¹⁵⁵ *Id.* at 924 n.16 (discussing precedent stating that willful blindness instructions should be given rarely, but specifying that such precedent does not create a separate substantive restriction on the doctrine).

¹⁵⁶ *Id.* at 922 (“When knowledge is at issue in a criminal case, the court must first determine whether the evidence of defendant’s mental state, if viewed in the light most favorable to the government, will support a finding of actual knowledge. If so, the court must instruct the jury on this theory. Actual knowledge, of course, is inconsistent with willful blindness. The deliberate ignorance instruction only comes into play, therefore, if the jury rejects the government’s case as to actual knowledge. In deciding whether to give a willful blindness instruction, in addition to an actual knowledge instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government’s evidence of actual knowledge. If so, the court may also give a *Jewell* instruction.”).

¹⁵⁷ *Id.* at 919–20; accord *United States v. Inv. Enters., Inc.*, 10 F.3d 263, 268 (5th Cir. 1993) (expounding substantially the same rule). The full Ninth Circuit in *Heredia* overruled a third element suggested by the Circuit’s previous three-judge panel ruling which would have additionally required a showing that the defendant deliberately avoided acquiring inculpatory knowledge with the intent to avoid prosecution. *Heredia*, 483 F.3d at 920–21; see also *Ninth Circuit Holds That Motive Is Not an Element of Willful Blindness*, *supra* note 106 (criticizing the en banc Ninth Circuit’s overruling of the motive prong).

¹⁵⁸ Compare *Heredia*, 483 F.3d at 923 (“We do not share the worry, expressed in some of our cases, that giving both an actual knowledge and a deliberate ignorance instruction is likely to confuse the jury.”) with *United States v. Heredia*, 429 F.3d 820, 824 (9th Cir. 2005) (3-judge panel decision) (citing *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1988)) (“The instruction should therefore be rarely given because of the risk that the jury will convict on a standard of negligence: that the defendant *should* have known the conduct was illegal.”)

abuse. The en banc Ninth Circuit specifically stated that, “[a] jury is presumed to follow the instructions given to it, and we see no reason to fear that juries will be less able to do so when trying to sort out a criminal defendant’s state of mind than any other issue.”¹⁵⁹ A previous three-judge panel of the court was far less optimistic on the latter points, stating that “[t]he government may not request a [willful blindness] instruction to close the gaps in its case. . . . If we were to permit the issuance of the [willful blindness] instruction absent specific evidence that the defendant ignored the truth in order to provide herself with a defense, the deliberate ignorance doctrine in this circuit would slide perilously close to negligence or even strict liability.”¹⁶⁰

The concerns raised by the Ninth Circuit above should be particularly instructive to a reexamination of the willful blindness doctrine in the current context. Despite the en banc Ninth Circuit’s criticism, the risk of confusion between actual knowledge and willful blindness should be considered by judges before issuing a willful blindness instruction. In addition, such instructions should contain a clear, plain-language distinction between deliberate, willful avoidance and mere negligence. Such instructions should make absolutely clear that the former satisfies the knowledge requirement in willful blindness, whereas the latter cannot. Contrary to the Ninth Circuit’s en banc decision, such concerns of mens rea confusion amongst jurors must be addressed and remedied if the doctrine is to maintain its proper purpose in convicting only those who acted willfully. These concerns of overinclusiveness and excessive prosecutorial zeal are particularly acute in light of other substantive and procedural restrictions already acting on those accused of acts of international terrorism in the current U.S. prosecutorial scheme.

(internal quotes omitted, emphasis in original)). The full Ninth Circuit in *Heredia* did, however, amend the panel decision to clearly spell out the differences between the various culpable mental states. 483 F.3d at 917 (amending footnote in previous panel opinion to read: “As our cases have recognized, deliberate ignorance, otherwise known as willful blindness, is categorically different from negligence or recklessness. A willfully blind defendant is one who took deliberate actions to avoid confirming suspicions of criminality. A reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; a negligent defendant is one who should have had similar suspicions but, in fact, did not.” (citations omitted)).

¹⁵⁹ *Heredia*, 483 F.3d at 923.

¹⁶⁰ 429 F.3d at 825, 830.

5. SPECIFIC DANGERS OF THE WILLFUL BLINDNESS DOCTRINE IN THE WAR ON TERROR

As one writer has argued, the September 11, 2001 terrorist attacks brought the dangers of terrorism into our collective consciousness, while simultaneously raising the countervailing danger of reacting to terrorism with corrosive or overinclusive policies.¹⁶¹ In light of the domestic and international criticism noted above, this Section argues that the U.S. government has underappreciated that danger in the prosecutorial scheme of the War on Terror. With these concerns in mind, reexamination and restraint of the willful blindness doctrine would be a small step toward addressing the danger of such overreaching, and thus toward improving the procedural propriety of our legal system. In short, this Section argues in part that because detainees' procedural rights are largely abrogated through adjudicative mechanisms of the War on Terror, improper use of the willful blindness doctrine may serve to abrogate the mens rea requirements used to convict them as well. Doing so unduly undermines the legitimacy of the legal process, and thus the perceived legitimacy of U.S. terror prosecutions and foreign policy. As a result, this Section recommends both reexamination and more cautious application of the willful blindness doctrine as a small step toward reform, focusing on danger specific to (though not exclusive to) defendants in the War on Terror.

This Section examines specific arguments for reexamining the willful blindness doctrine with regard to detainees. These reasons include the dangers of overinclusive convictions, the limitations of knowledge and understanding by factfinders, the finality of execution as punishment, and the potential use of the doctrine in a coercive manner. The Section concludes with a discussion of potential critical responses to these arguments.

5.1. *Overinclusiveness*

An unduly broad application of the willful blindness doctrine raises the real threat of overinclusive convictions. Specifically, by

¹⁶¹ BLAKESLEY, *supra* note 5, at 35 ("Since September 11, 2001, we in the United States, and elsewhere have been caused to face not only the dangers of expected terrorism against us, but we must also face dangers associated with possible implementation of reactive draconian criminal laws, procedures, and methods that risk eroding our values, our protections, and liberties." (citations omitted)).

confusing or improperly lowering the mens rea required to convict a defendant, misconstrual of the willful blindness doctrine creates the risk that defendants may be convicted for offenses requiring knowledge, where they did not have the requisite knowledge as defined by law. This, at the simplest level, could thus result in convictions of defendants for offenses they did not commit. More largely, this could exacerbate the expansion of the willful blindness doctrine beyond the confines of offenses requiring willfulness.

At worst, use of the doctrine as currently misconstrued risks penalizing terror defendants for mere association¹⁶² with blameworthy persons, and doing so at the same level as knowing or intentional participants.¹⁶³ Guilt by association is insufficient to convict criminal defendants, including even for conspiracy charges.¹⁶⁴ As a result, it would be plainly improper to use the willful blindness doctrine to convict defendants who did not possess the requisite knowledge. Properly narrow construction of the doctrine is necessary to avoid that impropriety.

More narrowly, as discussed above, failure to reform the current doctrine may result in the improper conflation of willfulness with negligence.¹⁶⁵ Some judicial rhetoric indicates that

¹⁶² See generally Danner & Martinez, *supra* note 50, at 79 (“[I]f not limited appropriately, [the doctrine of joint criminal enterprise liability has] the potential to lapse into forms of guilt by association, thereby undermining the legitimacy and the ultimate effectiveness of international criminal law. Doctrinal reforms may help avoid this danger.”).

¹⁶³ See generally MODEL PENAL CODE § 2.02(2) (defining and separating four levels of culpability for those who act purposely, knowingly, recklessly, or negligently).

¹⁶⁴ See *United States v. Diaz*, 864 F.2d 544, 551 (7th Cir. 1988) (“[M]ere association with conspirators or those involved in a criminal enterprise is insufficient to prove defendant’s participation or membership in a conspiracy.”); *United States v. Moya-Gomez*, 860 F.2d 706, 759 (7th Cir. 1988) (“[P]resence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy.” (quoting *United States v. Mancillas*, 580 F.2d 1301, 1308 (7th Cir. 1978))); see also FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, instr. 5.11(a) (1999) (disallowing convictions for mere presence at the scene of a crime or association with participants of a crime without a showing of knowledge that the crime was being committed).

¹⁶⁵ See generally Danner & Martinez, *supra* note 50, at 79 (“[W]e argue that certain forms of joint criminal enterprise and command responsibility that tolerate a reduced mens rea should not be used in cases involving specific intent crimes such as genocide and persecution. With respect to command responsibility, we argue that something more than ordinary negligence should remain the touchstone for criminal liability.”)

such a risk may be dangerously unappreciated.¹⁶⁶ This concern may be particularly relevant to prosecutors attempting to have lesser figures in the War on Terror strike deals in exchange for implicating more senior terrorist leaders. Furthermore, even assuming that the innocent-coercion problem noted above is not implicated, and that the lesser figure is culpable, the problem of overinclusiveness remains, in that it risks ensnaring those who do not possess the requisite culpable knowledge. In the end, this conflation could also lead to a greater exacerbation of the problem of an overinclusive willful blindness doctrine, by creating a slippery slope of expanding precedent. This would create the obvious risk of an overinclusive doctrine which may punish the guilty few but at the cost of potentially ensnaring the innocent, a result that would be inconsistent with Constitutional guarantees of a presumption of innocence.¹⁶⁷

In the specific context of the War on Terror, failure to reexamine the willful blindness doctrine could thus result in an increase in the quantity of convictions without a corresponding increase in their qualitative legitimacy. For example, it could result in a high rate of convictions for lower-level couriers and middlemen for terrorists, rather than higher-level terrorist leaders and financiers. While such convictions are of course extremely valuable in themselves,¹⁶⁸ this result would be only loosely

¹⁶⁶ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 694 (2006) (Thomas J., dissenting) (“[U]nlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the killing [and] disabling . . . of peaceable citizens or soldiers.”) (internal quotation marks omitted).

¹⁶⁷ See generally *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty.”).

¹⁶⁸ See Amos Guiora, *Using and Abusing the Financial Markets: Money Laundering as the Achilles' Heel of Terrorism*, 29 U. PA. J. INT'L L. 59, 60 (2007) (“There may be hundreds of men and women willing to carry a bomb, but operationally eliminating one of them merely makes room for another. However, only a small number of people act as financiers of such attacks. Thus, while the use of military and law enforcement in counterterrorism operations achieves the “on-the-ground” objectives of rooting out terrorists, legislators must take proactive steps to permanently close the loopholes easily used by unscrupulous investors. Terror financiers are fewer and further between and thus have a far greater individual impact on terrorism themselves. Therefore, eliminating a single terror financier will have a greater impact on preventing attacks than will merely eliminating a few bomb-carriers. As such, the bull’s-eye of counterterrorism must be expanded to larger concentric circles that include not only the fighters, but also those providing material support. This discussion does not argue for the killing of such

consistent with the stated goals of the War on Terror.¹⁶⁹ However, if the doctrinal underpinnings of such convictions are not properly sound, such convictions risk exacerbating domestic and international perception of the U.S. terror prosecution scheme as unjustly theatrical.¹⁷⁰

5.2. *Limitations of Knowledge and Understanding by Factfinders*

As previously alluded to, cultural differences between American factfinders (civilian or military) and foreign defendants may adversely impact understanding such defendants, and thus adversely impact their ability to accurately determine such defendants' knowledge. Many scholars have characterized the underpinnings of the War on Terror as ideological and cultural in nature.¹⁷¹ Furthermore, some have specifically noted the unique problems created by cultural and ideological differences between the United States and Middle Easterners in the context of the War on Terror, saying: "[Americans] certainly must understand our own tendency to demonize . . . those of other cultural backgrounds, religions, races, or views. . . . We have already begun to demonize the Al Qaeda gang and the Taliban, especially those in detention"¹⁷²

financiers, but rather for an acknowledgment that these individuals must be pursued with the same intensity as the bomb-carriers themselves.").

¹⁶⁹ See 2002 NATIONAL SECURITY STRATEGY, *supra* note 1, at 1 ("The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better. Our goals on the path to progress are clear: political and economic freedom, peaceful relations with other states, and respect for human dignity.").

¹⁷⁰ See generally *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) ("When structure fails, liberty is always in peril."); Danner & Martinez, *supra* note 50, at 97 ("[P]roceedings perceived as illegitimate are not likely to foster peace and reconciliation.").

¹⁷¹ See, e.g., Robert L. Phillips, *The War Against Pluralism*, in *TERRORISM AND INTERNATIONAL JUSTICE* 101, 110-11 (James B. Sterba ed., 2003) ("[I]t is important to hold before us constantly the fact that we are involved in a culture war."); Louis P. Pojman, *The Moral Response to Terrorism and Cosmopolitanism*, in *TERRORISM AND INTERNATIONAL JUSTICE* 135, 138 (James B. Sterba ed., 2003) (characterizing the September 11, 2001 terrorist attacks as "rooted in culture, namely a religious worldview and practice").

¹⁷² BLAKESLEY, *supra* note 5, at 234-35 (internal quotation marks omitted); see also Naji Abi-Hashem, *Peace and War in the Middle East: A Psychopolitical and Sociocultural Perspective*, in *UNDERSTANDING TERRORISM*, *supra* note 11, at 69, 80-85 (discussing several causes of anti-American sentiment in the Arab Islamic world, including a perceived "Cultural and Moral Invasion").

This tendency to classify foreign defendants as fundamentally different or “other” out of fear understandably may compromise U.S. factfinders’ ability to reason fairly and objectively regarding the defendant.¹⁷³ On this issue, other scholars have identified difficulties posed by trying potential terror defendants with value systems radically different from typically Western values produced as a result of such a cultural divide.¹⁷⁴ Similar difficulties exist in asking American factfinders to determine the boundaries of “reasonable inferences” to be drawn from the circumstances presented to them to establish a foreign defendant’s liability.¹⁷⁵ Factfinders may unintentionally conflate differences in values (specifically hostility toward America or Western values generally) with willful blindness of or complicity in terrorist plots, resulting in convictions for blameless defendants. This potential problem is arguably even more pronounced in military commissions than in U.S. domestic courts due to the fact that the defendant is often represented by a member of the military that is prosecuting him.¹⁷⁶ This cultural obstacle must be taken into account when

¹⁷³ See BLAKESLEY, *supra* note 5, at 297 (“Sadly, many of us tend to distrust, denigrate, and discriminate against those whom we perceive as being different from us, especially if we are made to be afraid of them.”).

¹⁷⁴ See Pojman, *supra* note 172, at 139 (“It is hard to reason with religious fundamentalists, for they generally hold their faith or religious assumption to trump what we in the West call *reason*. Reason, for them, always functions as a strategy within the ‘bounds of religion alone.’” (emphasis in original)); Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 39, 47 (Berta Hernandez-Truyol ed., 2002), available at http://www.ces.uc.pt/bss/documentos/toward_multicultural_conception_human_rights.pdf (“To understand a given culture from another . . . may thus prove to be very difficult, if not impossible.”); see generally Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kwan Yew*, <http://www.fareedzakaria.com/articles/other/culture.html> (1994) (stating of Singaporean Senior Minister Lee Kwan Yew: “Part of his interest in cultural differences is surely that they provide a coherent defense against what he sees as Western democratic imperialism.”).

¹⁷⁵ See De Sousa Santos, *supra* note 175, at 47 (arguing that the strong rhetorical “commonplaces” of a given culture “become highly vulnerable and problematic whenever ‘used’ in a different culture.”); see generally *Ratzlaf v. United States*, 510 U.S. 135, 149 n.19 (1994) (stating that a jury may determine defendant’s knowledge by “drawing reasonable inferences from the evidence of the defendant’s conduct.”).

¹⁷⁶ See generally MCA, *supra* note 33, § 948k(b) (providing qualification requirements for defense counsel, including requiring that any civilian counsel be “otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense.”).

reconsidering the scope and application of the willful blindness doctrine to those accused of acts of international terrorism.

To clarify, this argument does not mean to imply that American factfinders necessarily *cannot* adequately evaluate the liability of a non-American defendant. To the contrary, U.S. courts have demonstrated their ability to do so appropriately and effectively even in extraordinary terror cases, both before and after the September 11th attacks. For example, in *United States v. Salameh*,¹⁷⁷ the Second Circuit in New York City engaged in a reasoned and sophisticated review of an appeal by a key architect of the 1993 World Trade Center bombing. There, the court carefully weighed the defendant's arguments, and ultimately remanded him for resentencing out of concern that, as a pro se litigant, he was arguably inadequately represented at the original sentencing hearing.¹⁷⁸ Similarly, in a more recent case, *United States v. Moayad*,¹⁷⁹ the Second Circuit remanded a conviction for conspiracy to support Al Qaeda ruling that certain evidentiary and procedural errors were committed by the lower court. That ruling further required the case to be remanded to a different judge due to those procedural errors.¹⁸⁰ Regardless of the outcome of these cases, they help demonstrate a level of procedural integrity and institutional legitimacy in the domestic court system that many have argued are lacking in military commissions. The more diversified factfinders' level of understanding, increased procedural safeguards for the accused, and the greater opportunity for cross-examination in domestic court trials leaves the process with a greater chance of reflecting those goals. In the end then, these cases help to indicate that domestic courts may be appropriate and effective instruments for evaluating the liability of foreign defendants, even amidst local, highly publicized, catastrophic terror attacks.¹⁸¹

¹⁷⁷ 152 F.3d 88 (2d Cir. 1998).

¹⁷⁸ *Id.* at 161.

¹⁷⁹ No. 05-4186-cr, 2008 WL 4443841 (2d Cir. Oct. 2, 2008); see also Benjamin Weiser, *Appeals Court Overturns Two Terror Convictions, Citing Errors by Judge*, N.Y. TIMES, Oct. 3, 2008, at B1 (describing the ruling).

¹⁸⁰ Weiser, *supra* note 180, at B1. (calling the reassignment "a highly unusual step").

¹⁸¹ See generally HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE, *supra* note 47, at 5 (concluding that "contrary to the views of some critics, the [federal courts are] generally well-equipped to handle most terrorism cases").

Rather than arguing broadly that American factfinders cannot understand terror defendants, this Comment argues more narrowly that the risks of convicting a defendant unjustly are significantly higher in such cases. Specifically, the risk of a mistaken American factfinder inferring knowledge where there is merely culturally influenced hostility toward the prosecuting government by the defendant contributes to the need to ensure that procedural protections afforded to such defendants are robust. As a result, a reexamination and narrow construal of the willful blindness doctrine would be at least beneficial in minimizing that risk, and thus will constitute a step toward increased legitimization of the terror prosecution paradigm.

5.3. The Finality of Execution as Punishment

The fact that many terror convictions may result in the execution of the accused makes these concerns particularly poignant. It is a long established legal principle that for capital offenses, courts are (and ought to be) even more concerned than usual with ensuring the procedural legitimacy of the trial process. This principle exists due to the inherent finality and inexorability of execution as punishment—the fact that “death is different.”¹⁸² The failure of a court to employ such heightened procedural protections risks the potential execution of an unjustly convicted defendant. However, the risks extend more broadly to the policy sphere as well. For example, applying the death penalty to one convicted of acts of international terrorism after a trial where the defendant’s presumption of innocence was compromised by internal procedural erosions would likely be viewed as a fundamentally unjust result by the international community.¹⁸³

¹⁸² See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.” (citation omitted)).

¹⁸³ See POHLMAN, *supra* note 16, at 247 (“It was a near certainty that international public opinion would not accept the legitimacy of a death sentence for [convicted terror defendant Zacarias] Moussaoui if he was not permitted any personal access to witnesses who could provide exculpable testimony on his behalf.”); Glaberson, *U.S. Said to Seek Execution for 6 in Sept. 11 Case*, *supra* note 44, at A1 (“Some countries have been critical of the United States’ use of the death penalty in civilian cases, and a request for execution in the military commission system would import much of that criticism to the already heated debates about

Thus, with such a grave penalty hanging over the defendant,¹⁸⁴ the procedures followed to obtain a conviction must be held to the strictest standards of fairness to avoid the undesirable appearance of an unfairly vengeful adjudicative framework. One step toward ensuring greater procedural integrity in such trials must be the proper construal and application of mens rea requirements to establish guilt, particularly one as potentially expansive as willful blindness.

5.4. Threats of Coercion

Misapplication of the use of willful blindness as a theory of knowledge could be used to prosecute and convict guilty lesser terrorist figures to inculcate larger terrorist figures. At worst, the intentional misuse of the willful blindness doctrine (playing on the likelihood of juries to misunderstand it) could be used as a device by zealous prosecutors to threaten or coerce innocent detainees to inculcate others, regardless of the truth of that inculcation. These kinds of coercion, even if theoretical, could be used by prosecutors to pressure defendants into either false guilty pleas or into falsely inculcating other figures to escape punishment. Either falsified result is undesirable from a legal or policy standpoint.

Intentional coercion is, of course, contrary to both U.S. domestic law¹⁸⁵ and international law.¹⁸⁶ Despite the United States'

the legitimacy of Guantánamo and the Bush administration's legal approach there, some lawyers said.").

¹⁸⁴ See generally POHLMAN, *supra* note 16, at 197 (quoting Judge Gregory in a June 3, 2003 CIPA proceeding regarding accused terrorist Zacarias Moussaoui as saying "[The] sword of Damocles is over . . . [his] head . . .").

¹⁸⁵ See, e.g., 18 U.S.C. 1589 (2006) (criminalizing obtaining "the labor or services of a person by threats of serious harm to, or physical restraint against, that person or another person; by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or by means of the abuse or threatened abuse of law or the legal process"); see also 18 U.S.C. § 872 (2006) (criminalizing extortion by officers or employees of the United States); see generally U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce

oft-invoked assertion that the Geneva Conventions do not (or should not) apply to detainees,¹⁸⁷ such coercion, if utilized, could violate the Conventions' prohibition on the same.¹⁸⁸ A reexamination of the willful blindness doctrine and its more carefully narrowed application would be a step toward combating such potential coercion operating on those accused of acts of international terrorism. Such a reexamination would also thus serve the goals of improving the perceived legitimacy of the U.S. terror prosecution paradigm as a whole.

5.5. Critical Responses

Critics may argue that reform of willful blindness has little relevance to the War on Terror. Such critics would argue that it is unclear that willful blindness plays a central role in terror trials in domestic courts or in military commissions, and that military commissions are so infrequently actually used as to render them less germane to the discussion. Such critics may specifically point to the recent military commission ruling in *United States v. Hamdan*, in which Osama bin Laden's former driver was convicted of supporting terrorism, but was acquitted of the more serious charge of conspiracy to commit terrorist attacks.¹⁸⁹ Such critics thus may suggest that this Comment's call for reform of the willful blindness

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

¹⁸⁶ See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 20, art. 99 ("No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 20, art. 31 ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.").

¹⁸⁷ See Cheney remarks, *supra* note 21 (describing Vice President Cheney's contention that detainees are not "prisoners of war" and thus do not receive the same guarantees and safeguards).

¹⁸⁸ See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 20, art. 99 ("No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 20, art. 31 ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.").

¹⁸⁹ Jess Bravin, *Bin Laden Ex-Driver is Convicted*, WALL ST. J., Aug. 7, 2008, available at <http://online.wsj.com/article/SB121802824878616731.html>.

doctrine is overblown, in light of the fact that both domestic courts and military commissions have demonstrated their ability to adjudicate such cases fairly, and properly attribute the appropriate degree of culpable knowledge to terror defendants.

Regarding these criticisms, the argument presented in this Comment points to a widely critiqued problem of confusion and overbreadth in the willful blindness doctrine. While it would be unrealistic to assume that this problem infects only cases dealing with non-terror related subjects, even if that were true, the problem would still reflect one that looms with special implications for terror defendants. In addition, while military commissions have been infrequently used, the doctrinal problem at least runs the serious risk of infecting both the domestic court system and military commissions. In short, the argument made in this Comment does not say that courts *cannot* reflect a clear willful blindness jurisprudence, but rather that the confusion and complexity that has infected that jurisprudence makes it unreasonably difficult for them to do so. That complexity should be reduced with a clearer explication of the criteria and limitations of the doctrine going forward.

Critics may also argue that strong policy reasons exist to apply the willful blindness doctrine liberally to terror defendants. The principal argument for such critics would likely be that willful blindness is a proper legal doctrine, and limiting it would create a grave threat of terrorists closing their eyes to avoid liability in case of prosecution. However, such views mistake the nature of the problem. As this Comment has argued, the proper use of willful blindness doctrine would be an invaluable tool to effectively capture and convict those who deliberately avoid inculpatory knowledge. Properly applied, the doctrine is effective in convicting those who act willfully, as it was intended to do. However, the critics' argument fails to consider the problems caused by *misuse* of the willful blindness doctrine to punish those who do not act willfully. As this Comment has argued, neither the goals of the War on Terror nor the foreign policy goals of the United States are served by the conviction of innocent defendants. To that end, a reexamination of the willful blindness doctrine is necessary to prevent the misuse of the doctrine to convict defendants who do not act with the requisite knowledge to satisfy the charges against them.

Similarly, critics may argue more broadly on utilitarian grounds that, even if the willful blindness doctrine is improperly

applied, that the exigencies of the threats posed by international terrorism more than outweigh any comparatively academic concerns of procedural impropriety. Such a view has been suggested indirectly by several governmental officials and judicial opinions.¹⁹⁰ However, without addressing the claims of ongoing exigency or the severity of such an ongoing threat, there are strong grounds to disagree with the view that any such exigency justifies a procedural abrogation of the nature discussed above. The deprioritization of the protections afforded by legal procedure is a disfavored response to exigent circumstances. While examples of such erosions of procedural protections abound in American history,¹⁹¹ such reactionary measures have required a strict showing of necessity.¹⁹² Contrarily, where such necessity has not

¹⁹⁰ See, e.g., THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 20 (Sept. 2006), available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf> (“[W]e will continue to take all necessary measures to protect our national and economic security”); John Yoo & Eric Posner, Editorial, *The Patriot Act Under Fire*, WALL ST. J., Dec. 9, 2003, at A26 (“[S]ome think that even a small restriction of civil liberties can never be justified. These people think that, as a mark of our commitment to freedom, courts should not allow the government to invade our civil liberties even during emergencies. The truth is the opposite. . . . [F]ear provoked by emergency also can motivate government to react to new threats in creative ways. . . . Errors may occur, but they happen during peacetime as well as during emergencies.”); see generally *Boumediene v. Bush*, 128 S.Ct. 2229, 2294 (2008) (Scalia J., dissenting) (arguing that “The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. . . . In the long term, then, the Court’s decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect. In the short term, however, the decision is devastating.”).

¹⁹¹ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944) (upholding detention of American citizens of Japanese ancestry in light of a military claim of necessity).

¹⁹² See, e.g., *id.* at 216 (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions”); *Ex parte Milligan*, 71 U.S. 2, 139–40 (1866) (“Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.”); see also *Brown v. Glines*, 444 U.S. 348, 369 (1980) (“[T]he concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security ‘necessities’ to justify

been demonstrated, the deprioritization of legal procedure in favor of the erosion of civil liberties has been harshly denounced.¹⁹³ In either event, such erosions are justifiable, if at all, only for the duration of the exigent circumstances.¹⁹⁴ Finally, even where necessity was demonstrated in particular cases, later courts have sometimes condemned the erosions of civil liberties enacted under such claimed necessity as anachronistic.¹⁹⁵ Similarly, here, it is difficult to conceive of valid arguments for justifying an adherence to and misapplication of the willful blindness doctrine in the name of exigency. This is true particularly in the context of detainees, where flaws and limitations of the current doctrine render it an unduly blunt tool for achieving justice.

Thus, in short, utilitarian arguments should not persuade us to rationalize the misuse and misapplication of legal doctrine at the expense of a defendants' presumption of innocence. Countless legal avenues exist to convict accused terrorists of existing crimes without resorting to an overbroad misuse of willful blindness to achieve the same result. The current overbreadth of the willful blindness doctrine threatens the conviction of innocent defendants, potentially undermining the legitimacy of the United States' legal process, and thus risks undermining the political standing of the

an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism . . .").

¹⁹³ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 612 (2006) (finding that the government failed to satisfy the "most basic precondition" of military necessity for permitting the use of trial by military commission).

¹⁹⁴ See *id.* at 636 (Breyer, J., concurring) ("Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part and dissenting in part) ("[A]n emergency power of necessity must at least be limited by the emergency . . ."); *Milligan*, 71 U.S. at 127 ("As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power.").

¹⁹⁵ *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Calif. 1984) (granting writ of *coram nobis*, stating: "Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.").

United States in the international community. To correct that problem, reform of the willful blindness doctrine is both necessary and desirable to further the United States' legitimate legal and policy goals.

5.5.1. *Regarding Practicality*

Critics may argue that a proposed reexamination of the willful blindness doctrine is overly idealistic, and unlikely to have practical effect in light of the many pressures facing prosecutors engaged in international terrorism trials. Of course, such pressures are both real and numerous. Critics will argue that prosecutors of alleged terrorists are likely to view their duty as one of protecting lives and protecting the health of the nation.¹⁹⁶ As a result, prosecutors of that mindset are unlikely to view with favor a perceived limitation on their authority or discretion. In addition, critics would argue that personal, financial, and political pressure to win may trump the interest to follow perceived limited procedural restraints.

Despite these pressures however, several countervailing interests support a reexamination or limitation on the application of the willful blindness doctrine in the context of international terrorism trials. Most importantly, prosecutors and governments are under legal and ethical duties to apply the law both zealously and properly. While some may argue that the high-stakes nature of international terrorism trials may justify or necessitate a more zealous and expansive prosecutorial demeanor,¹⁹⁷ such arguments should be resisted. Rather, this Comment argues that the

¹⁹⁶ Many politicians encouraged such a view after the September 11th attacks, stressing the desire to use any means necessary to capture and prosecute alleged terrorists. See Newsmax.com Wires, *supra* note 2 (quoting then Attorney General John Ashcroft: "Let the terrorists among us be warned We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America."). Ironically, some framed such views in the language of willful blindness. See Associated Press, *President Urges Renewal of Patriot Act*, USA TODAY, Apr. 17, 2004, available at http://www.usatoday.com/news/washington/2004-04-17-bush-terrorism_x.htm (quoting President Bush's April 17, 2004 radio address as stating "To abandon the Patriot Act would deprive law enforcement and intelligence officers of needed tools in the war on terror, and demonstrate willful blindness to a continuing threat.").

¹⁹⁷ See Yoo & Posner, *supra* note 191 (arguing in part that certain emergencies justify a curtailment of civil rights and a more aggressive prosecutorial scheme to combat such emergencies).

protections afforded by the law exist to provide a procedural framework by which proper prosecutions must occur, including those which occur under extreme circumstances.¹⁹⁸ Adhering to such a procedural framework may reinforce the legitimacy of such prosecutions, a result that could resonate socially, politically, and ideologically in the United States and abroad.¹⁹⁹

6. CONCLUSION

The willful blindness doctrine is a central point on which to focus the debate between advocates of the potentially competing values of civil rights and national security in the context of the War on Terror. When properly construed and applied, the willful blindness doctrine is an invaluable tool for establishing the culpable knowledge and liability of a defendant, regardless of the context. However, when improperly extended or applied, the willful blindness doctrine presents serious potential dangers of overinclusiveness, illegitimacy, and coercion, to name a few. Practical applications of the doctrine and its extensions have demonstrated these dangers in both domestic and international fora.

These dangers take on particular significance in the context of the doctrine's use against those accused of acts of international terrorism. As such, it is important for courts and tribunals to reexamine both the wording of willful blindness instructions to

¹⁹⁸ See *Doe v. Gonzales*, 500 F. Supp. 2d 379, 415-16 (S.D.N.Y. 2007) ("It is the judiciary's independent function to uphold the Constitution even if to do so may mean curtailing Congress's efforts to confer greater freedom on the executive to investigate national security threats."); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."); see generally HCJ 5100/94 Public Committee Against Torture in Israel v. State of Israel [1999] IsrSC 53(4) 817, reprinted in ISRAEL LAW REPORTS: 1998-1999 at 567, 605 (Sari Bashi ed., Nevo Press Ltd. 2004), available at http://www.hamoked.org.il/items/260_eng.pdf ("Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand."). But see *Hamdan*, 548 U.S. at 723 (Thomas J., dissenting) ("[N]o governmental interest is more compelling than the security of the Nation . . ." (internal quotations omitted)).

¹⁹⁹ See generally Rosemary Foot, *Human Rights in Conflict*, 48 SURVIVAL 109, 115-21 (2006) (arguing in part that increases in transparency and accountability will improve the perceived legitimacy of the United States' terror prosecution scheme, benefitting the United States politically, morally, and in terms of national security, concluding: "The exercise of power in the absence of legitimacy is extraordinarily wasteful of resources and unlikely to achieve desired outcomes in the long term.").

factfinders, and to apply the doctrine properly, in order to reinforce the legitimacy of the legal process itself. This kind of reexamination will serve multiple important interests, the most salient of which being enhancing the legitimacy of the means used and the ends pursued in the U.S.-led War on Terror. Such improvements may also promote the improved political perception of the United States abroad, by demonstrating that prosecutions of those accused of international terrorism are guided (and restricted) by proper applications of established rules of law.

Broadly speaking, prioritizing procedural fairness used in terror prosecutions in the War on Terror would benefit the United States in numerous ways. Politically, it would reinforce the integrity of the U.S. legal system and terror prosecution paradigm, leading other nations to cooperate more readily in bringing terrorists to justice. Ideologically, it would reestablish a convincing moral sense of leadership and noble purposes, leading other governments to support (or at least not oppose) the United States on some moral grounds. Socially, it would refortify the public's confidence in the U.S. legal system, leading the public to support both the War on Terror's means and ends. While reexamining the willful blindness doctrine of course could not accomplish all of these goals alone, doing so nonetheless would be a small but valuable step toward strengthening the procedural integrity of our legal system. In doing so, this step forward would serve the interests of civil rights and national security, thus furthering both the goals of the War on Terror and a broader sense of justice.