

Habeas Corpus and Global Justice  
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Global justice is normally discussed as a matter of substantive rights: the criminal justice rights of those who are the victims of mass crimes like genocide or the economic rights of victims of inequality. It is undeniable that these substantive rights are very important and should be protected globally. My earlier work in international justice has concerned substantive rights such as the right not to be the subject of genocide, aggression, war crimes, or crimes against humanity.<sup>1</sup> Very good work has also recently been done on global economic rights, especially the rights to adequate food, shelter, and medicine.

In the book that this paper I cut from, I will explore the value of procedural rights in the debates about global justice. I will focus on a handful of rights, some of which are procedural rights, such as habeas corpus. The difference between substantive and procedural rights is not easy to draw. To make things somewhat easier I will begin with a discussion of the right of habeas corpus, as it was understood prior to Magna Carta. Habeas corpus was at first merely the right to be brought out of the dungeon and to have the charges against one publicly read. One could be immediately returned to the dungeon after the reading and no other rights were involved. Yet, Bracton and Blackstone, the great legal theorists of the 13<sup>th</sup> and 18<sup>th</sup> centuries, say that habeas corpus was fundamentally important, as have many legal theorists since.

Habeas corpus, at least in this first and most minimal version, is really proto procedural since there is no clear set of rules that need to be conformed to, except the one rule that a prisoner can petition to be brought out of prison and have the charges

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<sup>1</sup> See Crimes Against Humanity: A Normative Account (Cambridge UP, 2005); War Crimes and Just War (Cambridge UP, 2007); Aggression and Crimes Against Peace (Cambridge UP, 2008); and Genocide: A Normative Account (forthcoming).

against him read. But it is definitely not substantive in that there is no clear human good that is directly aimed at, or even one that is risked. Indeed, habeas corpus rights are consistent with fairly great iniquity. Nonetheless, there is something very valuable indeed to this right. One needs only to think about Guantanamo in order to see what can happen when this right is systematically abridged – the challenges against detention at Guantanamo were all drawn in habeas corpus terms. Habeas corpus sets out a simple rule to be followed, and a rule that is so innocuous that it is hard to see why it would be of such importance for domestic or global justice. In this paper I try to explain why this procedural, or proto procedural, right may be of the first importance for global justice.

In other parts of the book I will explain how procedural rights came to be gap fillers in the emerging system of law in post Magna Carta England. At present, I merely wish to get us started in thinking about the value of procedural rights somewhat ahistorically. The ensuing exercise is meant to be merely an introduction to the subject about which I will have quite a lot more to say in a developed manner. But I begin with a fairly simple puzzle, namely, how the innocuous right that one is to be brought out of prison and read the charges against one, has come to assume such near-mythical characteristics in legal theory. One of the main values of habeas corpus and other procedural rights will indeed turn on the promotion of certain human goods, but this will be indirect rather than direct, although no less important. At least as important a value is that such rights support and even constitute the rule of law which has independent value quite apart from the human goods that may be advanced. At the end of the paper I will indicate how the goal of fairness is a non-substantive normative basis for procedural rights like habeas corpus, and why it is vitally important that such rights be protected at the global level.

## **I. Habeas Corpus and the Value of Procedural Rights**

In certain countries, those who are in prison may get out of prison and have the charges against them made public by filing a habeas corpus petition. For over 800 years in the English speaking world, the right to file such a petition has been sacrosanct. Important legal theorists, such as William Blackstone, have said that this procedural right is the cornerstone in the “preservation” of personal liberties, since without protection of habeas corpus a prisoner can be incarcerated in such a way that his or her “sufferings are unknown or forgotten.”<sup>2</sup> But why is this so important? If one is guilty, and properly sent to prison, where most people would suffer, why is it that if one cannot make such a petition then all of that person’s liberties, indeed, all of everyone’s liberties, are adversely affected?

In thinking about this puzzle, one place to start is simply to substitute the word “dungeon” for “prison” in the above account. Webster’s unabridged dictionary defines dungeon as “a place of confinement, especially a subterranean chamber or other dark and gloomy cell.” It is perhaps not so odd to think that everyone has a strong interest in getting out of a dark and gloomy underground cell. But again, if one deserves to be in such confinement, why is it of paramount significance that one must be once brought out? Why think that all of one’s other rights depend on the right to petition to be brought out of the dungeon and have a reading of the charges against one? Yet, at least since just before the time of Magna Carta, habeas corpus has been given just such a position of pre-eminence.

Compounding the puzzle is that the rudimentary idea of habeas corpus is not that one has a right to get out of jail or prison altogether, but only that one’s jailer

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<sup>2</sup> William Blackstone, Commentaries on the Laws of England (1765), Chicago: University of Chicago Press, 1979, vol. I, p. 132.

must “produce the body” of the prisoner, bring him or her out of the dungeon temporarily, merely so that the prisoner can be seen, and have the charges against him or her publicly declared. In its most rudimentary form, the form that was given just prior to Magna Carta, it is seemingly acceptable to take the prisoner back to the dungeon immediately afterwards. The right to be only temporarily removed from jail is such an innocuous right that it is quite puzzling to figure out why habeas corpus has been thought to have such importance.

Bracton clearly lists the writ in his De Legibus et Consuetudinibus Angliae (c. 1230), and specifies its form as follows:

that he produce his body [“et nunc praecipietur vicecomiti quod habeat corpus”] on another day by a writ of this kind: The king to the viscount greeting. We enjoin you before our justiciaries &c. on such a day the body of A., to answer to B. concerning such a plea.<sup>3</sup>

Here we see the writ described as addressing the official who is detaining or jailing a person, requiring him merely to produce the body of the prisoner and provide an answer concerning why the prisoner should continue to be deprived of his or her freedom. So, the right of habeas corpus is not a “get out of jail free” card, but only a right to be brought out of the dungeon quite temporarily, where it may be that one is then subjected again to incarceration and suffering soon thereafter.

The folk history of habeas corpus has it that there are three things that are important about this right. First, the body must be produced to demonstrate that the person has not merely been killed. Second, bringing the body into the light of day allows one to see if there are marks on the body indicating torture or other forms of physical abuse. Third, the public reading of the charges against the prisoner is meant

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<sup>3</sup> 6 Bracton 474-477, Sir Travis Twiss, ed., Bracton, De Legibus et Consuetudinibus Angliae (London: Longmans and Co., 1883), quoted in William F. Duker, A Constitutional History of Habeas Corpus, Westport, CT: Greenwood Press, 1980, pp. 16-17.

to act as a deterrent against arbitrary or unlawful incarceration. It is the third factor that is often said to be the most important as a cornerstone of all other rights. But it seems to me that the full value of habeas corpus cannot be seen unless one takes into account all three of these considerations.

Today, habeas corpus in the United States means much more than the rudimentary concerns I have been discussing, and includes an examination of any violations of a person's constitutional rights. Federal habeas corpus cases are collateral attacks on the constitutional firmness of the conviction that caused the prisoner to be incarcerated. Surprisingly, perhaps, innocence is a controversial basis for a successful habeas appeal. Typically when one is successful, the remedy is either a retrial or outright exoneration and freedom from incarceration. The leading scholars of habeas corpus law in the United States call habeas "a civil, appellate, equitable, common law, and statutory procedure."<sup>4</sup> Hertz and Liebman go on to explain that habeas corpus has become a broad "surrogate for Supreme Court review"<sup>5</sup> of whether the petitioners "constitutional rights have been preserved."<sup>6</sup>

Initially, and most fundamentally, habeas corpus is not such a broad right. It is indeed very simple, almost simplistic, and highly innocuous. Yet, why should the mere display of the prisoner and the public reading of the charges against him or her, with no other procedural considerations required, deter arbitrary or unlawful incarceration, and be necessary for the efficacy of all other rights? Was Blackstone right to think that habeas corpus would deter tyranny? And short of deterring tyranny how exactly will habeas corpus deter wrongful acts at all since it is such an innocuous right? These are the questions I shall be pursuing.

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<sup>4</sup> Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure, Lexis Law Publishing, 1998, fourth edition 2001.

<sup>5</sup> *Ibid.*, p. 23.

<sup>6</sup> *Ibid.*, p. 86, quoting Justice Oliver Wendell Holmes in *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923).

Let us consider three possibilities. First, habeas might literally be necessary for deterring all other rights abuses since if one could stick someone away for no good reason, it could be done whenever one might complain about other rights violations. Second, it may be that being made to disappear is so feared that one would be willing to trade away nearly anything to prevent it, including one's most valuable freedoms. Third, habeas might be important for deterring something else, such as torture, which must be deterred in order to secure all other rights. In what follows I will take up each of these possibilities, ultimately arguing that they fail to explain the inordinately widespread acceptance of the stripped down habeas corpus right, and then supply my own view, which is indebted to Plato's tale of the ring of Gyges. Ultimately, I defend the view that the key normative principle is that of visibility, the very thing that is lost if prisoners can be secretly incarcerated. And I will also argue that such a right must be protected globally.

## **II. The Deterrence Argument**

In my view, each of the three arguments I will discuss has some plausibility, and I will build on each of these in a later section of this paper in support of my own account of the value of habeas corpus. To begin, there is an obvious deterrence argument that I will present here that has quite a few problems and that adversely affects its plausibility as an explanation of the high value placed on the right of habeas corpus. The idea seems to be that even tyrants will be dissuaded from violating the rights of their subjects if the subjects have the right to bring those deeds to the public attention. Even with its problems, this deterrence argument contains quite a bit of truth.

Yet, there are two initial problems with this argument. First, bare bones habeas rights do not include the right to trial or even the right to respond to the charges

brought against one in some other forum than a trial. Rather, the right is merely to have the jailer publicly set out the charges in the presence of the prisoner. There is nothing here that requires that the rights violations against the prisoner should be disclosed, except perhaps that there were trumped up charges that landed the prisoner in jail. And because of this fact, there is little that a leader would fear from having a habeas corpus petition recognized.

Second, it is not clear why tyrants would care if those who they abused had to be produced occasionally and the charges against them read in public, even if the charges are thereby shown to be trumped up. This issue, as I said above, is the heart of the matter. For if the stripped down habeas right merely means that there is a bit of publicity to the misdeeds of a tyrant or other political leader, the question is why this would matter so much that the tyrant would not risk such a public disclosure by having violated the rights of the prisoner in the first place. At its core, this rationale for the high value of habeas turns on a psychological claim about how humans respond to publicity, especially publicity about their putative misdeeds. And for the argument to work, the claims about publicity would have to be true of everyone, not just benevolent and sensitive leaders, but also the tyrants of the world who are those most likely to abuse the rights of subjects .

Deterrence is here linked to the fear of being publicly shamed or embarrassed. And the issue I am raising is whether some political leaders might not be beyond shame or embarrassment. Feeling shame is different from feeling guilt in that it is related to how an audience responds, or an anticipated audience would respond. Think of the Greek chorus in the plays of Sophocles, always watching the action and passing judgment on the deeds of the actors. Oedipus is so concerned about the

reactions of others to his misdeeds of sleeping with his mother and killing his father that he pokes out his eyes so that he can not be shamed by fellow Greeks.

For such shaming to act as deterrence, the person to be shamed must have eyes to see the reaction. In the case of anticipated reactions, the agent must at least have the kind of normal sympathies that would make him or her responsive to the reactions of others, to care about how others might react. But not all political leaders are like Oedipus in this respect, and none that I know of have gone to such extreme lengths to avoid being shamed. Degrees of susceptibility to shame or embarrassment seems to me to run across a fairly wide spectrum, especially in the class of those who are political leaders. And while it may be that no one is completely shameless, it certainly seems that some political leaders have come pretty close, and would not care very much if their misdeeds were made public.

I suppose the other possibility is that political leaders will fear being turned out of office if their misdeeds are publicized. This would be most relevant to those political leaders who must stand for election; but every political leader is subject to recall or at least to civil rebellion, and must care what the populace, or at least part of the populace thinks of him or her. Deterrence could indeed work through such fears more straightforwardly than through shame or embarrassment. Here the idea would be that public disclosure of one's misdeeds will weaken one's hold on the reins of power by sewing seeds of discontent among the populace. To make sure that does not happen, political leaders, even tyrants, may be willing to restrict rights abuses out of fear that they will be disclosed when those whose rights have been abused are brought into the light of public scrutiny. So there is some truth to the deterrence argument but it is not as strong as some have assumed.

The problem again is why we would think that merely having the charges

read publicly, without more of an exposure about the circumstances leading up to the filing of those charges, would be likely to weaken the hold on the reins of power that political leaders desperately want to retain. Why would the lack of habeas corpus rights make for a greater likelihood that subject/citizens would rebel against their political leaders? To answer this question, more is needed than the slender argument based on questionable moral psychology of political leaders. It needs to be shown that there is something highly valuable lost when arbitrary incarceration is never made public, that would motivate such possible rebellions or serious criticism of rulers. In the next two sections I will sketch several possible ways to understand that value, a value which may be so important that people would be willing to risk their lives in rebellion against political leaders who denied their subjects such a right.

### **III. The Disappeared Argument**

In his book, Prisoner Without a Name, Cell Without a Number, Jacobo Timmerman evokes the situation feared by so many in Latin America and elsewhere: that one will become a member of the disappeared. In a real sense, if one is made to disappear so that one's identity is unknown to anyone, one has no rights. This is because rights need some kind of enforcement mechanism to be real. If you are held secretly in prison, where no one knows whether you are alive or dead, or if alive who you are, and where no one knows that you have rights in need of protection, it is meaningless to say that you have rights. This is one possible way to understand Blackstone's famous defense of habeas corpus:

To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to jail, where his

sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.<sup>7</sup>

Blackstone does not explain precisely why it is more dangerous, but indicates that it has to do with the fact that the prisoner is out of the public eye – “unknown and forgotten” – and hence less likely to be known as someone whose rights should be protected by the community.

Disappearance is worrisome in part because there is the possibility that one has been disappeared permanently by being killed. So, while initially the fear is that one has been indefinitely deprived of one’s liberty, part of the fear that one feels is that one is forgotten to such an extent that one will not be missed if one is unjustifiably executed. In Argentina, the mothers of the Plaza de Mayo tried to counter their disappeared loved ones by carrying pictures of them in all of their demonstrations so that the “disappeared” would not actually be forgotten. By displaying their pictures, the mothers fought to keep their sons alive. It is in this way that the rights to liberty and life are linked in the concerns about being made to disappear.<sup>8</sup> If one’s life and significant liberty can be secretly jeopardized, then it seems that one’s other rights will not be secure either.

Yet, we have not explained why depriving a person of life or liberty in secret makes it so much worse than doing so in public view. Blackstone explicitly makes this claim, as would be necessary to defend the preeminence of habeas corpus rights over other procedural, or even substantive, rights. If a person is kept in a highly public prison, rather than in a secret dungeon, why is it less likely that his or her rights would be violated? Why think that it is more likely that a person will be killed in a

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<sup>7</sup> William Blackstone, *Commentaries on the Laws of England* (1765), Chicago: University of Chicago Press, 1979, vol. I, pp. 131-132.

<sup>8</sup> See the discussion of this issue in Chapter Seven, “Personal Liberty and Security,” in Francis Jacobs and Robin White, *The European Convention on Human Rights*, third edition edited by Clare Ovey and Robin White, NY: Oxford University Press, 2002, especially p. 103.

secret prison than in a non-secret prison? Again, as in the previous section, we are thrown back on the dubious speculations about what rulers are likely to be deterred from doing. And Blackstone himself seems to set the stage for such speculation.

But there is another alternative, also suggested by Timmerman as well as the mothers of the Plaza de Mayo, namely, when one is officially forgotten, there is a sense in which one ceases to be a rights-bearer. This is not a matter of psychology, and is only loosely related to the fear of being disappeared. Rather as we will see later, it is something formal, rather than having to do with either the psychology of the political ruler or the subject. I will here begin to explore the connection between the insights about the disappeared and the formal detriment that occurs when one is held in secret and not allowed to be brought into the light of day.

Rights can be viewed as abstract entities, but even in this mode they are often thought of as claims. And for something to be a claim there must be a rudimentary structure where when one utters various words then there must be another person who is required to receive the claim even if not to required to satisfy it. If one is in a secret prison, where in effect the key to one's cell has been thrown away, there is no one who is required to respond to claims one might make, and in this sense one has no rights, except perhaps in a hortatory sense. I suppose there could be a secret prison where one had the right to make claims and others were required to respond to these claims, but without some kind of public accountability, there is no guarantee that those who are supposed to respond are truly required to do so or have any intention of doing so.

So, I must revise my previous account to say that having rights entails that there is someone who is required to respond and there is a system of holding accountable these individuals. If a person is in a secret prison, or secretly incarcerated

in some other way, those who might be required to respond to his or her claims are not subject to public accountability, and hence the people in these prisons are formally without rights. It is in this sense that they have been forgotten and have disappeared from the community of rights holders. And in this way, the deprivation of the right of habeas corpus could very well result in the deprivation of all other rights for the prisoner.

We have not yet explained why others are adversely affected when habeas corpus is denied, but we have begun to see why the prisoner is adversely affected. But we have not explained why it is wrong to be deprived of rights. And hence there is another part of the story that must be told, namely what precisely is risked if one loses rights as a result of being deprived of habeas corpus. To understand this additional dimension of our problem, we will turn to our third strategy of understanding the value of habeas corpus, namely in terms of ancillary rights that are related to habeas corpus and that would be put in jeopardy if habeas corpus were to be denied.

#### **IV. The Torture Argument**

Of the rights most closely associated with habeas corpus is the right not to be tortured. Initially, as a conceptual matter it is not evident why habeas corpus and torture would indeed be closely linked. In this section I will try to shed some light on this puzzle before setting my own account of the value of habeas corpus, which will involve aspects of each of the arguments in these three sections. While the right not to be tortured ends up being only ancillary to the right of habeas corpus, it is nonetheless quite important. Indeed many have argued that torture is the worst thing that people can do to one another and so anything that diminished the likelihood of

torture is of great value.<sup>9</sup> Other ancillary rights, such as the right not to be excessively deprived of sleep are also important here as well.

Torture is vastly unpopular and hence something that one would imagine would be hard to carry out in any setting other than one of secrecy. There can be secret interrogation centers where the right of habeas corpus has been denied, as has certainly happened within the United States. The background consideration for my study is the torture that occurred at Guantanamo Bay, Cuba by the US military. But well-known instances of torture have also occurred within the United States, in cases in Boston, New York, and Los Angeles, to name only examples from some of the biggest cities. At Guantanamo, the lack of habeas corpus seems to have made torture more likely. There are habeas corpus rights within the United States, but this has not always stopped torture, although it certainly may have diminished its prevalence.

So there is no necessary connection between denial of habeas corpus and the use of torture, but nonetheless there is a strong correlation. The reason for this again has to do with the lack of accountability in prisons where the right of habeas corpus is denied. There has been a tendency to shield torturers from public view, as well as public censure and retaliation in the criminal justice histories of many societies. And what better way to shield torturers and their supervisors from public view than not to allow prisoners to be brought into the light of day where the results of torture might be observed. The folk history of habeas, as I said above, has it that one of the things that was looked for when the jailer brought the prisoner out of jail was whether there were marks on his or her body indicating that torture had occurred. Again, this is not definitive because torture does not always leave publicly visible marks, but it often does.

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<sup>9</sup> See Henry Shue, "Torture," Philosophy & Public Affairs, vol. 7, no. 2, (1978), pp. 124-143.

After the fact, torture is not always evident, but the marks on the body will often remain for quite a long time, as will the marks on the demeanor and spirit of the prisoner. Otherwise it is the prisoner's word against that of his or her jailers. But the physical effects of torture "speak for themselves," as is the best translation of the legal doctrine of *res ipsa loquitur*. When confronted with such obvious evidence, the denial of the jailers pales completely. So, there is a strong disincentive to allow prisoners who have been tortured to be allowed into the light of day, and a corresponding deterrence of jailers to torture when they realize that their handiwork may be made public because of habeas corpus petitions. One of the things that public scrutiny means is that the most publicly repulsive practices are likely to be diminished.

Similarly, other forms of abuse of the prisoner, including use of techniques that stop short of torture but are nonetheless terrible, such as extreme sleep deprivation, also seem to correlate with lack of habeas corpus rights. As with forms of torture, the effects of these other abuses will often leave marks that will be evident to those who view the prisoner in the light of day. Of course, this does not necessarily mean that such practices will be deterred by the worry about accountability, but there seems to be a tendency in this direction. For instance, when it became clear that habeas corpus was open to the prisoners at Guantanamo, reports indicated that living conditions improved. The more practices that seem to correlate with the kind of lack of accountability that is bred when habeas corpus rights are denied to prisoners, the greater the value of having habeas corpus rights strongly protected in a given society. Given the black hole in US law created by Guantanamo, there may also be good reasons to think that habeas corpus should be recognized as an international right as well – a topic I will address at the end of the paper.

Perhaps even more significant than the correlation between lack of habeas corpus and torture is that between lack of habeas and summary execution. This is one of the key considerations in the movement against those responsible for the disappeared in Argentina and other countries. Those whose relatives disappeared feared that their relatives were already dead; and those who were held nameless in prisons feared that they could easily be killed and no one would know or seek justice in their behalf. Once dead, they could not seek justice on their own. And if no one knew what had become of them, then no one would act in their behalf to secure justice. In this sense, the prisoners would truly be forgotten, both in life and death, rendered less than human by being denied the dignity of a name, a reputation, and a minimum of respect.

The torture argument is an ancillary argument, not a direct argument for the value of habeas corpus. Indeed, the torture argument turns on certain empirical claims, which I have suggested but not substantiated. The strength of this argument will obviously depend on the strength of the evidence in support of the correlation I have sketched. Here the various components discussed earlier come together. For we have fear of disappearance as well as the hope of deterrence that are the components of the value of habeas, now linked to other ancillary considerations that make the value stronger yet. The liberties of the prisoner are intimately tied to this one liberty, the right of habeas corpus. And there is a sense, still only inchoate, that if habeas corpus is denied the liberties of all have been adversely affected, not just the liberties of the prisoner in question. It is to this topic that I next turn as I set out my own account of the value of habeas corpus derived in part from the considerations we have encountered in the previous sections of this paper, but now amended in various ways. I will then turn to the issue of global protection.

## V. The Ring of Gyges

In The Republic, Plato has Glaucon present the case for the innate self-interestedness of most people. Glaucon describes self-interest as “the motive which all men naturally follow if they are not forcibly restrained by the law and made to respect each other’s claims.”<sup>10</sup> He then tells the story of the Lydian shepherd who found a gold ring that when turned a certain way made the shepherd invisible to his companions.

He was wearing this ring when he attended the usual meeting of shepherds which reported monthly to the king on the state of his flocks; and as he was sitting there with the others he happened to twist the bezel of the ring toward the inside of his hand. Thereupon he became invisible to his companions, and they began to refer to him as if he had left them. He was astonished, and began fingering the ring again, and turned the bezel outward; whereupon he became visible again. When he saw this he started experimenting with the ring to see if he really had this power, and found that every time he turned the bezel inwards he became invisible, and when he turned it outwards he became visible. Having made this discovery he managed to get himself included in the party that was to report to the king, and when he arrived seduced the queen and with her help attacked and murdered the king and seized the throne.<sup>11</sup>

Later in this section of the text, Glaucon says that the conclusion to draw is: “once give him the power, and he will be the first to use it as fully as he can.”<sup>12</sup>

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<sup>10</sup> Plato, The Republic, 359c, translated by Desmond Lee, second edition, NY: Penguin Books, 1974, p. 105. In a different translation (by Jowett), the motivation to be just is said to turn on whether one is “put to the proof” in terms of “the fear of infamy.”

<sup>11</sup> *Ibid.*, 359e-360b.

<sup>12</sup> *Ibid.*, 366d.

There are several lessons to draw from this parable. First, for several thousand years, philosophers have embraced the idea that if one were invisible the normal moral constraints would not be operative. This is presumably as true of the Lydian shepherd who could make himself invisible and hence avoid detection of his crimes, as of the jailer who can make the prisoner invisible and hence hide the jailer's crimes as well. The second thing of note about the ring of Gyges example is that once there is the possibility of making oneself, or one's wrongdoing, invisible there is not a human being no matter how morally upstanding who can resist the use of this device. Of course, one does not have to be as skeptical about human nature as Glaucon and Adeimantus, and yet still think that it will be very difficult, although perhaps not impossible, to resist the allure of being able to commit wrongdoing and get away with it. And the ring of Gyges then is a parable that applies to our case of the jailer who does not have to worry about habeas corpus just as much as it does to the Lydian shepherd case.

I wish to use the ring of Gyges example to aid us in pulling together a coherent account of the value of habeas corpus. In the first instance, habeas corpus matters because it makes visible wrongdoings what would otherwise be invisible. It is also the case, as we will see, that habeas is important for the maintenance of the rule of law. I will turn to the rule of law issue in a moment, but first I address the issue of the exposure of wrongdoing. There are four main forms of wrongdoing that can be exposed by habeas corpus, even in its minimal form of merely calling for the prisoner to be temporarily brought out of the dungeon to have the charges against him or her publicly proclaimed.

First, is the wrongdoing of incarcerating someone arbitrarily. This form of wrongdoing can become visible if the prisoner is brought out of the dungeon and there

are no charges that can be read against him, or where the charges are palpably trumped up. This is instilled in American law as the right of arraignment. Soon after arrest, the prisoner is to be brought before a judge or magistrate and told publicly why he or she is being held. The arraignment is the first stage of the criminal justice process that does not merely involve the police, and it is the first time when the arrested individual may be released due to arbitrary arrest.

Second, is the wrongdoing of having executed the prisoner instead merely of having incarcerated him or her. Again this form of wrongdoing will be palpable if there is no live body in the name of the prisoner to be brought out of the dungeon. In this sense habeas corpus makes it virtually impossible for prisoners to become disappeared and forgotten in contravention of their being a person with rights. Of course, it doesn't guarantee that prisoners are not killed while in captivity, but only that the wrongdoing involved in summary execution is brought to light. Jailers can claim to have "lost" prisoners for only so long before being exposed as having killed them.

Third, is the wrongdoing of having tortured the prisoner, a wrongdoing nearly universally recognized as abhorrent. As I indicated above, this form of wrongdoing can be made visible insofar as the marks on the tortured prisoner's body, or on his or her psyche, are still observable. Of course, excuses can be concocted about how the marks were caused, such as by inmates falling down stairs or engaging in self-mutilation. But such excuses again can only mask wrongdoing for a while. Especially in a society with a free press, the questions about how the prisoner became injured will not be easily covered-up.

Fourth, is the wrongdoing of other forms of abuse perpetrated against the prisoner. And this will be made visible insofar as there are marks of the abuse on the

prisoner's body. If not, then in some cases the prisoner will be able to voice a complaint against such abuse, or at very least the jailer will worry that the prisoner will voice such abuse when brought out of the dungeon. And if there are such marks, then it may be that the wrongful acts that caused them can be brought to the attention of the public. Such wrongful practices as sleep deprivation and water boarding are not as easy to see on the body or the prisoner as is true for torture, but there often are marks or signs nonetheless that will reveal the wrongdoing.

The ring of Gyges helps us see how habeas corpus, and other procedural rights, could prevail against the arbitrary exercise of power. As we have seen arbitrariness often seems to need the cloak of secrecy and invisibility. Even benevolent arbitrary exercise of power is highly suspicious and unpopular, both because it is anti-democratic and because of the strong possibility that what is once benevolent can turn malevolent so easily. The Lydian shepherd may use his new power for the good of his people, but if he then chooses to use it for ill, there is no stopping him from doing so. The ruler, or jailer, who discovers that he can render a person invisible from public view, may also use this power for wrongdoing, or for hiding wrongdoing, and such abuse of power is at least partially stopped by the anticipation of habeas corpus appeals.

## **VI. Valuing Visibleness and the Rule of Law**

By now the value of habeas corpus and similar kinds of procedural rights is hopefully clear. And one of the keys is that wrongdoing is rendered visible and subject to censure and deterrence. The value of habeas corpus concerns what I call "the principle of visibleness." The principle of visibleness is simply the normative idea that rulers must make their decisions transparent. This principle does not guarantee that those who are detained or incarcerated will not be treated wrongly or

even that they will be treated fairly, but only that if they are to be treated unfairly it cannot be done completely in secret. The principle of visibility is then a protection of security, which, as Justice Kennedy said, “subsists, too, in fidelity to freedom’s first principles.”<sup>13</sup> Security of the person is often a by-product of habeas corpus, but as I have indicated it is not a direct but only an indirect consequence of honoring habeas corpus rights.

The prospect of the revelation of the wrongdoing through even a very rudimentary habeas corpus procedure may act as a deterrent against the wrongdoing occurring at all, or against similar wrongdoings occurring in the future. And in this sense habeas corpus is clearly related to a human good, namely that wrongdoing should not occur. But habeas corpus is not directly related to this good, but indirectly so. And it is my view that this is the way that procedural rights are generally related to substantive ones. Procedural rights do not normally have value in themselves, but only as they somehow support substantive rights. There is one clear exception to this idea and that concerns the so-called rule of law.

Merely having procedural rules that govern human affairs is often thought to be of value insofar as rule by these rules is better than rule by “man.” In this sense rule by rules is definitive of the rule of law and against the kind of arbitrariness that comes when people make decisions unconstrained by rules. Procedural rules have value here because they are constitutive of a norm, not merely because they support some other norm. The norm that these procedural rules constitute is itself a procedure. It is for this reason that I have elsewhere called rules like habeas corpus “proto-procedural” rules rather than procedural rules. Proto-procedural rules or rights

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<sup>13</sup> *Boumediene v. Bush*, 553 U.S. \_\_\_\_ (2008), p. 68.

set out rudimentary procedures but their value is not in the procedure itself but in the procedural system they constitute.

Procedural rights have instrumental or derivative value in that they support substantive rights. Procedural rights also have intrinsic value in that they are constitutive of a rule of law which promotes fairness. In this latter sense, procedural rights do not have content and while they aim at a certain good, that good, fairness and non-arbitrariness, has no content, unlike the goods that substantive rights aim at such as property rights or free speech rights which have content and aim at a human good.

Non-arbitrariness is related to a type of fairness that involves complying with a rule joined with a system of overseeing that the rule is complied with. This is generally discussed under the heading of the rule of law. Political orders are arbitrary both by having rule by the whim of a person or persons, instead of a rule, and by having no oversight. The value of non-arbitrariness is hard to characterize. There is a kind of formal fairness that is achieved when procedural rights are respected. Habeas corpus provides a minimal rule for deciding, and also a rudimentary system for oversight. In this sense habeas corpus epitomizes procedural fairness. And the value is not merely derivative of substantive rights. Of course, there is also value to procedural rights in the various ways that they are means to substantive ends.

Habeas corpus is constitutive of the rule of law in that it is clearly better that prisoners be treated according to a regime that has the habeas corpus rule than subject to the possibly arbitrary rule of their jailers. Habeas corpus is a paradigmatic constituent of the rule of law insofar as it stands against the arbitrary exercise of authority. Generally, the rule of law concerns the limitation on a ruler's authority by rules imposed on rulers, not made by them. The value of the rule of law, as with the

value of habeas corpus which is itself part of the rule of law, is not merely in the substantive values it advances but also, in a curious way, in the value that inheres in a system of rules that restricts, or places “stops” in the way of, arbitrariness. As I’ve argued, arbitrariness is a disvalue in itself that is not necessarily connected to a specific human good, at least not in a direct way. I next take up two challenges to this view.

First, one could argue that habeas corpus directly promotes a substantive human good, namely, that we not be forced to assume certain risks. Larry Alexander has denied that procedural rights have value, or even status, independent of substantive rights. His position is that “procedural rights just are substantive rights, albeit substantive rights of a special (but quite numerous) kind: rights against risks.”<sup>14</sup> He argues that “procedural rights are in some sense secondary to substantive rights because they are rights about official determinations of the facts governing the application of substantive rights.”<sup>15</sup> The examples he gives are all of that sort: “the right to a court appointed attorney,” “the right to compel witnesses to testify,” and “the right to a jury trial.” And he argues that the goal of such procedural rights is “Minimizing the risk of mistaken conviction” which then “increases the risks associated with crime.”<sup>16</sup>

The kind of fairness that Alexander concerns himself with is thus a kind of substantive fairness – minimizing the risk of mistaken conviction. This kind of fairness has largely derivative status, as he argues. But I have argued that there is another form of fairness, which is opposed to arbitrariness, and which will not be so easy to explain in derivative terms. Concerning rights like habeas corpus, Alexander

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<sup>14</sup> Larry Alexander, “Are Procedural Rights Derivative Substantive Rights?” *Law and Philosophy*, vol 17, no. 1, January 1998, p. 19.

<sup>15</sup> *Ibid.*, p. 23.

<sup>16</sup> *Ibid.*, p. 24.

contends that these procedural rights have value only as that value derives from the substantive right “to liberty from confinement.”<sup>17</sup>

I do not deny that sometimes this is true of procedural rights like habeas corpus. But I think that the more important and more interesting value of habeas has to do with its intrinsic value as part of the rule of law. And here it is protecting people against arbitrariness that may not support any other substantive right. It may be that the liberty from confinement is unaffected by habeas rights since the prisoner has only very temporary removal from confinement associated with this right, as I have indicated above. Alexander may be right that there is a worry about certain risks, but specifying what the risk is in the case of a denial of habeas rights is not always easy to do. And it is especially unclear what substantive right is risked when the rule of law is denied.

Second, one could argue that the human good of fairness is what the rule of law promotes, and what is at jeopardy when habeas rights are denied. But fairness is not best thought of as a substantive right and hence if it is a human good it is a distinctly different one from such goods as health or well-being. Fairness is not a state or outcome, but a way or method to reach states or outcomes. And there is value in having some ways of achieving ends rather than other ways. Some ways are fairer than other ways, despite the fact that both ways could lead to exactly the same human good. Since different ways can lead to the same human good, the difference among these ways or methods is not just in what human good they promote. Indeed, fair procedures can lead to manifestly unjust results insofar as substantive goods are denied or diminished rather than advanced. Here think of dividing a pie fairly by dividing it into equal slices, and yet some of the recipients of pieces are not hungry

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<sup>17</sup> Ibid., p. 31.

while other recipients are so famished that their portions will not help them sufficiently to stave off starvation.

If a human good is achieved by a fair method, and the same human good is produced by an unfair method, there is a normative superiority of the fairly achieved human good, but not merely because that good is indeed achieved, since that good can also be achieved by an unfair method. A fair method is often one that is open to all parties and that proceeds in a publicly open manner. I can award children treats based on a private calculation of who I like best, or based on an open competition for the treats the terms of which the children are aware of. It may turn out that by both methods the treats are awarded to the same children. So the fair method is not better because of what it achieves. There must be something about the allocation process, or the process to decide how to engage in allocation, that itself has value in such cases. And even if no human good is advanced, allocations that are fair seem to have some value nonetheless.

## **VII. The International Rule of Law**

Fair methods are generally ones that are open to public scrutiny – they conform to the principle of visibleness. This principle does not have overriding weight, but it is a significant consideration. And the value is that arbitrariness is diminished. Arbitrariness is a disvalue that again is not fully understood in terms of outcomes or goods. For the same result could be achieved arbitrarily or non-arbitrarily. Procedural rights create a bulwark against arbitrariness and for this reason they have value, and that value is independent of what human goods are promoted. The rule of law is merely what is constituted by a coherent and efficacious set of procedural rights. There is a close link between the rule of law and political fairness and on my account habeas corpus plays a significant role in the rule of law, indeed is

constitutive of the rule of law in certain situations. And as I have argued, fairness has value independent of substantive human goods.

Procedural rights are also crucial for an international rule of law. Promotion of the rule of the law is meant to restrain arbitrariness but it is also a good in itself. Like democracy, the rule of law is valuable not just because of what it produces. Christian Tomuschat talks of *jus cogens* norms, the most fundamental norms of international law, as “rules of conduct which proscribe certain attacks on a number of particularly cherished goods of the international community.”<sup>18</sup> Democracy and the rule of law are goods, even if not the sort of goods that are typically listed as important human goods, such as health and well-being. Rather than goods of bodily integrity, the rule of law is a good of fairness. Indeed, fairness is cherished by the international community as is true of all communities. Insofar as it is an important good, the rule of law should be promoted as should those things that are constitutive of it, such as habeas corpus.

In discussing *jus cogens* norms, one German legal theorist has commented that many human rights conventions “contain core guarantees which the member States may not suspend even in a period of national emergency, such as the right to life, and the ban on torture, arbitrary detention, slavery, and forced labor.”<sup>19</sup> It is interesting that in this list are substantive rights, and also one right that spans the divide between procedural and substantive rights, the right against arbitrary detention. As we saw above this right is not quite the same right as that of habeas corpus. But the idea is roughly the same, namely, that some procedural rights are as important as some important substantive rights. And this is because they protect core interests, such as

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<sup>18</sup> Christian Tomuschat, “Concluding Remarks,” in *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, edited by Christian Tomuschat and Jean-Marc Thouvenin, Leiden: Martinus Nijhof, 2006, p. 430.

<sup>19</sup> Stefan Kadelbach, “The Identification of Fundamental Norms,” in Tomuschat and Thouvenin, *ibid.*, p. 30.

the right to liberty. So far, such procedural rights have been protected largely through regional human rights commissions and courts. But as I have argued, more is needed, especially in light of the failures to protect detainee rights in the Guantanamo case. So the question is how best to protect procedural rights at the global level.

The international rule of law is in many ways more about fairness than about substantive justice. If there is to be an international rule of law certain core rights will have to be protected against abuse wherever in the world that abuse occurs. And a good example is the failure to provide core procedural rights at the prison in Guantanamo Bay, Cuba. It seemed as if there was a legal black hole, and indeed that was just what certain members of George Bush's administration actually advocated. If human rights are to be protected globally, protecting such procedural rights as habeas corpus across the world seems to be utterly crucial.

### **VIII. A Global Right to Habeas Corpus**

In 2002 the Inter-American Commission on Human Rights (IACHR) considered a petition from some of the detainees at Guantanamo who argued that their habeas corpus rights had been violated. On March 22 of that year the Commission issued "precautionary measures in favor of the detainees being held by the United States at Guantanamo Bay, Cuba." The Commission "decided to request that the United States take urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal." The United States disputed the Commission's jurisdiction. The Commission rejected the United States' objections and maintained its request. The matter was never resolved as the "Commission did not subsequently receive any information indicating that its request for precautionary measures had been complied with." The only solace for the IACHR came when the United States Supreme Court ruled similarly to it in 2004. But despite

the Inter-American Commission reiterating its concern about the Guantanamo detainees each year after its initial issuing of precautionary measures, there is little evidence that the United States changed its behavior or policies.

Nonetheless, what is most significant is that the Inter-American Commission did not feel it could take stronger measures against the United States in the Guantanamo case. Indeed, even after it became clear that the United States would ignore the Commission's Precautionary Measures, the Commission did not seek further measures to protect the Guantanamo detainees, who the commission admitted were at grave risk. It is striking that there has never been a decision of the Inter-American Court of Human Rights against the United States on this issue or anything stronger from the Commission than the "request" that was articulated above. So, while it is true that the Inter-American Commission at least took up the issue of the deprivation of rights of the Guantanamo detainees, the result is quite far from minimally satisfactory – calling into question the efficacy of at least this particular regional human rights commission, if not the entire structure of human rights commissions as vehicles for protecting procedural rights such as those of habeas corpus.

My view is that more is needed to enforce such procedural rights as habeas corpus at the global level than is provided by the current, mainly regional, human rights regime. Part of the difficulty is that violations of procedural rights simply do not capture people's imagination the way that violations of substantive rights do. When genocide or ethnic cleansing occurs, the "conscience" of the world's community is easily aroused. And so it matters less whether the protections offered are regional or global, although with the institution of the International Criminal

Court, there is what promises to be an effective global enforcement mechanism for these substantive rights violations to go along with the regional bases of protection.

So far, procedural rights have been protected, if at all, largely through regional human rights commissions and courts. But more is needed, especially in light of the failures to protect detainee rights in the Guantanamo case. The Security Council is empowered to sanction States that would violate the global norm against aggression. The International Criminal Court provides sanctions for violations of the global norms against genocide, crimes against humanity, and war crimes. Piracy and slavery have been condemned in large multi-lateral treaties that are enforced by *aut dedere aut judicare* principles mandating that States either prosecute or extradite those responsible for such violations of global norms.<sup>20</sup> Procedural rights need a similarly global protection institution.

On one level what I envision could be simply understood as a court of appeals from the regional courts and commissions of human rights. On another level, such a court could also, in a limited set of contexts, be a court of first impression where one did not have first to exhaust remedies before these regional courts. On yet another level, the court I envisage could also be an appellate court from decisions rendered by domestic courts, although again this would have to be quite limited in scope if it is ever to be acceptable in a system of strong State sovereignty. The upshot would be that there would no longer be legal black holes where detainees could languish in prison for years without ever having charges against them publicly proclaimed and in their presence.

Many who have written on the rule of law have not recognized the central role of habeas corpus. Lon Fuller, for instance, only mentions habeas corpus once in his

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<sup>20</sup> M. Cherif Bassiouni and Edward M. Wise, Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law, Ardsley, NY: Transnational Publishers, 1995.

lengthy chapter on the rule of law in his book The Morality of Law.<sup>21</sup> And even Fuller does not give to habeas corpus the sort of standing in procedural due process that I have argued that it should have. The seemingly innocuous right that a prisoner be brought out of the dungeon and have the charges against him or her publicly proclaimed is indeed crucial for the protection of many other substantive rights, but it is also a value in itself insofar as it is a crucial component of the rule of law. And when thinking about the international rule of law, habeas corpus should be one of the first rights protected.

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<sup>21</sup> Lon Fuller, The Morality of Law, New Haven, CT: Yale University Press, 1964, p. 81.