

Habeas Corpus, Procedural Rights, and Fundamental Law

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“Confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown and forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.” Blackstone (1765)

Most of the recent literature on global justice in political philosophy has focused on substantive issues, such as claims of economic distributive justice of those in poor countries, or the right against persecution. Such rights are extremely important. But there is a class of issues that have been given little attention, namely procedural rights such as the right of habeas corpus or nonrefoulement at the global level. These rights are arguably just as important for the security of peoples across the globe and yet there is little discussion of them and few global institutions that currently consider them. I will address this issue in the context of the need to confront arbitrariness of rulers whether tyrants or merely benevolent presidents.

The debates about global justice typically concern economic distributive justice or criminal retributive justice. Both of these forms of justice concern substantive justice, namely the substantive rights that people have by virtue of either their economic need or their status as victims. I wish to discuss a different subject matter in the field of global justice, namely, the procedural rights that constitute an international rule of law. I will contend that procedural rights provide a moral core to any system of law, perhaps even more so at the international level. Such procedural rights also provide at least minimalist protection concerning substantive rights as well. In this respect, the moral content of the law may very well be best exemplified in the institution of the rule of law. Any

substantive rights can be held hostage if the person who would claim these rights can be incarcerated unjustifiably.

I. Habeas Corpus and Magna Carta

This project is inspired by two events, 788 years apart. The first is the signing of Magna Carta in 1215 and the second is the establishment of a prison at Guantanamo Bay in 2003. It may seem odd to link these two events, but I don't think it is odd at all. Magna Carta established that any person is entitled to due process of law. Guantanamo Bay stands for the idea that certain prisoners can be denied due process if they fall through the cracks in the various extant legal regimes.

Both international law today and Magna Carta are law based on contract. Magna Carta was a covenant extracted from King John of England by feudal barons. Chapter 39 (normally referred to as Chapter 29, in the 1225 revised version of King Henry III) says:

No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

There are at least four distinct rights in this document, which came to stand for the core of procedural due process, and all four were violated by the establishment of the prison at Guantanamo Bay.

The rights enshrined in Magna Carta are: 1) the right not to be arbitrarily imprisoned; 2) the right not to be sent into exile; 3) the right not to be removed from the protection of the law; 4) the right to trial by jury. At Guantanamo Bay, all four rights were violated. The right of habeas corpus was denied to these prisoners. Several prisoners were sent from Guantanamo to countries that were known routinely to use torture. The

prisoners were described as being in a “legal black hole” in that they were neither within the jurisdiction of US courts nor under the jurisdiction of the laws and customs of war, since they were unlawful, or “enemy,” combatants. And the prisoners at Guantanamo were denied trial by jury of their peers.

The writ of habeas corpus predates the Magna Carta of 1215, but is thought to have been given support in that document, even if not named there. By 1230, Henry of Bracton clearly lists the writ in his De Legibus et Consuetudinibus Angliae, 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.¹

Here we see the writ described as addressing the official who is detaining or jailing a person 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. The writ of habeas corpus “developed as an instrument for judges to control arbitrary detention.” And at least one legal theorist has persuasively argued that such rights were never thought to be restricted to just one jurisdiction.²

I will argue that procedural rights like habeas corpus rights are fundamental or basic rights, on all fours with their better known economic and retributive concerns. It is my contention that such rights are the backbone of a minimal respect for human rights

¹ 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.

² Timothy Endicott, “Habeas Corpus and Guantanamo Bay: A View from Abroad,” draft in the possession of the author.

generally and if recognized globally would provide equitable relief and significantly fill gaps in an international rule of law. I defend this thesis in what follows.

At the moment, the ICC has four substantive crimes as the basis of its jurisdiction: genocide, crimes against humanity, war crimes, and the crime of aggression (the last is currently not operational because of a lack of consensus on what constitutes aggression). The crimes other than aggression are very specifically defined and are only likely to be prosecuted when there has been a mass atrocity. In addition, the ICC is governed by the important principle of complementarity, which requires that the prosecutor can only take a case if the State that otherwise would have jurisdiction has refused or indicated that it cannot hear the case on its own. I see the global procedural justice rights as a corollary consideration to the substantive rights already protected at the ICC, but they are also gap fillers on the way toward a much more robust, and morally significant, international legal regime.

II. Procedural Rights and Equity

My view is that procedural rights differ from substantive rights in that substantive rights are especially weighty rules that aim at the promotion of a particular human good, whereas procedural rights are especially weighty rules that aim only at a certain kind of formal fairness.

Procedural rights are of value because of the two primary goals that they serve: First procedural rights have instrumental value as complements to substantive rights.

- 1) Procedural rights offer protection for substantive rights.
- 2) Procedural rights are stand-ins for substantive rights.
- 3) Procedural rights are “stops” against certain forms of wrongdoing.

Second, procedural rights have intrinsic value as constitutive of the rule of law.

- 4) Procedural rights allow for a system of law to emerge out of a set of substantive rules.
- 5) Procedural rights minimize arbitrariness.
- 6) Procedural rights support fairness.

This analytical analysis gives us a beginning at understanding the normative importance of procedural matters. In particular, I would urge that we give great weight to the following two normative statements, one first declared by Grotius and the other by Blackstone:

Procedures should “prevent the dangers to persons of particular eminence becoming excessive.”³

If once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities.⁴

For Grotius, one of the great evils to be avoided, especially in time of war, was the excessive acts of a sovereign. For Blackstone, habeas corpus was a shield against arbitrary use of executive power. And the more general normative principle, one which Blackstone called a natural right, was that persons should have their liberty, especially liberty of physical movement, respected at all times, and especially by the executive.

Obviously, good normative grounds can be given for restrictions of liberty, but it is the arbitrary restriction of liberty that has been so strongly condemned since Magna

³ Hugo Grotius, *De Jure Belli ac Pacis* (On the Law of War and Peace) (1625) translated by Francis W. Kelsey, Oxford: Oxford University Press, 1925, p. 656.

⁴ William Blackstone, *Commentaries on the Laws of England* (1765), facsimile of the first edition, Chicago: University of Chicago Press, 1979, Volume 1, p. 131.

Carta. And to make sure that arbitrariness is not hidden, the four rights of Magna Carta are as important today as they were at the beginning of the thirteenth century. And Blackstone, writing in the 18th century, again put it quite well:

But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown and forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.⁵

It is fitting that what is secreted in the interstices of the procedural right of habeas corpus is the moral principle against secrecy in confinement.

I propose to capture this idea in what I call the normative **principle of visibleness**⁶ in detention and incarceration as a counter to the secrecy that masks arbitrary exercise of power in this domain. Habeas corpus stands for the proposition at its most minimal, but also at its most powerful, that no one can be hidden in jail or prison. And the reason for this is that such secrecy is too likely to hide mistreatment and abuse. In its first instance, habeas corpus means simply that the prisoner must be produced. The other rights memorialized in Magna Carta's chapter 29 (39), spell out what procedures must be in place to deal with the prisoner who has now been brought into the light and made visible.

It is part of the folk history of the right of habeas corpus that one of the first things to look at when the prisoner has been made visible is whether there are marks on his or body indicative of abuse. Before one looks for such marks of abuse of power, one must first be able to look upon the prisoner, to see that he is still alive and then to see what his body tells us initially about how he has been treated. Habeas is a proto-procedural right

⁵ Ibid., p. 132.

⁶ The OED lists, as one of the earliest uses of the term visibleness, a 16th century reference to the fact that the Catholic Church did not maintain open procedures.

since it does not yet tell us what procedures must be followed in treating the prisoner once transported out of the secrecy of the dungeon. And the normative basis of this right has to do with counteracting the normal human tendency to do wrong when it is unlikely that anyone will know about it, as Plato famously indicated in the myth of Gyges.

Twenty-five hundred years ago, in Book Two of The Republic, Plato discusses the ring of Gyges, where the motivation to be just is said to turn on whether one is “put to the proof” in terms of “the fear of infamy.” To be clothed in justice, it cannot be that one can escape by becoming invisible.⁷ The seemingly innocuous right of habeas corpus is crucial for various security rights, putting those who would abuse such basic rights “to the proof.”

In the recently decided US Supreme Court case of *Boumediene v. Bush*, Justice Kennedy, writing for the Court, discusses the role of the historical doctrine of habeas corpus I have outlined: “Remote in time it may be, irrelevant to the present it is not.”⁸ Kennedy cites *Schlup v. Delo* as holding that habeas corpus “is at its core an equitable remedy.”⁹ In this brief section I will say a bit about the various ways in which this statement can shed light on some of the issues I have been addressing. Equity has been a clear way to deal with unfairness in an otherwise proper legal proceeding, and when the laws are either silent or ambiguous. Indeed, since at least the time of Thomas More, the first lay official in England to be Lord Chancellor and to expand the reach of equitable relief, equity has been seen as the bridge between morality and legality in a system of law.

In his classic work, Commentaries on Equity Jurisprudence, Justice Joseph Story sketches the broad nature of equity:

⁷ Plato, The Republic, Book II, Jowett translation.

⁸ *Boumediene v. Bush*, 553 U.S. ____ (2008), p. 68.

⁹ *Ibid.*, p. 50, citing *Schlup v. Delo*, 513 U.S. 298, 319 (1995).

In the most general sense, we are accustomed to call that equity, which in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex aequo et bono*. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian ... Now it would be a great mistake to suppose that equity, as administered in England, embraced a jurisdiction as wide and extensive as that which arises from the principles of natural justice above stated.... But there is a more limited sense in which the term is often used, and which has the sanction of jurists in ancient, as well as in modern times... Thus Aristotle has defined the very nature of equity to be the correction of the law...¹⁰

Indeed, Aristotle said that equity is outside of legal justice, since it is a correction of it, but is also better than legal justice and one of the most important considerations of law.¹¹

Equitable considerations have played an important, if controversial, role in habeas proceedings in the United States. Consider the circumstance addressed in the *Boumediene* case where new potentially exculpatory evidence arises after a trial has occurred. In *Boumediene*, the Court declared:

There is evidence from 19th century American sources indicating that, even in States that accorded strong *res judicata* effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or unavailable to the prisoner.¹²

While controversial in some respects, *Boumediene* affirms this doctrine today:

¹⁰ Joseph Story, *Commentaries on Equity Jurisprudence* (1834), London: Stevens and Hayes, 1884, pp. 1-3.

¹¹ Aristotle, *Nicomachean Ethics*, Book V, Ch. 10, 1137b10.

¹² *Ibid.*, p. 51.

If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court... The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.¹³

As the Court recognized, these considerations make habeas an equitable remedy.

The habeas court, seen as an equity court, acts as the conscience of the republic by making sure, in these circumstances for instance, that no innocent prisoner remains incarcerated. Another way to think about it is that, as fundamental law, habeas and related rights bring basic moral considerations into the legal system. And just as the foundation is not always part of the structure itself, so habeas is equitable in that it is fundamental to but not necessarily a proper part of the legal system itself. As I said above, this gives us the conceptual space to see equity as a bridge between morality and law.

Seeing habeas as an equitable remedy also allows us to begin to understand how such a simple proceeding could constitute a challenge to the legitimacy of an action by a properly authorized executive action. Just as the old courts of equity (as the Chancellor's court) acted to overturn abuse in either the common law or king's courts, so habeas is understood today to have the same equitable function. And this is to say that habeas brings in a certain set of basic moral considerations into a legal system. It also allows for equity to be a gap-filler for situations where the law is silent or where the law as applied would be unfair, and hence cause law and justice to separate.

¹³ Ibid., p. 61. Also see Larry May and Nancy Viner, "Actual Innocence and Manifest Injustice," St. Louis University Law Journal, vol. 49, no. 2, 2004, pp. 481-497.

III. Fundamental Law and Moral Fairness

Fundamental law today most frequently refers to the formal Constitution of a given legal system. But this is misleading for several reasons. First, it implies that systems of law that lack a formal constitution lack fundamental law. And second, it makes it seem as if the written document itself is fundamental law rather than the principles which are contained therein, or even merely assumed in the written document. Instead, fundamental law concerns first principles for a given legal order. And these principles can be written or unwritten and can even be merely inferred from procedures that are thought to be especially important within a legal system.

“Fundamental law” is a phrase that came to have its most important meaning in 17th Century England. It was “opposed to arbitrary and tyrannical government.”¹⁴ Fundamental law is that which constitutes the roots of a political institution. When there is an actual Constitution, fundamental law is often thought to be virtually identical to it. But if the Constitution is to have roots as well, these will have to be understood in terms of principles not found in any document but understood to be the grounding principles of a political institution. Ronald Dworkin has been at the forefront of developing an analysis of the grounding principles for the American Constitution. He has argued that understanding a Constitution requires that one uncover its underlying principles and then construct the most coherent set of like principles that would indeed support the text of the Constitution. These principles are what he and others have called “fundamental principles.”¹⁵

¹⁴ House of Commons, January 1649 - see J.W. Gough, Fundamental Law in English Legal History, Oxford: Oxford University Press, 1955, p. 1.

¹⁵ Ronald Dworkin, Taking Rights Seriously, London: Dukworth, 1977, see especially pp. 106-7 and 134-5.

When there is no Constitution, fundamental law typically refers to certain long-standing customs, perhaps even being “fixed and unalterable.”¹⁶ The customs themselves may articulate principles, but they are not the same as the principles, and certainly do not gain their authoritativeness merely from being long-standing.¹⁷ The principles are moral principles that derive their authority in the way all moral principles do, because of their claim to legitimacy. Typically there are a small set of substantive principles that are thought to be definitive of a particular political society, such as freedom of speech, press, and association, or nondiscrimination on the basis of race or gender. Like the principles that undergird a Constitution, in a society without a Constitution there are principles that also provide a foundation for the political and legal system.

Habeas corpus is not itself fundamental law in the sense of being a body of substantive principles undergirding a legal system, but habeas corpus can be significantly intertwined with fundamental law. Procedural, not merely substantive, rights are significant in fundamental law because of the two important roles procedural rights play. As we saw above, procedural rights are instrumentally valuable as they complement substantive rights. One way that they can do this is by gap-filling. Equity relies on such gap filling insofar as the substantive rules of any system of rules will not always fit the specific case in the way the drafters of the rules envisioned. In particular, habeas corpus can be a gap-filler in that its requirement of visibility may inhibit kings and presidents from finding loop-holes by which prisoners can be abused, or where other forms of unfairness can creep into the system of law.

¹⁶ Gough., p. 15.

¹⁷ See my discussion of the problems with custom in my book Crimes Against Humanity: A Normative Account, NY: Cambridge University Press, 2005.

Habeas corpus provide a deceptively simple procedure, namely, that a person must be brought out of the dungeon and have the charges against him or her publicly recited. This procedure is a bulwark against some of the most serious forms of oppression. Those who exercise their substantive rights to speech, press, or assembly, for instance, cannot be incarcerated indefinitely, or threatened with such treatment, in order to keep them from expressing their substantive rights. The procedural right of habeas corpus secures these substantive rights. Indeed, whatever the substantive rights are, habeas corpus will help secure them. Whatever the substantive rights, habeas corpus makes sure that there is a minimum of fairness in a system of law that has those substantive rights at its core.

As fundamental law, procedural rights like habeas corpus are also valued intrinsically in that they support basic fairness within the legal system. Such rights do not specify any right to a particular form of treatment or liberty that the State must protect. Rather these rights are simply what minimally must be done so that arbitrariness does not creep into the way that people are deprived of their liberty by being incarcerated. And minimal procedural fairness translates into the embodiment of the moral fairness that is necessary for a system of law to be deserving of fidelity on the part of the population at large. When there is arbitrariness in the system of law the rule of law is disrupted and the system of law becomes fundamentally undermined.

While it may be that substantive rights undergo change over time, having procedural rights remain constant is crucial, especially since there is much less need for procedural rights to change over time. Habeas corpus is of this sort – a procedural right that can remain fixed even as the particular substantive crimes that could lead to arrest

and incarceration might vary quite significantly over time. Basic moral fairness is achieved in the system of law when there is such a fixed set of procedural guarantees as that provided by habeas corpus, and when those procedures conform to a minimum of fairness. Here habeas corpus that guarantees that no prisoner is locked away for arbitrary reasons, or as a way to deny other important moral rights of the prisoner, secures a moral minimum.

The idea of fundamental law has been somewhat controversial over the last few centuries, since some have seen reference to fundamental law as an attempt to limit what duly elected legislatures can do. The worries about fundamental law have mainly been voiced concerning substantive principles, such as the right to privacy supposedly discovered as a substantive right undergirding the American system of law. But such a criticism is harder to mount if we are discussing fundamental procedural rather than substantive rights. Procedural rights typically do act as a restraint, but most frequently on the executive rather than the legislative branch of government. Even when they restrict democratically elected legislatures, procedural rights are less controversial than substantive rights because they do not clearly overrule the will of the people.

The will of the people is normally expressed substantively and procedural rights can accommodate changes in what the populace thinks are the fundamental substantive norms of the society. If the populace votes to overturn the right of habeas corpus the will of the people may be thwarted, but this is much less anti-democratic than overruling the populace on substantive grounds. Procedural rights, unlike substantive ones, are much less likely to be abused in an anti-democratic way. Since most procedural rights are minimal protections of fairness, it is hard to see why a populace would object to them.

Magna Carta was cited most frequently as being the embodiment of fundamental law in England in the 17th Century. And as I've indicated, habeas corpus was thought to be part of the rights guaranteed in Magna Carta – in fact the most significant of these rights were procedural not substantive. The rights contained in Chapter 29 (39) of Magna Carta are what are sometimes referred to as fundamental law. A number of historians, including Holdsworth, date the idea of habeas corpus to an earlier time than Magna Carta. And interestingly, the earliest uses of habeas corpus also do not stand for such a broad right as due process, but only for the right to challenge one's imprisonment, a purely procedural right. The provisions of Chapter 29 (39) were seen as crucial for "enforcing the law" especially for making sure that the legal rights were not denied by spiriting a potentially complaining party away, either into jail or out of the country altogether. No rights would be secured without these rights of habeas corpus and other similar rights enforced.

Henry Maine made an important point very clear indeed when he said that fundamental law can be made in the form of procedures:

So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.¹⁸

The substantive rights of liberty, especially the right to be free in one's bodily movements, are indeed first approached in a system of law that moved beyond the purely local, toward norms that applied across the entirety of England.

¹⁸ Sir Henry Maine, Dissertations on Early Law and Custom, NY: Henry Holt and Company, 1886, p. 389.

It is also true that many other types of early law, including Irish and Indian legal systems, give “an extraordinary prominence” to procedure.¹⁹ When early legal systems focus on procedure they display an awareness that the most important “service to mankind was to furnish an alternative to savagery, not to suppress it wholly” by limiting but still partially allowing private remedies. As long as the appropriate procedures are followed, these private remedies were important since early tribunals often lacked the “power of directly enforcing their own decrees.”²⁰ Procedures, like those that set limits on the arbitrary use of power, nonetheless allow a wide variety of enforcement mechanisms, something that is especially important when there is no centralized sovereign power, or when the will of the populace is shifting.

Maitland tells us how the “forms of action” were absolutely crucial in determining whether there even was a wrong that had been committed. As Maitland put it, one didn’t see a wrong and then look for a form of action, but one first had to find a form of action before there was anything that could be called a wrong that was legally actionable. There is no doubt, though, that Magna Carta came to be seen as hugely important, especially the habeas corpus provision. One historian makes the point quite succinctly:

Magna Carta had established itself as more than simply a venerable statute; by then it was fundamental law.²¹

Habeas corpus is part of fundamental law. Its value cannot “be wholly divorced from morality”²² just as for other types of fundamental law, setting the stage for an understanding of why kings and presidents should be especially worried about it.

¹⁹ See, *ibid.*, pp. 374 and 386.

²⁰ *Ibid.*, p. 387.

²¹ A. E. Dick Howard, Magna Carta: Text and Commentary, U. of Virginia Press, 1964, 1998, pp. 24-25.

²² Gough, p. 213.

IV. Why Habeas has Bothered King's and Presidents

In my reconstruction of the history, habeas corpus was initially thought of as a proto-procedural right, merely the right to be brought from the dungeon and told of the charges against one. At nearly the same time, the right also came to be seen as a right to have those charges assessed to see if there was a prima facie reason to think that they had any basis, and this was understood as the right not to be arbitrarily incarcerated. Later, habeas corpus came to stand for the right to due process in general. And later still habeas corpus was understood, as it is today in the American system of law, as a right to challenge a ruling on the basis of any of one's significant constitutional liberties. As the right expanded it became more than procedural. But the question is why the stripped down version of habeas corpus was feared by kings from Magna Carta onward and was the bane of George W. Bush's presidency in the Guantanamo case.

In Bush's case, he claimed that if the charges had to be publicly read, or even if the identities of the detainees at Guantanamo had to be disclosed, this would jeopardize national security. While habeas corpus rights have been suspended due to emergency situations before, Bush never explained why the identity of the Guantanamo detainees was connected to any aspect of national security other than a vague reference to confronting terrorism. As the cases of these detainees finally begin to move forward, some of the reasons for Bush's fear of public disclosing of the detainees and the charges against them are now evident, including that torture and other inhumane treatment was employed in interrogating these detainees. It appears that Bush feared the public outcry, both domestically and internationally, if this had been known earlier.

The general 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, the 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 is the heart of the matter. For if the stripped 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, including some current political leaders. 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. 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 the 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.

What of the rule of law that is served by fundamental procedural rights? When rulers obstruct the rule of law, they in effect admit that they are ruling based on their arbitrary will and not the will of the people. Again, some rulers may not be shamed or bothered by this. Visibleness does not guarantee that those who are detained or incarcerated will be treated fairly, but only that if they are to be treated unfairly it must not be done in secret. The principle of visibleness is then a protection of security. This, of course, still leaves open vast avenues of abuse, at least in certain societies. But in those societies that are governed by law and not by tyrants, visibleness will be able to curtail quite a lot of abuse. And even in those societies where tyranny is rampant, visibleness may deter as well, insofar as the tyrants, as humans, care about what others care about, even those outside the society in question.

There is one other thing that could explain the often forced respect for habeas corpus among political leaders. Habeas corpus and other similar procedural rights, as had been often expressed at least since the time of Magna Carta, represents a kind of morally minimal core for a government. Justice Kennedy said that habeas corpus "represents

“fidelity to freedom’s first principles.”²³ And it is fidelity that is often the key consideration – for when a people does not have respect for a government and its laws they will not feel bound to obey those laws. Fidelity to law requires that laws be seen to meet a minimal moral core, to be grounded in a minimal moral foundation. Basic fairness is the cornerstone of such a foundation, and habeas corpus has been recognized as one of freedom’s first principles of that foundation.

Is the most minimal of habeas rights, the procedural right to be removed from the dungeon and brought into visibility, the normative core of the rule of law? It is in the sense that most executive or judicial decisions that are arbitrary or unfair simply won’t withstand the light of day, with the possible exception of extreme tyrants. If one can be secreted away in prison or in rendition, Blackstone is surely right that to say that none of one’s rights are secure. In addition, I have tried to indicate why the minimal sense of habeas is so important to fidelity to law and correspondingly to the minimal moral core of a government’s laws. On this point, Justice Kennedy is quite clear: “Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”²⁴

Let us return to the earliest form that habeas took, according to Bracton: that the jailer “B” is merely to produce the body of “A.” Aside from seeing that “A” is still alive, and whether his or her body has bruises, we now have some reasons for why this is so important. When kings and presidents can render their wrongdoings invisible they feel they can act with impunity. But even these most powerful figures worry when their

²³ *Boumediene v. Bush*, 553 U.S. ____ (2008), p. 68.

²⁴ *Ibid.*, *Boumediene*, p. 69.

actions can be exposed to public view. Twenty-five hundred years ago Plato made this point in The Republic, and it is still true today. J.W. Gough also put the point well when he said that the fundamental law is the law which leaders

“who expect obedience must themselves obey – the limit which they can overstep only at the risk of offending the sense of justice of the community: in the last resort of arousing such resistance as to threaten its social and political cohesion.”²⁵

²⁵ Gough, p. 223.