

# Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing



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## ABSTRACT

While there has been a great deal of focus on who may be detained in the armed conflict with al-Qaeda and associated forces (the so-called war on terror), there has been relatively little consideration of how long the government may hold individuals. The Article provides a new approach to this issue. It argues that review of long-term terrorism detentions should be addressed not merely through application of the laws of war, which permit detention until the end of a conflict, but should also draw on principles rooted in criminal sentencing.

The Article makes two main points: First, criminal sentencing highlights the value of a judicial proceeding focused on the length of detention, and second, the United States should develop a detention standard that incorporates a broader range of factors about an individual, his background, and past conduct to assess whether the government should continue to hold him. This standard may be utilized whether review of continued detention takes place in a judicial or an administrative proceeding.

The Article not only seeks practical solutions to the seemingly intractable problems posed by the detention of terrorism suspects at Guantánamo Bay Naval Base. It also attempts to reframe the larger debate surrounding the war on terror by demonstrating how traditional legal concepts, such as those governing the detention of combatants, must be adapted given the nature of the armed conflict the United States is waging.

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## INTRODUCTION

Guantánamo remains a quagmire. Political opposition and legal impediments have thus far thwarted President Obama's January 2009 pledge to close the U.S. detention center there.<sup>1</sup> The repatriation of detainees has come to a virtual standstill, even though approximately one-half of the remaining 164 prisoners have been cleared for transfer by the U.S. government because their continued confinement no longer serves the national interest.<sup>2</sup> In January 2013, the administration closed the special office responsible for shutting down Guantánamo.<sup>3</sup> A widespread hunger strike subsequently forced Obama to declare the current situation unsustainable and to renew his commitment to closing the prison.<sup>4</sup> In his May 2013 speech at the National Defense University, Obama announced that he was lifting his own moratorium on detainee transfers to Yemen and appointing a new, special envoy at the State and Defense Departments charged with effecting the transfer of detainees to third-party countries.<sup>5</sup> While these renewed efforts may result in the transfer of some detainees,<sup>6</sup> it remains uncertain whether they will lead to the prison's closure or

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1. See David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179 (2012).
  2. See U.S. DEPT OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 10–11 (2010), <http://www.justice.gov/ag/guantanamo-review-final-report.pdf> (noting that the Obama administration had cleared 126 detainees for transfer but that eighty-two of those detainees remained at Guantanamo); Jeremy Herb, *Obama Promise to Close Guantánamo Prison Unfulfilled*, HILL (Jan. 12, 2012, 1:32 AM), <http://thehill.com/homenews/administration/203727-obama-promise-to-close-prison-at-guantanamo-still-unfulfilled> (estimating that eighty-nine prisoners who have been cleared for transfer remain at Guantanamo).
  3. Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, N.Y. TIMES, Jan. 28, 2013, <http://www.nytimes.com/2013/01/29/us/politics/state-dept-closes-office-working-on-closing-guantanamo-prison.html>. The Pentagon, meanwhile, has requested an additional \$49 million to build a new prison at Guantánamo for “special” detainees, on top of the approximately \$150 million requested to upgrade deteriorating facilities there. See Charlie Savage, *Money Requested for New Prison at Guantánamo*, N.Y. TIMES AT WAR BLOG (Mar. 21, 2013, 6:32 PM), <http://atwar.blogs.nytimes.com/2013/03/21/pentagon-wants-to-build-new-prison-at-guantanamo>.
  4. Barack Obama, President of the U.S., News Conference (Apr. 30, 2013) (transcript available at [http://www.washingtonpost.com/politics/president-obamas-april-30-2013-news-conference-transcript/2013/04/30/0edc67b0-b1a3-11e2-baf7-5bc2a9dc6f44\\_story\\_4.html](http://www.washingtonpost.com/politics/president-obamas-april-30-2013-news-conference-transcript/2013/04/30/0edc67b0-b1a3-11e2-baf7-5bc2a9dc6f44_story_4.html)).
  5. Barack Obama, President of the U.S., Remarks by the President at the National Defense University (May 23, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>).
  6. In August 2009, the Obama administration transferred two detainees to Algeria. See Andrea Shalal-Esa & David Alexander, *U.S. Transfers Two Guantanamo Detainees to Algeria*, REUTERS (Aug. 29, 2013, 1:20 PM), <http://www.reuters.com/article/2013/08/29/us-usa-guantanamo-algeria-idUSBRE97S0HU20130829>.

significantly impact the status of detainees slated for continued law-of-war detention.

Paradoxically, for many detainees the best hope for leaving Guantánamo in recent years has seemed to be prosecution and conviction for a war crime in a military commission.<sup>7</sup> Yet, even that window may be closing: A federal appeals court recently ruled that *ex post facto* concerns preclude military commission prosecutions for material support for terrorism and conspiracy, the two most common charges for garden-variety detainees who never committed a terrorist act.<sup>8</sup> Additionally, the U.S. Congress has eliminated the exception for plea agreements from the strict certification requirements it has imposed on the president before transferring detainees from Guantánamo.<sup>9</sup> The decreased availability of military commissions will exacerbate the problem of long-term detention without charge or trial.<sup>10</sup>

Such detention has become embedded in law and practice. The Obama administration has continued to hold terrorism suspects without charge, declaring the practice to be consistent with both international law and the U.S. Constitution.<sup>11</sup> Congress has expressly affirmed what lower courts previously held: The 2001 Authorization for Use of Military Force (AUMF)<sup>12</sup> permits the president to detain members and substantial supporters of al-Qaeda, the Taliban,

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7. See David Cole, *Military Commissions and the Paradigm of Prevention*, in *GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE* 95 (Fionnuala Ni Aoláin & Oren Gross eds., 2013); Frakt, *supra* note 1 (describing the role of military commission plea agreements in securing a prisoner's release).
  8. See *Al Bahlul v. United States*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (*per curiam*), *reh'g granted*, No. 11-1324, Doc. No. 1432126 (D.C. Cir. Apr. 23, 2013) (conspiracy); *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238 (D.C. Cir. 2012) (material support for terrorism). The D.C. Circuit has granted the government's request for rehearing en banc to reconsider the basis for these rulings. See Order Granting Respondent's Petition for Rehearing En Banc, *Al Bahlul*, No. 11-1324 (D.C. Cir. Apr. 23, 2013), available at <http://www.lawfareblog.com/wp-content/uploads/2013/04/Bahlul-DC-En-Banc-Order.pdf>.
  9. National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. § 1028(a) (2012) (enacted).
  10. See Jess Bravin, *Guantanamo Detainee Begs to Be Charged as Legal Limbo Worsens*, WALL ST. J., July 15, 2013, <http://online.wsj.com/article/SB10001424127887324069104578527012686080732.html> (noting the decreased likelihood of military commission prosecutions and the increased number of detainees held without charge).
  11. Barack Obama, President of the U.S., Remarks by the President on National Security (May 21, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09)) [hereinafter President's Remarks on National Security]; see also Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 41 (2012).
  12. Pub. L. No. 107-40, 115 Stat. 224 (2001).

and associated forces for the duration of the armed conflict.<sup>13</sup> Although the U.S. Supreme Court has yet to rule that this detention authority extends beyond the battlefield in Afghanistan, it has declined several opportunities to cabin assertions of broader, global-wide detention power.<sup>14</sup> Further, there are continuing calls for Congress to enact a new AUMF that would expand the president's authority to use military force to include other groups and to address terrorist threats in Africa and other regions.<sup>15</sup> More than a decade after 9/11, the question thus appears to be not whether the United States will continue to detain terrorism suspects indefinitely under an armed conflict rationale, but rather how long those detentions will last and whether they will extend beyond the existing detainee population.

Habeas corpus review, meanwhile, has not had the anticipated impact on the release of detainees.<sup>16</sup> A common explanation is that lower courts—and the U.S. Court of Appeals for the D.C. Circuit, in particular—have failed to provide the “meaningful review” required by the Supreme Court in *Boumediene v. Bush*,<sup>17</sup> instead creating hurdles that make it difficult for a detainee to prevail.<sup>18</sup> But there is another, less obvious explanation. Habeas judges have focused almost exclusively on front-end classifications—examining whether a prisoner falls within the terms of the AUMF and is thus eligible for long-term detention.<sup>19</sup> They have largely ignored the separate but equally important question of whether, even assuming a person meets the threshold criteria rendering him eligible for detention—for example, because he once attended a guesthouse frequented by al-Qaeda members or trained at an al-Qaeda-affiliated camp<sup>20</sup>—the government

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13. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011) (enacted).

14. See Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1456–57 (2011).

15. See Julian E. Barnes & Evan Perez, *Terror Fight Shifts to Africa*, WALL ST. J., Dec. 6, 2012, <http://online.wsj.com/article/SB10001424127887323316804578163724113421726.html>.

16. See Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385 (2010) (questioning the conventional wisdom that habeas corpus would have a significant effect on the release of detainees from Guantánamo).

17. 553 U.S. 723, 783 (2008).

18. See, e.g., *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011) (holding that government intelligence reports are entitled to a presumption of accuracy despite evidence that they have proven unreliable in the past); *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010) (applying a conditional probability analysis in determining whether a detainee was “part of” al-Qaeda); see also Vladeck, *supra* note 14, at 1474 (“[T]he D.C. Circuit’s post-*Boumediene* jurisprudence yields a landscape in which petitioners have limited prospects for success on the merits.”).

19. For an overview of habeas judges’ approaches, see Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 92–109 (2012).

20. See, e.g., *Uthman v. Obama*, 637 F.3d 400, 404 (D.C. Cir. 2011) (upholding detention based, inter alia, on the petitioner’s appearance at an al-Qaeda guesthouse); *Al-Adahi*, 613 F.3d at 1109

should continue to hold him as time passes and circumstances change. Although some judges have struggled with this perceived limitation on their authority,<sup>21</sup> only one has thus far ruled that she has the power to order the release of an AUMF-covered prisoner who no longer poses a danger to the United States.<sup>22</sup>

The U.S. government has attempted to fill the void by creating internal executive branch review procedures to address the length of detention.<sup>23</sup> These procedures, however, have previously proven ineffective.<sup>24</sup> The most recent procedures contain an expanded list of factors to guide the administrative periodic review inquiry into the future threat posed by a detainee, including several factors suggested in this Article.<sup>25</sup> While these changes to the internal review process may yet bear fruit, past experience casts doubt on the government's ability to curb overdetention through administrative predictions about future dangerousness.<sup>26</sup>

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(finding that proof that a detainee stayed at an al-Qaeda guesthouse and trained at an al-Qaeda camp provided “overwhelming” evidence in favor of detention); Sophia Brill, Comment, *The National Security Court We Already Have*, 28 YALE L. & POLY REV. 525, 534 (2010) (“[T]he government argues that petitioners are (more likely than not) part of al-Qaeda or the Taliban, based on a host of claims that usually involve suspicious travel into Afghanistan and stays at suspect guesthouses.”).

21. See, e.g., *Anam v. Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (questioning limits on the court's authority to order the release of nondangerous prisoners but concluding that the court's “hands are tied”); *Awad v. Obama*, 646 F. Supp. 2d 20, 24 (D.D.C. 2009) (finding it “ludicrous to believe” that the prisoner—“a marginally literate [redacted] who has spent more than seven of his twenty six years—since he was a teenager—in American custody”—currently poses a security threat, but nevertheless concluding that it lacked the authority to inquire into the necessity of his continued detention as long as the armed conflict continued).
22. *Basardh v. Obama*, 612 F. Supp. 2d 30, 33–35 (D.D.C. 2009) (rejecting the government's argument that it could necessarily hold detainees who were part of al-Qaeda or the Taliban until the end of hostilities irrespective of the threat each individual detainee presently posed).
23. Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011) [hereinafter PRB] (establishing procedures for conducting ongoing administrative review of Guantánamo detainees who have been slated for continued law-of-war detention or referred for prosecution but who have not yet been charged).
24. See Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1441 (2012) (noting that the Obama administration's Periodic Review Board has had “scant impact on the release rate so far”).
25. See Memorandum from the Deputy Sec'y of Def. to the Secretaries of the Military Dep'ts et al., Directive-Type Memorandum (DTM) 12-005, “Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567” (May 9, 2012) (Incorporating Change 2, Nov. 4, 2013) [hereinafter DTM-12-0005], available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-12-005.pdf>.
26. See Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SECURITY L. & POL'Y 1, 29–30 (2009) (“On the one hand the government brought many supposedly dangerous individuals to Guantánamo who were then released because they were later believed not to pose much threat after all; on the other hand, some of those released have turned out to be quite dangerous, and have reengaged in terrorist activity.”); see also Scott Shane & Benjamin Weiser, *Judging Detainees' Risk, Often With Flawed Evidence*, N.Y. TIMES, Apr. 24,

Proposals for addressing prolonged detention typically center on instituting more rigorous periodic review procedures.<sup>27</sup> This Article, however, takes a different approach. It argues not simply for more review, but for a different type of review, one more closely aligned with the nature of the detentions themselves. The Article addresses the current impasse by urging incorporation of criminal sentencing principles into review of AUMF detention.

The Article draws on two main aspects of criminal sentencing. First, it explains how sentencing highlights the value of a judicial proceeding focused on the length of detention, one in which judges have authority to order the release of detainees whose confinement no longer appears warranted. Second, it looks to sentencing to develop a richer detention-review standard: one that incorporates multiple factors about the individual, his background, and his conduct, and that is not limited exclusively to an assessment of future dangerousness.

Civil commitment, rather than criminal sentencing, might at first blush seem more relevant to review of law-of-war detention, as it is also imposed without trial and premised on the nonpunitive nature of the confinement.<sup>28</sup> Criminal sentencing, however, also provides a useful analogy and a fertile source for reform for several reasons. Criminal law concepts of culpability and individual responsibility permeate the detention of terrorism suspects under the AUMF. Criminal sentencing, with its potential for calibrated assessments and the imposition of liberty restrictions proportionate to an individual's conduct, also has a greater potential to curb overdetention. If civil commitment functions like an on-off switch, criminal sentencing operates more like a rheostat—more capable of finely tuned adjustments to determine an appropriate length of incapacitation for a disparate group of individuals all potentially subject to

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2011, <http://www.nytimes.com/2011/04/25/world/guantanamo-files-flawed-evidence-for-assessing-risk.html>.

27. See, e.g., David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 750 (2009) (arguing for heightened procedural safeguards in an armed conflict with a terrorist organization because there is likely to “be greater doubt about the identity of the enemy, a much longer and more nebulous conflict, and an ability on the part of detained individuals to choose to abandon the fight”); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 387–88, 408–13 (2008) (arguing for a system of administrative detention in which nonbattlefield terrorism suspects are afforded prompt and robust review); Waxman, *supra* note 26, at 29 (discussing potential refinements in the detention standard that would more accurately capture those who pose a risk to the United States and arguing for a sharper focus on a risk of future dangerousness).

28. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (describing the purpose of detention as “prevent[ing] captured individuals from returning to the field of battle and taking up arms once again”); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (“The object of capture [of an enemy soldier] is to prevent the captured individual from serving the enemy.”).

incarceration. It is, moreover, unnecessary to determine that AUMF confinement formally constitutes punishment<sup>29</sup>—thus triggering the panoply of criminal trial rights—to acknowledge that criminal sentencing can inform the design and operation of a detention review system conducted under the law of war. If, as Robert Chesney and Jack Goldsmith have argued, the emerging model of national security detentions properly incorporates heightened procedural safeguards drawn from criminal law in determining *who* may be held,<sup>30</sup> that hybrid model can likewise constructively draw on other facets of the criminal law to determine *how long* the confinement should last.<sup>31</sup>

The impetus for rethinking these traditional categories lies in changes in armed conflict itself—between the current conflict against al-Qaeda and associated forces and traditional interstate conflicts that informed and shaped the development of the laws of war. These changes have multiple implications for developing a coherent law of detention, not only at Guantánamo but also in other places where the United States continues to detain individuals under the rationale that it is engaged in a transnational armed conflict with terrorist organizations. For example the United States continues to hold a number of non-Afghan prisoners at the Parwan Detention Facility in Afghanistan (formerly the Bagram Theater Internment Facility).

AUMF detentions are more likely to generate false positives than traditional combatant or prisoner-of-war detentions because, unlike prisoners of war, suspected terrorists do not wear uniforms, carry arms openly, or otherwise adhere to the laws and customs of war.<sup>32</sup> To the contrary, terrorists typically seek to

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29. See *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (describing civil commitment and other forms of nonpunitive detention); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (listing factors to determine whether a statutory scheme constitutes criminal punishment as opposed to civil regulation); see also *United States v. Salerno*, 481 U.S. 739, 746–47 (1987) (explaining that “the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment” and finding pretrial detention to be regulatory and nonpunitive).

30. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1108–17 (2008).

31. See Simon Bronitt & Susan Donkin, *Australian Responses to 9/11: New World Legal Hybrids?*, in 14 POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 223, 224–25 (Aniceto Masferrer ed., 2012) (describing a continuum of post-9/11 counterterrorism regulation that is hybrid in nature and straddles the divide between civil and criminal law); cf. Hakimi, *supra* note 27, at 375–86, 407–14 (critiquing in the counterterrorism context an approach that requires a choice among regulatory domains, each with distinct standards, and arguing instead for a more functional approach that focuses on a set of common principles that cut across those regulatory domains).

32. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 221–22 (2011) (describing “the high risk of erroneously identifying individuals as members of nonstate groups”); Chesney & Goldsmith, *supra* note 30, at 1088–89.

conceal their location, membership, organizational structure, and activities.<sup>33</sup> Moreover, because terrorist fighters are deemed unprivileged belligerents, they lack the incentive combatants have to admit they engaged in belligerent acts and thereby claim the benefit of prisoner-of-war status.<sup>34</sup>

AUMF detentions also increase the cost of error given their greater potential for prolonged imprisonment.<sup>35</sup> The Geneva Conventions require the prompt repatriation of prisoners upon the cessation of hostilities even if no formal peace treaty or armistice has been concluded.<sup>36</sup> But in a war against terrorist groups, there is no opposing body to negotiate a truce or surrender, and it is more difficult to determine when hostilities have ceased.<sup>37</sup> Concerns about overdetention are magnified when the enemy organization is loosely formed and decentralized, making it more difficult to assess whether the enemy has in fact been defeated.<sup>38</sup>

These deviations from the traditional combatant paradigm underlay Justice O'Connor's caution in *Hamdi v. Rumsfeld*<sup>39</sup> about the possible limits of AUMF detention. She noted that the Court's acceptance of indefinite military detention in the case of a Taliban fighter captured in Afghanistan could "unravel" if the "the practical circumstances" of the armed conflict diverged substantially from the type of conflicts "that informed the development of the law of war."<sup>40</sup> Since *Hamdi*, however, judges have been reluctant to challenge the executive's determination of the conflict's length or geographic scope, or to consider what

33. Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163 (2013).

34. See Bellinger & Padmanabhan, *supra* note 32, at 221–22.

35. See *Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (“[T]he consequence of error may be detention of persons for the duration of hostilities that may last a generation or more . . . .”); MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 135 (2012) (explaining how the war on terror “broke the problem of war’s temporality into the open” and increased the difficulty of determining the line between war and peace).

36. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; see also Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1180 (2011) (noting that Article 118 of Geneva III “sought specifically to eliminate pretexts to delay repatriation used in earlier conflicts, such as the absence of a formal peace treaty or the ‘non-termination of the armed conflict by or against a co-belligerent’”). Indeed, Geneva III requires the prompt repatriation of seriously wounded or seriously sick prisoners of war once they have been cared for and are fit to travel (and thus prior to the cessation of hostilities). Geneva III, *supra*, art. 111.

37. See Chesney, *supra* note 33, at 178 (“[I]t is entirely unclear just where the line lies between the level of intensity at which violence remains a matter of civil disorder or criminality and the level beyond which it earns the title ‘armed conflict.’”).

38. See *id.*

39. 542 U.S. 507 (2004) (plurality opinion).

40. See *id.* at 521.

might constitute an “unraveling” of AUMF detention authority.<sup>41</sup> They have instead addressed concerns surrounding the potential risk and cost of error by creating a front-end process to determine whether a person is properly subject to AUMF confinement in the first instance.<sup>42</sup>

Front-end process fails not only to grapple with the durational challenges posed by long-term AUMF detention but also to capture how an armed conflict against terrorist organizations affects a detention model based on status rather than conduct. As Samuel Issacharoff and Richard H. Pildes have observed, the enemy in the conflict against al-Qaeda is defined by the volitional acts of an individual rather than categorical, group-based judgments that turn on an individual’s status.<sup>43</sup> Becoming “part of” al-Qaeda is more like joining a criminal enterprise than enlisting in a state’s armed force. It thus involves a degree of culpability absent from the prisoner-of-war detention model. Adjusting detention review to reflect the increased role of individual responsibility requires new methods—methods utilized in criminal sentencing—for evaluating the length of confinement.

The Article does not argue that military terrorism detentions constitute criminal punishment nor does it advocate for the wholesale importation of criminal sentencing rules by assigning each detainee a fixed term of confinement. Its aim is more modest. The Article highlights the way AUMF detentions differ from prior combatant detentions given the nature of the armed conflict the United States is waging. These detentions, which bear hallmarks of traditional criminal confinement, call for new approaches to assessing the length of time an enemy fighter should be held—approaches that reflect the hybrid nature of the detentions and respond to what Judith Resnik has described as the need for a more integrated jurisprudence of detention.<sup>44</sup>

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41. See Chesney, *supra* note 33 (describing how the continued armed conflict in Afghanistan has helped provide the appearance of stability to the legal architecture of U.S. counterterrorism detention policy and has obscured underlying debates over the scope of the government’s detention power).

42. *Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (noting the high risk of error in the Combatant Status Review Tribunal’s findings of fact and the consequences of such errors in terms of the length of detention); *Rasul v. Bush*, 542 U.S. 466, 476 (2004) (noting that petitioners claim that they were not fighting or supporting an enemy force); see also *Hamdi*, 542 U.S. at 534 (proposing a procedural scheme that would “meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error”).

43. Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility 2* (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-40, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2129860###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129860###).

44. Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010).

Although the Article calls for enhanced judicial review, it recognizes that such review is not a panacea. Judges' fears about releasing individuals accused of belonging to a terrorist group will affect their assessments of whether particular prisoners should continue to be held, just as it has affected their assessments in the current habeas litigation of whether prisoners are eligible for detention in the first instance. Terrorism prosecutions themselves provide a caution, as judges have imposed lengthy sentences against individuals convicted of providing support to a terrorist organization.<sup>45</sup>

Sentencing nonetheless suggests that judicial review has the potential to provide a meaningful constraint on overdetention. Sentencing highlights, for example, the potential value of judicial discretion, the capacity of judges to compensate for overbroad criminal statutes in imposing sanctions, and the judiciary's comparatively greater insulation from the political pressures that can distort evaluations of how long prisoners should remain confined. An approach that draws on criminal sentencing could help transform the psychology of the judiciary by requiring judges to assess not merely whether but also how long a detainee should be held, particularly when that judgment is based on proportionality concerns as well as predictive assessments of future risk.<sup>46</sup>

The Article's proposal for judicial review of the length of detention is, moreover, severable from its call for reforming the standard of detention review. Criminal sentencing's broader examination of the individual in question could be incorporated into detention review conducted by bodies other than Article III courts, whether by the Periodic Review Board (PRB), which is currently tasked with reviewing Guantánamo detentions, or by military judges, who are charged with reviewing detentions at Parwan. Expressly empowering decisionmakers to consider multiple factors beyond future dangerousness—factors considered under various sentencing models—could thus strengthen the existing system of administrative review.

The Article does not address the underlying legitimacy of AUMF detention itself.<sup>47</sup> Rather, it accepts that the current framework permits the confinement of AUMF-covered individuals, and argues for new and different procedural opportunities focused on whether and under what circumstances such persons should

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45. See Brian S. Carter-Stiglitz, *Trying Terrorists*, 34 WM. MITCHELL L. REV. 5123, 5128–29 (2008) (noting harsh sentences imposed in material-support-for-terrorism cases).

46. Cf. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1380 (2009) (observing a pattern of judicial deference to predictive judgments by the executive in the national security context).

47. I have argued elsewhere against the indefinite confinement of terrorism suspects without criminal trial. See JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM* 205–38 (2011).

continue to be held. It thus proposes a role for courts—or, alternatively, administrative bodies—that transcends the narrow question of whether a person meets the threshold criteria for detention to consider the undertheorized and largely ignored question of temporal scope. It responds to what International Committee of the Red Cross (ICRC) President Jakob Kellenberger has described as “an urgent need to explore new legal ways” to grapple with issues raised by the detention of individuals in noninternational armed conflicts and seeks to fill a lacuna in the emerging U.S. law of counterterrorism detention.<sup>48</sup> It does so not merely by attempting to translate the law of war to a new type of armed conflict, as Harold Koh has proposed,<sup>49</sup> but also by drawing on other bodies of law that speak to the nature of the confinement itself.

Part I describes the current model of habeas review under the AUMF. It explores how the absence of any mechanism for calibrating an appropriate length of confinement has led to inaccuracies and arbitrariness incompatible with the liberty interests at stake as well as the purposes of law-of-war confinement and meaningful judicial scrutiny. Part II describes the ways in which criminal sentencing is relevant to review of AUMF detentions. Part III then describes how criminal sentencing principles might be incorporated into this review, whether conducted by courts or administrative tribunals.

#### I. THE LIMITS OF THE TRADITIONAL COMBATANT DETENTION MODEL IN AN ARMED CONFLICT AGAINST TERRORIST ORGANIZATIONS

Military detentions under the AUMF rest on the following premises: (1) the United States is engaged in an armed conflict of global scope with al-Qaeda and associated forces, (2) Congress has empowered the president to detain those who are part of or who have substantially supported those enemy forces, and (3) the detention of covered individuals may last for the duration of the conflict.

This framework is based loosely on the treatment of combatants under the Geneva Conventions, which permit confinement until the end of hostilities

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48. Jakob Kellenberger, President, Int'l Comm. of the Red Cross, Address on the Current State of International Humanitarian Law: Strengthening Legal Protection for Victims of Armed Conflicts (Sept. 21, 2010) (transcript available at <http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm>); see also Bellinger & Padmanabhan, *supra* note 32, at 202–04 (advocating new ways of thinking to fill perceived gaps in the law for states engaged in conflicts with nonstate actors).

49. Harold Hongju Koh, Address at the Oxford Union: How to End the Forever War? (May 7, 2013) (transcript available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>).

following an initial determination of a prisoner's status.<sup>50</sup> But the framework has been superimposed on a transnational armed conflict with terrorist organizations that differs significantly from the classic interstate conflict on which it is based. First, the conflict with al-Qaeda and associated forces contains a much greater potential for prolonged detention. Second, enemy fighters in this conflict are regarded as inherently culpable, undermining the nonpunitive premise of traditional law-of-war detention. Third, the conflict is being waged against an enemy force of such disparate individuals that it strains the one-size-fits-all standard of combatant detentions and suggests the need for more calibrated assessments of personal responsibility and involvement. Fundamental differences in the nature of the armed conflict the United States is waging, in short, call for adjusting the rules governing detention, highlighting the need for individualized review not only of who may be detained but also of how long detained individuals should be held.

#### A. The Risk of Prolonged Detention

The humanitarian thrust of *jus in bello* rules of armed conflict<sup>51</sup> lies in balancing military necessity with a desire to alleviate human suffering.<sup>52</sup> In the realm of detention, a state's authority under international humanitarian law to deprive individuals of their liberty during armed conflict is thus tempered by a moral obligation not only to treat prisoners humanely but also to limit confinement to that which is necessary to achieve legitimate military objectives. Thus, while international humanitarian law permits the detention of combatants without criminal trial—a departure from the peacetime default rule under the Constitution and international human rights law—it cabins the duration of detention by limiting it to ongoing hostilities.

But discerning the cessation of hostilities is inevitably difficult in a transnational armed conflict against amorphous and decentralized terrorist organizations.<sup>53</sup> The uncertainty surrounding the conflict's duration extends not

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50. See Geneva III, *supra* note 36; see also *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

51. *Jus in bello* concerns how armed conflicts (whether international or noninternational) are fought, and addresses the methods and tactics used by each side in a war; *jus ad bellum* concerns the legitimacy of the use of force itself. See Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 585 (2011).

52. See David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1346 (2011). The moral foundations of international humanitarian law are embodied by the Martens clause of the 1899 and 1907 Hague Conventions. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

53. JOHN ROBB, *BRAVE NEW WAR: THE NEXT STAGE OF TERRORISM AND THE END OF GLOBALIZATION* 139 (2007) (describing al-Qaeda's decentralized structure); Oren Gross, *What*

only to al-Qaeda but also to the undefined category of associated forces, whose members may be detained under the AUMF. The risk of perpetual detention is heightened by the notion of superseding conflicts—in which a person seized and detained in connection with one conflict (for example, the conflict with the Taliban in Afghanistan) may continue to be held in connection with a separate conflict (possibly the transnational armed conflict with al-Qaeda and associated forces), all under the broad umbrella of the AUMF.<sup>54</sup>

In his National Defense University speech, President Obama for the first time publicly recognized the need to bring the war against al-Qaeda and associated forces to a close and indicated that he would work with Congress to seek the AUMF's ultimate repeal.<sup>55</sup> But Obama did not say how he would determine when the conflict had concluded, let alone suggest when it might terminate. As former Pentagon general counsel Jeh Johnson previously observed, determining a “tipping point,” where al-Qaeda has become so weakened that the group has effectively been destroyed, is difficult when every member of the enemy organization cannot all be expected to lay down its weapons or sign a peace treaty.<sup>56</sup> Further, the armed conflict model's perceived operational value to the government's targeted-killing program will likely complicate efforts to end the war.<sup>57</sup> Indeed, a Pentagon official recently testified before Congress that he expected the current armed conflict with al-Qaeda and associated forces to last “[a]t least 10 to 20 [more] years.”<sup>58</sup>

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*“Emergency” Regime?*, 13 CONSTELLATIONS 74, 76 (2006) (“The notion of an endless war, with the attendant disappearance of a clear separation between war and peace, makes a decision that active hostilities have ceased either arbitrary or impossible to make.”); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 452 (2010); see also *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (describing al-Qaeda's structure as both uncertain and amorphous).

54. *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) (noting that the petitioner, a member of a Taliban-affiliated brigade who was originally detained in connection with the international armed conflict with the Taliban in Afghanistan, could continue to be held following that conflict's conclusion in connection with the separate conflict with al-Qaeda).
55. Obama, *supra* note 5.
56. Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., Address at the Oxford Union: The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at <https://www.commondreams.org/node/89097>).
57. Robert Chesney, *Corn Comments on the Costs of Shifting to a Pure Self-Defense Model*, LAWFARE (June 2, 2013, 11:23 PM), <http://www.lawfareblog.com/2013/06/corn-comments-on-the-prospect-of-a-shift-to-a-pure-self-defense-model/> (describing the “operational and tactical flexibility” afforded by an armed conflict model that is not provided under a self-defense model with respect to kinetic attacks against suspected terrorists).
58. Spencer Ackerman, *Pentagon Spec Ops Chief Sees ‘10 to 20’ More Years of War Against al-Qaida*, WIRED (May 16, 2013, 11:49 AM), <http://www.wired.com/dangerroom/2013/05/decades-of-war> (describing testimony of Michael Sheehan, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, before the Senate Armed Services Committee).

The prolonged, open-ended confinement inherent in a transnational armed conflict with terrorist organizations marks a departure from prior wartime detention powers and places significant stress on the humanitarian concerns underlying *jus in bello* rules. The framework for reviewing AUMF-based detentions has yet to grapple with this durational challenge or find an effective means of implementing the humanitarian constraints of international law that cabin a state's authority to imprison without trial.<sup>59</sup>

## B. The Quasi-Punitive Nature of AUMF Confinement

An armed conflict against terrorist organizations also blurs the clear distinction between nonpunitive and punitive confinement that characterizes traditional combatant detentions.

### 1. Traditional Combatant Detentions and the Nonpunitive Paradigm

Combatant detentions have traditionally been defined as “neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.”<sup>60</sup> In line with this nonpunitive purpose, the Geneva Conventions require only a streamlined, front-end process designed to assess a detainee's status.<sup>61</sup> For those held as prisoners of war, no further process is required.<sup>62</sup> By contrast, when a combatant is prosecuted for violating the law of war—and punitive sanctions are contemplated—he must be tried and sentenced, thus triggering not only an array of procedural protections but also a judicially imposed sentence specifying a length of confinement or, in some cases, a sentence of death.<sup>63</sup> In noninternational armed

59. See Bellinger & Padmanabhan, *supra* note 32, at 214 (arguing that identifying a temporal limit to detention is a key challenge in developing a legal framework for a conflict with nonstate actors).

60. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting decision of Nuremberg Military Tribunal, *reprinted in International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 229 (1947)).

61. Geneva III, *supra* note 36, art. 5 (requiring that a determination be rendered by a competent tribunal should any doubt arise as to whether a particular detainee qualifies for prisoner-of-war status); see also Bellinger & Padmanabhan, *supra* note 32, at 222 (“Article 5 tribunals were envisioned to perform a limited, but important, function: to determine whether a detained person who has committed a belligerent act receives prisoner-of-war status.”).

62. Geneva III, *supra* note 36, art. 5. For U.S. Army regulations bringing this provision into effect in battlefield review, see Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, § 1-6 (Oct. 1, 1997), *available at* <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf> (implementing Article 5 hearings for detainees in U.S. military custody).

63. Geneva III, *supra* note 36, arts. 103–108 (prescribing rules and procedures for the trial and sentencing of prisoners of war). Under Geneva III, moreover, detainees must be tried by the same procedures as those used to try members of the armed forces of the detaining power. *Id.* art. 102.

conflicts, the gap between rules governing detention and trial has historically been wider: The Geneva Conventions do not prescribe procedural rules governing detention<sup>64</sup> but do mandate that prosecutions adhere to basic fair trial requirements.<sup>65</sup> The Geneva Conventions' silence on detention review procedures in noninternational armed conflicts was intended to allow states greater latitude to enact standards and to criminalize conduct that would otherwise be protected from domestic prosecution if committed by combatants (or privileged belligerents).<sup>66</sup> Increasingly, international human rights law has filled the space by requiring procedural safeguards for detention in noninternational armed conflicts.<sup>67</sup> Those standards, however, focus on determining whether a person is eligible for detention, not how long he should be held.

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64. See INT'L COMM. OF THE RED CROSS, STRENGTHENING LEGAL PROTECTION FOR VICTIMS OF ARMED CONFLICTS 8–9 (2011), <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-5-1-1-report-strength-ihl-en.pdf> (noting the dearth of procedural safeguards under international humanitarian law for detention in noninternational armed conflicts); Bellinger & Padmanabhan, *supra* note 32, at 222 (noting that the Geneva Conventions, Article 75 of Additional Protocol I, and Additional Protocol II, while “contemplating detention of enemy fighters [in noninternational armed conflicts], do not require states to employ any particular set of procedures to determine who is subject to detention”). The Geneva Conventions do, however, require the humane treatment of detainees. See Geneva III, *supra* note 36, arts. 3(1)(a), (c) (prohibiting, inter alia, torture, cruel treatment, and “outrages upon personal dignity, in particular, humiliating and degrading treatment”).
65. Common Article 3 prohibits “[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” See Geneva III, *supra* note 36, art. 3(1)(d). Additional trial requirements are provided under Article 75 of the First Additional Protocol. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Although the United States has not ratified Additional Protocol I, Article 75 is widely regarded as customary international law. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 19–24 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).
66. See David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 197 (2005) (“States were, and still are, unwilling to grant the *status* of combatants to insurgents and other non-state actors . . .”).
67. See Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 413 (2009); Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 377–78 (2005) (describing requirements for detention in noninternational armed conflicts); Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT'L L.J. 135, 148 (2008) (arguing that in the absence of noninternational armed conflict rules on detention, “domestic law, tempered by international human rights obligations,” governs); see also Marco Sassoli & Marie-Louise Tougas, *International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan*, 56 MCGILL L.J. 959, 969–70 (2011) (“In the last twenty years, the jurisprudence from international criminal tribunals, the influence of human rights law and even some treaty rules adopted by states have narrowed the gap between the law of non-international armed conflicts and the law of international armed conflicts.”).

Combatant detentions have traditionally rested on pragmatic considerations: For a state to achieve the military objective of winning the conflict, enemy fighters must be confined until hostilities cease to neutralize the threat.<sup>68</sup> Combatant detentions, however, also draw on normative considerations: As long as an individual adheres to the laws of war, he is not culpable and may not be held criminally responsible. The normative underpinning of combatant detention is embodied by what is known as the combatant's privilege, which immunizes soldiers from prosecution for engaging in legitimate acts of warfare, such as targeting the enemy's armed forces or its military installations.<sup>69</sup> Only those soldiers who engage in illegitimate acts of warfare—acts that transgress the laws of war—are deemed culpable and subject to punishment.

Combatants in international armed conflicts, moreover, may be obligated to serve in a military force under their respective nation's conscription laws and criminally prosecuted for refusing to do so.<sup>70</sup> As Michael Walzer has observed, the laws of war presume that soldiers "all fight unwillingly."<sup>71</sup> Combatants are thus not considered morally culpable because taking up arms is legally required and not the choice of a free agent. This obligation is assumed even when soldiers are not conscripted but volunteer to serve in the armed forces, as the term of enlistment requires a defined term of service and soldiers must fight when ordered to.<sup>72</sup> It is this notion of combatant duty—the obligation to risk one's life

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68. The one exception is for combatants who are unlikely to return to battle because of serious illness or injury. These combatants must be repatriated. See Geneva III, *supra* note 36, arts. 109–110.

69. See *Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting) ("[L]egitimate 'acts of warfare,' however murderous, do not justify criminal conviction. . . . [I]t is no 'crime' to be a soldier."); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 778–79 (2010) (describing the privilege).

70. See *Johnson*, 339 U.S. at 772–73 ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign."); Waxman, *supra* note 53, at 452 (explaining that the "temporal dimension of detention law is premised on the assumption that released enemy fighters, bound to the commands of their sovereign, will return to fight again as long as hostilities are ongoing"); see also *United States v. Soglietto*, 41 F. Supp. 21, 33 (E.D. Va. 1941) ("[A] person in the military service . . . is acting under the compulsion of the grave penalties which military law traditionally prescribes for nonobedience to military orders.").

71. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 35 (4th ed. 2006).

72. See Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 168 (2005).

in armed conflict while also complying with the laws of war—that underlies the ideal of the honorable soldier.<sup>73</sup>

## 2. Blurring the Line Between Punitive and Nonpunitive Detention

In *Hamdi*, the Supreme Court superimposed the Geneva Convention-based paradigm of nonpunitive prisoner-of-war confinement onto enemy combatant detentions in the U.S.-led armed conflict against the Taliban in Afghanistan.<sup>74</sup> Subsequent decisions have hewed to this approach in applying the AUMF to individuals seized in connection with a more broadly defined armed conflict with al-Qaeda, the Taliban, and associated forces.<sup>75</sup> These decisions all accept the pragmatic goal of law-of-war detention—preventing the prisoner’s return to the battlefield—and the premise that the confinement is nonpunitive. They accordingly focus the judicial inquiry on determining whether a detainee meets the threshold definition of an enemy combatant (or unprivileged enemy belligerent under current terminology).<sup>76</sup>

The paradigm of nonpunitive combatant confinement, however, maps unevenly onto the U.S. armed conflict against al-Qaeda and associated forces. Prisoners of war may be legally obligated to return to the fight if released by the enemy force, but there is no corresponding duty to fight on behalf of a terrorist organization. While it is possible that a person may fear reprisal for refusing to carry out the commands of a terrorist organization or for otherwise breaking with the group, joining or supporting that organization is ultimately a choice and, in the United States, a crime, not a legal duty.<sup>77</sup> In this respect, becoming part of an AUMF-covered organization—thereby rendering one eligible for law-of-war detention—more closely resembles joining a criminal enterprise than a conventional military force.

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73. See William Bradford, *In the Minds of Men: A Theory of Compliance With the Laws of War*, 36 ARIZ. ST. L.J. 1243, 1275–77 (2004) (describing the historical evolution of the “honorable soldier”).

74. *Hamdi v. Rumsfeld*, 542 U.S. 507, 512–13, 516–17 (2004) (plurality opinion) (describing the allegations against Hamdi and the scope of the government’s military detention power at issue in the case).

75. See, e.g., *Salahi v. Obama*, 625 F.3d 745, 751–52 (D.C. Cir. 2010) (articulating a functional rather than formal test for determining who is part of al-Qaeda and eschewing any bright-line rules); *Al-Bihani v. Obama*, 590 F.3d 866, 872–73 (D.C. Cir. 2010) (describing the scope of the government’s detention authority under the Authorization for Use of Military Force (AUMF)).

76. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574 (codified in scattered sections of 10 U.S.C. (2012)).

77. See Yin, *supra* note 72, at 192–93 (noting the voluntary nature of membership in a terrorist organization like al-Qaeda).

AUMF detention also carries a presumption of guilt in tension with the nonpunitive premise of law-of-war confinement. U.S. officials have repeatedly characterized Guantánamo detainees in terms ordinarily reserved for criminals—indeed, in terms suggesting a new form of super-criminal.<sup>78</sup> Recidivism—a concept borrowed from criminal law—is commonly used to describe a former detainee’s reengagement in hostilities following his release.<sup>79</sup> The stigma associated with detention at Guantánamo, moreover, can resemble—if not exceed—that attached to a criminal penalty even if the prisoner is never convicted of any offense.<sup>80</sup>

The overlap between military detention and prosecution underscores this assumption of culpability. The overlap is reflected in the similarity between the standards defining eligibility for (nonpunitive) law-of-war detention under the AUMF and (punitive) war-crime prosecution in a military commission.<sup>81</sup> It is also reflected in the close relationship between the AUMF’s detention standard and several substantive offenses that Congress has made prosecutable in military commissions, including providing material support for terrorism and murder by an unprivileged belligerent in violation of the law of war.

Under the Military Commissions Act (MCA),<sup>82</sup> an alien unprivileged enemy belligerent can be charged with providing material support or resources to

78. See Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 732 (2011).

79. See DIR. OF NAT’L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA (2012), <http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/March%202012%20Summary%20of%20Reengagement.pdf>; Thomas Joscelyn, *Gitmo Recidivism Rate Soars*, WKLY. STANDARD (Dec. 7, 2010, 4:12 PM), [http://www.weeklystandard.com/blogs/gitmo-recidivism-rate-soars\\_521965.html](http://www.weeklystandard.com/blogs/gitmo-recidivism-rate-soars_521965.html).

80. See Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525, 548 (2005). By contrast, those held as prisoners of war do not appear to suffer any stigma or adverse consequences. See Yin, *supra* note 72, at 172.

81. Compare National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011) (enacted) (codifying the president’s authority under the AUMF to detain individuals who were “part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or directly supported such hostilities in aid of such enemy forces”), with Military Commissions Act of 2009, 10 U.S.C. § 948a(7) (2012) (defining an “unprivileged enemy belligerent,” subject to trial under the act, as a person who “engaged in hostilities against the United States or its coalition partners,” “purposefully and materially supported hostilities against the United States or its coalition partners,” or who is a member of al-Qaeda); see also David J.R. Frakt, *Direct Participation in Hostilities as a War Crime: America’s Failed Efforts to Change the Law of War*, 46 VAL. U. L. REV. 729, 741 (2012).

82. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

an international organization that has engaged in terrorism.<sup>83</sup> This definition tracks the language of the federal material support for terrorism statute that provides the basis for many Article III–court terrorism prosecutions.<sup>84</sup> Both the MCA and federal criminal law thus subject individuals to prosecution for virtually the same conduct that renders them eligible for law-of-war detention under the AUMF. Someone who, for example, “substantially supports” al-Qaeda—and who therefore can be held in nonpunitive detention under the AUMF—can be prosecuted for material support for terrorism in either a military commission or an Article III court.<sup>85</sup> The same is true for someone who becomes “part of” al-Qaeda or an associated force—for example, by attending an al-Qaeda training camp or visiting an al-Qaeda-affiliated guesthouse.<sup>86</sup> While the federal material support statute does not criminalize mere membership in a designated foreign terrorist organization,<sup>87</sup> the scope of its prohibition on providing support or resources—which includes the provision of oneself as personnel to a designated organization<sup>88</sup>—suggests there is little, if any, gap between the two substantive standards in practice given the AUMF’s conduct-centered approach to determining enemy status.

The military commission’s treatment of murder in violation of the law of war demonstrates a similar blurring between nonpunitive law-of-war detention and criminal prosecution. The MCA prohibits the intentional killing of anyone, including a privileged combatant, during armed conflict by an unprivileged enemy belligerent.<sup>89</sup> The statute thus provided the basis for criminally charging Canadian detainee Omar Khadr for mortally wounding a U.S. special forces officer during a firefight in Afghanistan in 2002.<sup>90</sup> International law does not

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83. 10 U.S.C. § 950t(25).

84. 18 U.S.C. § 2339A (2012) (providing material support or resources to terrorists); *id.* § 2339B (providing material support or resources to a foreign terrorist organization).

85. *Cf.* Hamlily v. Obama, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) (noting that “[t]he government’s approach” in construing the AUMF’s “substantial support” prong “evidences an importation of principles from the criminal law context”).

86. Although the D.C. Circuit recently held that *ex post facto* concerns precluded material support prosecutions in military commissions for pre-Military Commissions Act (MCA) conduct, the MCA nonetheless seeks to criminalize substantially the same conduct that the AUMF treats as a basis for nonpunitive law-of-war detention. *Hamdan v. United States*, 696 F.3d 1238, 1246–48 (D.C. Cir. 2012). The D.C. Circuit, moreover, left open the possibility of material support prosecutions for post-2006 conduct. *Id.*

87. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010) (construing 18 U.S.C. § 2339B).

88. Chesney & Goldsmith, *supra* note 30, at 1101–03 (describing the scope of the personnel provision of the material support statute).

89. 10 U.S.C. § 950t(15) (2012).

90. *See* Referred Charges of Omar Ahmed Khadr 4 (Apr. 24, 2007), *available at* <http://www.defense.gov/news/Apr2007/Khadreferral.pdf> (alleging that during an “armed conflict and without enjoying combatant immunity [Khadr] unlawfully and intentionally murder[ed] U.S. Army

criminalize such legitimate acts of warfare.<sup>91</sup> While an enemy soldier may be preventively detained for engaging in such hostilities against the opposing side, he may not be prosecuted, unless the specific conduct itself is a war crime (for example, targeting civilians).<sup>92</sup>

The MCA thus criminalizes virtually all uses of military force by al-Qaeda and associated groups, even when directed at legitimate military targets.<sup>93</sup> This expansion of war crimes liability not only eliminates the distinction between legitimate and illegitimate forms of warfare based on the status of the person engaged in hostilities. It also erodes the fundamental distinction between the law-abiding fighter who may be detained only preventively and the law-breaking enemy fighter who may be prosecuted for violating the law of war through his actions. In the current armed conflict against al-Qaeda and associated forces, all enemy fighters are effectively culpable and subject to prosecution as war criminals.

The United States, to be sure, has not exercised this authority, instead detaining the overwhelming majority of individuals held at Guantánamo and Parwan without charge. It has declined to prosecute detainees for a variety of reasons, including lack of admissible evidence, resource constraints, and a belief that some prisoners, while eligible for prosecution, do not warrant it.<sup>94</sup> But the

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Sergeant First Class Christopher Speer . . . by throwing a hand grenade at U.S. forces”). Similar charges were leveled against another Guantánamo detainee, Mohamed Jawad, for throwing a grenade at a U.S. military jeep and injuring two U.S. service members and their interpreter. David J.R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367, 1367–70 (2011).

91. See David Glazier, *A Court Without Jurisdiction: A Critical Assessment of the Military Commission Charges Against Omar Khadr* 10–11 (Loyola Law Sch., L.A., Legal Studies Paper No. 2010-37, 2010), available at <http://ssrn.com/abstract=1669946> (explaining that the combatant’s privilege provides immunity from ordinary domestic law for violence committed during the combatant’s participation in fighting).
92. *Id.* As Professor Glazier explains, “There is no reason for the [law of armed conflict] to criminalize the use of force by unprivileged belligerents . . . because these individuals lack immunity from ordinary civil law and can be held accountable for any acts of violence they commit under domestic law.” *Id.* at 10. Such conduct not only would violate the domestic criminal law of the State in which the act was committed, but also might violate the criminal law of the state (if different) of the perpetrator or victim, assuming that state’s relevant statute applied extraterritorially. Thus, for example, Khadr would have been eligible for prosecution under U.S. law for murder of a service member or under Afghan national law. *Id.* at 3, 17; see also Frakt, *supra* note 81, at 752–55 (discussing the flaws in Khadr’s case).
93. See Deborah N. Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, 41 CREIGHTON L. REV. 663, 665 (2008).
94. See DEP’T OF JUSTICE ET AL., *supra* note 2, at 8, 22–23; DEP’T OF JUSTICE & DEP’T OF DEF., DETERMINATION OF GUANTANAMO CASES REFERRED FOR PROSECUTION (2009), <http://www.justice.gov/opa/documents/tab-a-prel-rpt-dptf-072009.pdf> (describing criteria used by the government in determining where to prosecute a Guantánamo detainee whose case the Task Force has referred for prosecution).

current framework nonetheless exposes detainees to criminal liability for substantially the same conduct that renders them detainable under the AUMF, eroding the line between prevention and punishment.

### C. The Limitations of a One-Size-Fits-All Detention Standard

The current framework lacks any effective mechanism for assessing differences among the broad category of individuals subject to indefinite detention. Once a habeas judge determines that a Guantánamo detainee is covered by the AUMF, that prisoner may be held for the duration of hostilities, regardless of where he falls on the detainability spectrum. Similarly, military judges now authorized to review U.S. detentions at Parwan<sup>95</sup> must limit their inquiry to whether a prisoner falls within the AUMF and may not consider whether that prisoner should continue to be held.<sup>96</sup>

This model adopts a one-size-fits-all standard drawn from traditional combatant detentions. The nature of the U.S. armed conflict against al-Qaeda and associated groups, however, suggests the need to evaluate how differences among detainees inform the length of time they should be held. The only mechanisms designed to assess length—internal executive branch procedures such as the PRB—have thus far proven inadequate and could benefit from fresh approaches.

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95. See National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1024 (2011) (enacted) (providing for review by a military judge). This review, however, has not yet been implemented for all Parwan detainees subject to continued U.S. detention.

96. DEPARTMENT OF DEFENSE REPORT ON THE PROCEDURES FOR UNPRIVILEGED ENEMY BELLIGERENT STATUS DETERMINATIONS 4 (2012) (noting that the military-judge review required by the 2012 NDAA will be limited to determining whether an individual meets the statutorily defined detention standard and “will not include an assessment of the level of threat the detainee poses, nor will it serve as a substitute for the judgment of the combatant commander as to the appropriate disposition of a detainee lawfully detained by the Department of Defense”). The United States has indicated that it will continue to hold non-Afghan detainees indefinitely after transferring the other remaining 3000-plus detainees to Afghanistan government custody. See Charlie Savage & Graham Bowley, *U.S. to Retain Role as Jailer in Afghanistan*, N.Y. TIMES, Sept. 5, 2012, <http://www.nytimes.com/2012/09/06/world/asia/us-will-hold-part-of-afghan-prison-after-handover.html> (describing continued U.S. control over non-Afghan detainees at Parwan). According to the Obama administration, the United States continues to detain approximately sixty-six non-Afghan nationals pursuant to the AUMF. See Press Release, White House, Letter From the President—Regarding the War Powers Resolution (June 14, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/14/letter-president-regarding-war-powers-resolution>.

### 1. Habeas Review's Failure to Assess the Length of Detention

The one-size-fits-all approach to review in habeas cases is modeled on combatant detentions under the Geneva Conventions. Under the Third Geneva Convention (Geneva III), an individual classified as a prisoner of war is subject to detention for the duration of the conflict. No further process is required to address the length of confinement or to distinguish among individual prisoners. The absence of any such process may be explained by several factors, including the exigencies surrounding prisoner-of-war determinations (which are intended to be made close in time and place to the individual's capture); the demands of aggregate processing of large numbers of captured soldiers; the protections afforded prisoners of war that preclude criminal prosecution for taking part in hostilities (absent commission of a war crime); and the well-defined temporal limits of the conflict that reduce the risk of prolonged and open-ended confinement without trial.

The combatant model, however, translates poorly to the U.S. armed conflict against al-Qaeda and associated forces, which lacks the same demands of aggregate processing, effectively exposes all members of a covered enemy force to criminal liability, and poses a much greater risk of prolonged imprisonment without trial. The combatant model, moreover, was designed for a more homogenous and interchangeable group of detainees—the uniformed soldier of a state's armed forces. Detainees in an armed conflict against terrorist organizations are a disparate group and include individuals who present widely varying security threats and levels of involvement with the enemy force.<sup>97</sup> The current framework masks these differences. It also eliminates a possible incentive for sympathizers and supporters to limit their involvement in al-Qaeda or associated groups since they risk prolonged confinement for any involvement that crosses the minimum threshold and renders them eligible for detention.<sup>98</sup>

With judges confined to assessing detainability at the time of capture, release determinations for AUMF-covered prisoners have been left to the political branches. For most of Guantánamo's existence, the executive branch has determined which detainees leave the prison and when. Its release decisions have been influenced by considerations other than an individualized assessment of each detainee. Political factors centering on a detainee's nationality have played

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97. See Issacharoff & Pildes, *supra* note 43, at 7 (“We might hold the architects of 9/11 indefinitely, but it might not be appropriate similarly to hold low-level couriers or others indefinitely.”).

98. Cf. Huq, *supra* note 24, at 1492 (“[I]t is an odd result when the law works to encourage people to *deepen* their links with terrorism.”).

an important role.<sup>99</sup> So too have broader security concerns in a country or region, independent of the specific threat posed by the particular individual.<sup>100</sup>

Since 2009, Congress has asserted increasing control over release decisions, prohibiting the transfer of detainees to the United States and imposing restrictions on repatriating detainees administratively cleared for transfer by the executive to other countries.<sup>101</sup> The transfer restrictions—which apply equally to a detainee’s home country or a third country—impose numerous certification requirements on U.S. officials on the basis of the receiving country’s ability to ensure control over the transferred detainee and prevent future acts of terrorism.<sup>102</sup> They also preclude transfer to a country where there has been a confirmed case of recidivism by a former Guantánamo detainee previously transferred to that country<sup>103</sup> unless the secretary of defense issues a national security waiver.<sup>104</sup> Congress recently imposed similar restrictions on the transfer of non-Afghan detainees held at Parwan.<sup>105</sup> While there is increasing support for loosening these restrictions, the restrictions have contributed to an increasingly

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99. Mark Denbeaux et al., *Profile of Released Guantánamo Detainees: The Government’s Story Then and Now*, 41 SETON HALL L. REV. 1287, 1291 (2011) (discussing the role a detainee’s nationality has played in release decisions).
  100. For example, following an attempted terrorist attack in December 2009 in which the perpetrator had been radicalized in Yemen, President Obama suspended all transfers of Guantánamo detainees to that country. See Lindsey Ellerson, *President Obama Suspending Gitmo Detainee Transfers to Yemen*, ABC NEWS (Jan. 5, 2010, 3:02 PM), <http://abcnews.go.com/blogs/politics/2010/01/president-obama-suspending-gitmo-detainee-transfers-to-yemen>.
  101. See National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1028 (2011) (enacted). These transfer restrictions exclude detainees who have been ordered released by a court or competent tribunal. See *id.* § 1028(a)(2). For prior transfer restrictions, see, for example, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033, 124 Stat. 4137, 4351.
  102. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, § 1028(b) (requiring a certification by the Secretary of Defense, with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence, that the country to which a Guantánamo detainee is to be transferred meets several requirements, including that it “has taken or agreed to take effective actions to ensure that the [transferred] individual cannot take action to threaten to the United States, its citizens, or its allies in the future,” and that the receiving country agree to share information with the United States about the transferred detainee as well as information that could affect the security of the United States, its citizens, or its allies).
  103. *Id.* § 1028(c) (barring transfer “if there is a confirmed case of any individual who was detained at [Guantánamo since 9/11], who was transferred to such foreign country or entity and subsequently engaged in any terrorist activity”).
  104. *Id.* § 1028(d) (authorizing the secretary of defense to issue a waiver based, inter alia, on the secretary’s taking alternative actions taken to ensure fulfillment of the purpose of transfer restrictions and to “substantially mitigate the risk of recidivism with regard to the individual to be transferred”).
  105. See Charlie Savage, *Obama Disputes Limits on Detainee Transfers Imposed in Defense Bill*, N.Y. TIMES, Jan. 3, 2013, <http://www.nytimes.com/2013/01/04/us/politics/obama-signs-defense-bill-with-conditions.html>.

politicized release-decision process and have heightened the risk of overdetention.<sup>106</sup>

A more apt model for review of AUMF detention from international humanitarian law—and one that provides for calibration among detainees and for release before the armed conflict’s termination—is that governing security detentions under the Fourth Geneva Convention (Geneva IV).<sup>107</sup> Geneva IV provides for the detention (or internment) of civilians in occupied territory or in the territory of a party to the conflict during an international armed conflict.<sup>108</sup> It also recognizes, however, that internment is an exceptional measure.<sup>109</sup> Geneva IV imposes a more rigorous detention standard than that used for prisoner-of-war detentions, as aliens within the territory of a party to the conflict are subject to civilian internment “only if the security of the Detaining Power makes it absolutely necessary.”<sup>110</sup> A detainee, moreover, must be released “as soon as the reasons which necessitated his internment no longer exist,”<sup>111</sup> even if hostilities continue.<sup>112</sup> Geneva IV thus requires not only initial review by an independent court or administrative board but also periodic review of the internee’s suitability for release.<sup>113</sup> It reflects an effort to strike a balance between the state’s need to

106. See Charlie Savage, *Bill to Ease Transfer of Guantanamo Detainees Moves Through Senate*, N.Y. TIMES, June 24, 2013, <http://www.nytimes.com/2013/06/25/us/bill-allowing-guantanamo-detainees-to-be-moved-advances.html> (describing approval of a bill by the Senate Armed Services Committee that would loosen the restrictions on transferring Guantánamo detainees to foreign countries and also allow the transfer of detainees to the United States).

107. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 41, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

108. See Deeks, *supra* note 67, at 406–07.

109. Pejic, *supra* note 67, at 380.

110. Geneva IV, *supra* note 107, art. 42. The standard is more rigorous for occupying powers in occupied territory. *Id.* art. 78 (“If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”).

111. *Id.* art. 132; see also Laura M. Olson, *Practical Challenges for Implementing the Complementarity Between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-international Armed Conflict*, 40 CASE W. RES. J. INT’L L. 437, 440–41 (2009) (discussing civilian internment).

112. As under Geneva III, the cessation of hostilities provides an outer limit for detention. See Geneva IV, *supra* note 107, art. 133 (“Internment shall cease as soon as possible after the close of hostilities.”).

113. *Id.* art. 43 (requiring at least twice-annual review before a court or board); INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 260–61 (Jean S. Pictet ed., 1958) (describing requirement that the court or administrative board be independent); Deeks, *supra* note 67, at 408–11 (describing the process for initial review, appeal, and periodic review); Ryan Goodman, Editorial Comment, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 53 (2009) (noting that to detain civilians, international humanitarian law requires a specific determination that each civilian poses a threat to the security of the state).

intern individuals who threaten its security during armed conflict and the liberty deprivation that results from continued detention without trial. This goal is achieved in part by assessing differences among individuals who, although all initially eligible for detention, may warrant confinement for varying lengths of time.<sup>114</sup>

The current habeas review model has avoided this approach. It recognizes that the attributes of AUMF detention that preclude detainees' qualification as lawful combatants—such as their failure to wear uniforms or display their arms openly<sup>115</sup>—increase the likelihood of error, while the prolonged nature of the conflict increases the gravity of the liberty deprivation when false positives are generated. But it channels these concerns into review of an individual's threshold eligibility for confinement. Without review of an individual's continued suitability for confinement over time, judges cannot distinguish among the range of individuals who share the common denominator of AUMF detainability nor mitigate the harsh effects of prolonged confinement on those who occupy the low-end of the detention spectrum.

## 2. Shortcomings of the Current Periodic Review Approach

The United States has experimented with internal executive-branch methods for assessing a detainee's suitability for continued confinement. In 2004, the Bush administration created an Administrative Review Board (ARB) to conduct annual reviews of individual Guantánamo detainee cases to determine whether the military should continue to hold detainees designated as enemy combatants based on an assessment of future threat.<sup>116</sup> In 2009, the Obama administration created a Guantánamo Review Task Force to conduct a comprehensive inter-agency review of all individuals detained at the U.S. naval base and to recommend an appropriate disposition, including the transfer of detainees when consistent with U.S. national security and foreign policy interests.<sup>117</sup> The following year, the Task Force issued a report dividing the remaining 240 Guantánamo detainees into three general categories: prosecution (either in federal court or a military commission); continued law-of-war detention; and

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114. Deeks, *supra* note 67, at 407–08.

115. See Geneva III, *supra* note 36, art. 4(2) (describing criteria for prisoner of war status).

116. Memorandum from Gordon R. England, Sec'y of the Navy, to Sec'y of State et al., Implementation of Administrative Review Procedure for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba, para. 1(c) (Sept. 14, 2004) [hereinafter England Memorandum], available at <http://www.defense.gov/news/Sep2004/d20040914adminreview.pdf>.

117. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009).

transfer to another country subject to appropriate security conditions.<sup>118</sup> Subsequently, in 2011, President Obama established the PRB to conduct ongoing, administrative review of the cases of Guantánamo detainees who had been slated for continued law-of-war detention or who had been referred for prosecution but not yet charged in either a federal court or military commission.<sup>119</sup> Like the ARB, the PRB aims to determine whether continued detention is necessary.<sup>120</sup> The PRB evaluates whether individual detainees pose a continuing security threat through a discretionary, interagency review process. Although initially established by an executive order in May 2011, the PRB did not begin to get underway for more than two years.<sup>121</sup>

These executive branch mechanisms share several limitations. Neither the ARB nor PRB contains the heightened showing of necessity required for security internments under Geneva IV.<sup>122</sup> Neither provides for judicial review, instead basing the security threat assessment on an internal executive-branch determination.<sup>123</sup> The ARB lacked important procedural protections, including an opportunity to call witnesses,<sup>124</sup> and barred a detainee's counsel from participating in the proceeding.<sup>125</sup> Its determinations appear to have had little, if any, impact on whether prisoners were released.<sup>126</sup> The PRB imposes a greater burden on the government to justify continued detention<sup>127</sup> and contains additional protections, including allowing for the participation of detainees' private counsel.<sup>128</sup> But it has several limitations. The PRB can restrict a detainee's ability

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118. DEP'T OF JUSTICE ET AL., *supra* note 2, at 1.

119. PRB, *supra* note 23, § 1(a).

120. *Id.* § 2 ("Continued law of war detention is warranted for a detainee subject to the periodic review [procedures] of this order if it is necessary to protect against a significant threat to the security of the United States.").

121. See Carol Rosenberg, *Pentagon Prepares Review Panels for 71 Guantánamo Detainees*, MIAMI HERALD (July 21, 2013), [http://www.miamiherald.com/2013/07/21/3512527\\_pentagon-prepares-parole-board.html](http://www.miamiherald.com/2013/07/21/3512527_pentagon-prepares-parole-board.html) (reporting that the Pentagon would be holding PRB hearings for detainees initially slated for indefinite law-of-war detention and detainees formerly slated for prosecution).

122. See *supra* notes 107–114 and accompanying text.

123. PRB determinations are subject to review by a Review Committee. See DTM-12-005, *supra* note 25, at 16–17 (describing review procedures).

124. England Memorandum, *supra* note 116, encl. (3), para. 3(d).

125. *Id.* encl. (3), para. 2(c); see also Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 621 (2010) (describing limitations in Administrative Review Board (ARB) procedures).

126. See HAFETZ, *supra* note 47, at 133 (explaining that ARB determinations typically turned on political factors and the pressures exerted by the detainee's home government rather than on an individualized assessment of the detainee himself).

127. In contrast to the ARB, the PRB requires that a security threat posed by a detainee be "significant." See PRB, *supra* note 23, § 2.

128. Compare *id.* § 3 (outlining PRB procedures), with England Memorandum, *supra* note 116 (outlining ARB procedures).

to challenge the government's intelligence assertions.<sup>129</sup> The PRB has also been stymied by interagency disputes over how to handle evidence obtained by torture or cruel treatment,<sup>130</sup> despite the prohibition on the PRB's use of such evidence.<sup>131</sup> There also is no provision providing for public access to PRB proceedings, to the transcripts of those proceedings, or to the PRB's determinations. While the Defense Department's implementing guidelines expands the range of relevant factors for the PRB to consider in making its determination,<sup>132</sup> that determination turns solely on the question of whether the detainee presents a continuing security threat, regardless of how long the detention has lasted.

In contrast to the narrower law-of-war focus of these executive branch mechanisms, criminal sentencing offers a fresher and more open-ended approach to assessing the length of detention in an ongoing armed conflict against transnational terrorist organizations. It recognizes the value of judicial proceedings focused not merely on whether a person should be held but also for how long. It acknowledges, in short, that although two defendants may be subject to imprisonment under the same law, they should not necessarily be imprisoned for the same length of time.

Introducing sentencing elements into detention review is not without risks. The general increase in harsh sentences throughout the criminal justice system during the past several decades highlights how sentences can sanction judgments motivated by vengefulness or hostility—what defenders of the practice might deem retribution and just deserts.<sup>133</sup> Such judgments are purportedly prohibited in noncriminal detention, whether carried out under a law-of-war or civil confinement rationale. These risks should be kept in mind. Experience, however, also suggests that war-on-terrorism detainees are already subject to a

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129. PRB, *supra* note 23, § 3(a)(5) (describing the government's authority to withhold information from a detainee's personal representative or counsel where necessary to protect national security, including intelligence sources and methods).

130. Charlie Savage, *Despair Drives Guantánamo Detainees to Revolt*, N.Y. TIMES, Apr. 24, 2013, <http://www.nytimes.com/2013/04/25/us/guantanamo-prison-revolt-driven-by-inmates-despair.html> (noting that the CIA, in particular, has resisted any formal pronouncement that its interrogators engaged in torture or other cruel treatment).

131. PRB, *supra* note 23, § 10(b).

132. See DTM-12-005, *supra* note 25, at 7–8 (describing as relevant factors, inter alia, the extent to which the detainee was involved in or facilitated terrorist activity; the detainees' conduct while acting as part of or supporting an AUMF-covered enemy force; the level of knowledge or skill possessed by the detainee that has been or could be used for terrorist purposes; the detainee's conduct in custody; and the likelihood of family, tribal, or government rehabilitation support for the detainee in the potential destination country).

133. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003) (upholding a life sentence imposed under a "three strikes" law based on the defendant's theft of golf clubs worth approximately \$400 each); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 35 (2011).

form of long-term confinement that relies partly on a just desert theory (meaning, their membership in or support for al-Qaeda or an associated force evidences culpability warranting detention), but that lacks any of just desert's potential to limit the length of that confinement by asking how long it should continue. Further, proportionality can provide a meaningful restraint on overdetention, particularly for individuals who did not participate in or commit a terrorist act, by requiring a relationship between a person's conduct and the length of his imprisonment. Finally, because the proposed model would still operate within an overall law-of-war framework, the end of the hostilities would remain the outer limit for any person's confinement.

The remainder of this Article examines how criminal sentencing can help rethink the current approach to long-term terrorism detentions under the AUMF.

## II. CRIMINAL SENTENCING AND AUMF DETENTION REVIEW

Because the war against al-Qaeda and associated forces has led to new forms of detention, it requires rethinking existing rules and procedures. The significant liberty deprivation resulting from prolonged incapacitation in a global armed conflict against terrorist organizations, along with the increased risk of inaccuracy and arbitrariness in a review model so dependent on front-end classification decisions, underscore the need for new approaches. In particular, additional procedures are needed to provide a fuller assessment of the facts surrounding each individual, a greater ability to distinguish among the range of individuals eligible for detention, and more flexibility to curtail overincapacitation by limiting the length of detention. Although conceptualized as punishment—and thus, formally distinct from a regime of nonpunitive, law-of-war confinement—criminal sentencing offers insights that can inform review of long-term terrorism detentions under the AUMF.

This Part first draws connections between theories underlying criminal sentencing and AUMF detention. It then identifies five features of criminal sentencing that can inform a restructuring of the detention review process so that it aligns more closely with the realities of detention in an armed conflict with terrorist organizations. Those features are (1) the opportunity for judges to consider a range of questions bearing on an appropriate length of confinement that transcend an individual's guilt or innocence (or what one might term threshold detainability in the AUMF context); (2) the potential to mitigate the harsh effects of broad definitions of liability; (3) a flexible menu of sanction options that include alternatives to incarceration; (4) more formalized incentives for cooper-

ation, both in terms of obtaining information to assist in future law enforcement efforts and maintaining institutional discipline; and (5) the expressive value of having incapacitation reflect the seriousness of the underlying conduct.

### A. Sentencing Theory and AUMF Detention

Sentencing serves several, often overlapping, purposes. These purposes are commonly divided into two broad categories: utilitarian and nonutilitarian.<sup>134</sup> Utilitarianism (or consequentialism) justifies punishing past offenses based on punishment's future benefits.<sup>135</sup> Jeremy Bentham provided the classic deterrence explanation for punishment: that "[g]eneral prevention ought to be the chief end of punishment, as it is its real justification."<sup>136</sup> Under modern sentencing law, utilitarianism seeks various crime-control-oriented benefits, principally by preventing or reducing the frequency and seriousness of future criminal acts by the defendant or others. Traditional utilitarian considerations include deterrence, rehabilitation, and incapacitation. Of the three, incapacitation—preventing future harm to society by restricting an offender's liberty—retains the greatest influence.<sup>137</sup>

Sentencing's nonutilitarian goals, by contrast, embody principles of justice and fairness that may be considered ends in themselves regardless of any social or individual benefit.<sup>138</sup> Immanuel Kant, Bentham's contemporary, summarized the rationale underlying this theory: that punishment "can never be administered merely as a means for promoting another [g]ood," but rather should be "pronounced over all criminals proportionate to their internal wickedness."<sup>139</sup> Traditional nonutilitarian theories are tied to retribution (or "just desert"), which bases a sentence on what the moral gravity of the particular offender's conduct

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134. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005).

135. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997).

136. JEREMY BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 396 (John Bowring ed., 1838).

137. See Robinson & Darley, *supra* note 135, at 456 (noting the decline of the rehabilitationist approaches since the 1960s); see also Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 30–31 (2006) (discussing the growth of incapacitative crime control strategies).

138. See Frase, *supra* note 134, at 69–70; see also ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976) (advocating sentencing reform to align with the theory of just deserts).

139. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 195, 198 (W. Hastie trans., 1887) (emphasis omitted); see also Matthew A. Pauley, *The Jurisprudence of Crime and Punishment From Plato to Hegel*, 39 AM. J. JURISPRUDENCE 97 (1994) (describing the historical origins of the philosophical debate over the purposes of punishment).

warrants.<sup>140</sup> Retributive approaches can, however, serve utilitarian purposes. Paul H. Robinson and John M. Darley, for example, have demonstrated that a sanction based on a community's perception of just desert can be an effective strategy for reducing crime by promoting forces that lead to a law abiding society.<sup>141</sup>

Proportionality is often associated with nonutilitarian theories of retribution and just desert. Proportionality, as a theory of desert, bases a sentence on an assessment of the offender's blameworthiness, considering not only the nature and seriousness of the crime but also the offender's degree of culpability in committing it.<sup>142</sup> This assessment typically takes into account a variety of factors that aggravate or mitigate an offender's culpability.<sup>143</sup> Uniformity, which seeks to promote the end of fairness and equity in sentencing by treating similar offenders alike, is also often tied to nonutilitarian approaches to punishment.

But proportionality and uniformity can serve utilitarian ends as well. If society does not punish different crimes differently (or proportionately), offenders will have no incentive to limit themselves to the least harmful offenses.<sup>144</sup> Proportionality can also help cabin the economic and social costs of incarceration. Uniformity can achieve the utilitarian ends of reinforcing public views about relative crime seriousness and maintaining public respect for criminal laws and the criminal justice system.<sup>145</sup>

Additionally, proportionality can serve goals independent of any specific penological theory. As Alice Ristroph has explained, "liberty-interest proportionality" serves as an external limit on state power by requiring that restrictions on liberty be proportionate to the conduct that purportedly justifies the restriction.<sup>146</sup> The scope of penal power must accordingly bear some relationship to the conduct that gives rise to its exercise.<sup>147</sup>

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140. Frase, *supra* note 134, at 76 (noting that under a just desert theory, "all offenders should receive their particular deserts—no more and no less").

141. Robinson & Darley, *supra* note 135, at 454.

142. See ANDREW VON HIRSCH, CENSURE AND SANCTIONS 29–33 (1993); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relevant to What?*, 89 MINN. L. REV. 571, 590 (2005).

143. See Frase, *supra* note 134, at 73. Some scholars, however, have questioned whether just desert can serve as a meaningful limitation on sentences. See, e.g., Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1297 (2006) ("A study of the actual deployment and operation of the concept of desert suggests that, contrary to many theorists' hopes, democratic conceptions of desert are too malleable to serve as a meaningful limiting principle.").

144. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 274 (2005) (explaining proportionality's utilitarian origins).

145. See Frase, *supra* note 134, at 68.

146. Ristroph, *supra* note 144, at 268–69.

147. *Id.* at 269.

International humanitarian law already incorporates proportionality principles in several ways. Most importantly, it bars military action that would cause harm to civilians that is excessive compared to the military gains achieved.<sup>148</sup> The United States accepts that proportionality principles constrain its targeting killing of members of enemy forces in the armed conflict with al-Qaeda and associated groups.<sup>149</sup> The United States has also incorporated proportionality into its detention review process to some extent by seeking to release detainees whom it believes no longer pose any threat. But its use of proportionality principles in the detention arena has been limited.<sup>150</sup> The United States has employed the combatant paradigm to defend its right to hold enemy fighters until the end of the conflict and has maintained that release before that time remains solely a matter of executive discretion. In making those discretionary decisions, moreover, the United States has focused exclusively on the future threat a detainee might pose, excluding broader, sentencing-based conceptions of proportionality that center on the relationship between the length of incarceration and the individual's past conduct.

The assumption is that because AUMF detentions are nonpunitive, sentencing rationales are inapplicable: Detainees have not committed any crime and are thus not blameworthy in a legal sense. Notions of culpability, however, permeate the detention of individuals found to have joined or supported a terrorist group, even if they are never prosecuted.<sup>151</sup>

Moreover, the broader strategic costs of a detention regime that is perceived as arbitrary and disproportionate have been widely noted. In calling for Guantánamo's closure, President Obama noted that the prison's existence has "likely created more terrorists around the world than it ever detained."<sup>152</sup> More recently, he described Guantánamo as the "glaring exception" to the notion of wartime detention as a temporary measure.<sup>153</sup> Former CIA Director David

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148. Additional Protocol I, *supra* note 65, arts. 52, 57; U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 5 (1956).

149. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>) (maintaining that targeting operations are conducted consistent with law-of-war principles).

150. Monica Eppinger, *Reality Check: Detention in the War on Terror*, 62 CATH. U. L. REV. 325, 367 (2013) (describing the government's failure to effectively incorporate proportionality principles into detention operations); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1398-99 (2008) (advocating for the incorporation of military targeting rules, including proportionality, into review of AUMF detentions).

151. See *supra* Part I.A.

152. President's Remarks on National Security, *supra* note 11.

153. Obama, *supra* note 5.

Petraeus, who previously served as the United States' top commander in Iraq, has described how detentions at Guantánamo have undermined U.S. counterinsurgency efforts and how closing the prison would bolster the U.S. military campaign in Afghanistan (and would have bolstered those efforts in Iraq).<sup>154</sup> Other high-level military officials have linked the continued detention of prisoners at Guantánamo to al-Qaeda's recruiting efforts.<sup>155</sup> Senior counterterrorism officials have also noted the role U.S. detention policy plays in gaining the necessary cooperation from its allies and partners.<sup>156</sup>

Much debate has accordingly centered on whether treating terrorism suspects under a law-of-war paradigm, as opposed to a criminal-law-enforcement paradigm, undermines U.S. counterterrorism efforts.<sup>157</sup> But legitimacy costs also attach to the way terrorism suspects are treated within a given framework. The Obama administration has sought to justify the indefinite detention of terrorism suspects under the AUMF by bringing those detentions in line with the law of war<sup>158</sup> and creating an internal executive branch review process to assess continued confinement.<sup>159</sup> Yet, these reforms have not attempted to incorporate proportionality into detention review nor have they addressed the problem that some individuals continue to be held for longer than their prior conduct appears to warrant.<sup>160</sup>

Rehabilitation is another sentencing goal relevant to AUMF detention. The combatant detention model does not focus on rehabilitation because an enemy prisoner of war—whose actions result from his allegiance to his country—has no defect or failing that can be remedied.<sup>161</sup> The same is not true for AUMF detainees, who are considered to be at fault for joining or supporting the enemy

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154. See Greg Bluestein, *Petraeus Supports Closure of Guantanamo Bay Prison*, U-T SAN DIEGO (May 29, 2009, 11:51 AM), <http://www.utsandiego.com/news/2009/may/29/us-petraeus-commencement-052909>.

155. See Charles C. Krulak & Joseph P. Hoar, Op-Ed, *Guantánamo Forever?*, N.Y. TIMES, Dec. 12, 2011, <http://www.nytimes.com/2011/12/13/opinion/guantanamo-forever.html>.

156. See David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 30–31 (2011) (noting the importance of cooperation on issues such as providing witnesses and evidence, sharing intelligence, and transferring terrorism suspects).

157. See Wesley K. Clark & Kal Raustiala, Op-Ed, *Why Terrorists Aren't Soldiers*, N.Y. TIMES, Aug. 8, 2007, <http://www.nytimes.com/2007/08/08/opinion/08clark.html> (arguing that the military approach accords terrorist killers the status of soldiers).

158. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1–2, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. filed Mar. 13, 2009) (arguing that indefinite detention under the AUMF is consistent with long-standing law-of-war principles).

159. See *supra* notes 119–120 and accompanying text.

160. See *supra* notes 116–128 and accompanying text.

161. Yin, *supra* note 72, at 169.

force and thus have shortcomings that can potentially be rectified to prevent a future reoccurrence. Deradicalization—a variant of rehabilitation—is increasingly becoming part of U.S. counterterrorism strategy.<sup>162</sup> A greater focus on rehabilitation—when tethered to a system of release—could yield significant benefits,<sup>163</sup> as recent changes to the government’s periodic review procedures acknowledge.<sup>164</sup> A greater focus on rehabilitation and, relatedly, on the consequences of prolonged confinement for future conduct, is particularly appropriate given what some have criticized as the high rate of recidivism among Guantánamo detainees.<sup>165</sup> While available evidence suggests that the rate asserted by the Defense Department is significantly inflated,<sup>166</sup> the focus on recidivism highlights the need to pay greater attention to AUMF detention’s potential criminogenic effect. Prolonged indefinite confinement can increase the risk of a detainee’s radicalization, thus creating a threat among some prisoners that did not previously exist.<sup>167</sup> The detention review process should place more emphasis on the adverse effects of continued detention and on mitigating those effects by limiting the length of a prisoner’s confinement.

## B. Sentencing and the Opportunity to Be Judged

Sentencing is ordinarily conceptualized as the phase of a criminal proceeding in which a court imposes sanctions on a defendant for offenses he has committed. It may also, however, be viewed as a procedural opportunity for a defendant to be heard before a judge on issues other than innocence or guilt—

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162. See Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 145 (2012).

163. See Chris Jenks & Eric Talbot Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL’Y REV. 41, 90 (2011).

164. See DTM-12-005, *supra* note 25.

165. See DIR. OF NAT’L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA (2010), [http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/120710\\_Summary\\_of\\_the\\_Reengagement\\_of\\_Detainees\\_Formerly\\_Held\\_at\\_Guantanamo\\_Bay\\_Cuba.pdf](http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf) (asserting that, as of October 1, 2010, approximately 150 of the 598 detainees who had been released from Guantánamo were confirmed or suspected of “reengaging in terrorist or insurgent activities” after transfer). For a discussion of the empirical research on rehabilitation as a strategy for minimizing recidivism more generally, see Tonry, *supra* note 137, at 32–33. As Tonry explains, critiques of rehabilitation are often overstated, and “well-managed, well-targeted programs can reduce participants’ probability of reoffending.” *Id.* at 33.

166. See Peter Bergen & Bailey Cahall, *Terror Threat From Gitmo Prisoners Is Exaggerated*, CNN (May 8, 2013, 11:00 AM), <http://www.cnn.com/2013/05/07/opinion/bergen-gitmo-terror-threat> (arguing that the U.S. Director of National Intelligence’s estimate that 27.9 percent of released detainees were either confirmed or suspected of joining militant groups is significantly inflated and that the actual total number is 8.8 percent of released detainees).

167. See Huq, *supra* note 24, at 1502 n.327.

that is, on issues other than those establishing his eligibility for imprisonment. This procedural opportunity—one absent from habeas review of AUMF detention—recognizes both “the moral personhood of the defendant and the moral dimension of crime and punishment.”<sup>168</sup> It also emphasizes the value of judicial discretion, as courts can weigh various factors in assessing an appropriate term of incapacitation or the possibility of some lesser liberty restriction.<sup>169</sup>

Developments since *United States v. Booker*<sup>170</sup> highlight the reinvigoration of the idea of sentencing as a procedural opportunity for individualized judging. In *Booker*, the Supreme Court held that the Federal Sentencing Guidelines (the Guidelines) violated the Sixth Amendment by requiring mandatory sentences based on judicial factfinding<sup>171</sup> and remedied this constitutional defect by rendering the Guidelines advisory.<sup>172</sup> Created by the Sentencing Reform Act of 1984,<sup>173</sup> the Guidelines sought to provide greater certainty and fairness in sentencing and decrease sentencing disparity by reducing judicial discretion.<sup>174</sup> They prescribed sentencing ranges based on a complex matrix of factors regarding the offender and the offense, each of which was assigned a particular weight.<sup>175</sup> Judges had to sentence within the specified range absent narrow grounds for departure.<sup>176</sup>

Critics complained that the Guidelines sought “not to channel the exercise of informed judicial discretion, but to repress judgment and replace it with a calculus of justice.”<sup>177</sup> Mandatory sentencing under the Guidelines, they argued, ignored “the most important capacity that judges bring to criminal sentencing:

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168. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78 (1998).

169. The high-water mark of judicial discretion in sentencing is the U.S. Supreme Court’s decision in *Williams v. New York*, 337 U.S. 241 (1949), which upheld a judge’s authority to consider a wide range of information about the offender, including evidence not presented at trial, and to weigh that information in imposing sentence. *Id.* at 247–51.

170. 543 U.S. 220 (2005).

171. *Id.* at 245.

172. *Id.*

173. Pub. L. No. 98-473, 98 Stat. 1987.

174. 28 U.S.C. § 994(f) (2012).

175. Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO ST. L.J. 1697, 1713 n.95 (1998). The Guidelines were developed by the newly created U.S. Sentencing Commission. See 28 U.S.C. § 991 (2012).

176. 18 U.S.C. § 3553(b) (2000), *invalidated by Booker*, 543 U.S. 220. A ground for departure could “either [be] specified by the Sentencing Commission in the Guidelines themselves or, residually, if the case involved highly atypical and extraordinary factors not taken into account by the Commission in its Guidelines.” Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1428 (2008).

177. Kate Stith & José A. Cabranes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 11 FED. SENT’G REP. 187, 187 (1999).

the ability to pronounce moral judgment that takes into account all aspects of the crime and the offender.<sup>178</sup> Judges lost their ability to ensure that a defendant received punishment commensurate with his or her individual circumstances.<sup>179</sup>

*Booker* is often described as revitalizing the jury's historic function of limiting prosecutorial power,<sup>180</sup> helping to restore what Justice Scalia described as the jury's historic role as a "circuitbreaker in the State's machinery of justice."<sup>181</sup> But *Booker* may also be understood as reinvigorating judging, enabling judges to serve this circuitbreaker role by freeing them from a requirement to sentence within a specified range and giving them greater latitude to apply their practical wisdom in imposing punishment.<sup>182</sup> Along with subsequent decisions in *Gall v. United States*<sup>183</sup> and *Kimbrough v. United States*,<sup>184</sup> *Booker* helped resurrect judicial discretion in federal sentencing.<sup>185</sup> While the Guidelines still retain considerable influence,<sup>186</sup> *Booker* revived the notion of sentencing as a procedural opportunity for defendants to be judged as individual moral agents and for judges to calibrate punishment on a more individualized basis.<sup>187</sup>

178. *Id.*

179. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 100 (2003).

180. See, e.g., Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 689–90 (2012).

181. *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004). In striking down Washington's sentencing scheme, *Blakely* barred judges from imposing sentences that exceeded the maximum sentence allowed based on facts found by the jury or admitted by the defendant. *Id.* at 303–04.

182. See STITH & CABRANES, *supra* note 168, at 169–70.

183. 552 U.S. 38, 47 (2007) (holding that extraordinary circumstances are not required to warrant a significant departure from a Guidelines sentence).

184. 552 U.S. 85, 101 (2007) (holding that district courts may reject a Guideline sentence based on policy considerations).

185. See, e.g., Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 410 (2006) (describing *Booker's* effect as empowering judges to exercise discretion in sentencing); Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 414–15 (2011) (summarizing studies showing *Booker's* effect on upward and downward departures); Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 269 (2009) (noting *Booker's* rejection of "passive, mechanical sentencing" and emphasis on judicial discretion in sentencing).

186. The Supreme Court, for example, has upheld the use of a presumption of reasonableness for sentences imposed within a properly calculated Guideline range. See *Rita v. United States*, 551 U.S. 338, 347 (2007). Some studies, however, suggest that *Booker's* impact on actual sentences has been limited. See, e.g., Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1148 (2010) ("[D]espite *Booker's* holding that the federal guidelines are advisory, federal judges impose sentences within the ranges recommended by the guidelines in the majority of cases.").

187. As Jeremy Waldron has explained, treating individuals as moral agents—including by holding them responsible for their actions—is crucial to respecting their dignity. Jeremy Waldron, *Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley* 44–45 (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09-50, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1461220](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220).

Post-*Booker*, federal judges thus have greater flexibility to sentence under a statutory standard that includes consideration of the nature and circumstances of the offense, the history and characteristics of the offender, the need to provide punishment for the offense, and the need to avoid disparities.<sup>188</sup> This standard requires the “elementary principle of weighing the good with the bad,” that, as Judge Jed S. Rakoff has observed, is central not only to federal sentencing but also to “all . . . systems of justice.”<sup>189</sup>

The principle of individualized judging is also reflected in the Supreme Court’s requirement of individualized sentencing in capital cases. In a series of decisions starting with *Lockett v. Ohio*,<sup>190</sup> the Court has demanded that the sentencing authority be allowed to consider any aspect of a defendant’s character or record as well as any circumstance surrounding the offense.<sup>191</sup> In elaborating and enforcing the right to individual sentencing, the Court has widened significantly the range of evidence relevant to the punishment determination.<sup>192</sup>

These developments suggest two lessons for AUMF detention. First, they highlight the importance of a defendant’s opportunity to be judged individually based on a range of factors. Second, they suggest the value of channeled judicial discretion in weighing those factors in individual cases. Criminal sentencing, in short, points to incorporating more space for judging in reviewing AUMF detention: for judges to have greater latitude to assess an appropriate length of confinement based on an individual’s conduct, history, and circumstances.

### C. Sentencing as a Corrective Mechanism for Substantive Overbreadth

Sentencing can also be seen as a means of mitigating criminal law’s substantive overbreadth, a notion that is closely related to the idea of sentencing as an opportunity for individualized judging. Federal courts have historically focused on protecting the procedural rights of criminal defendants to ensure that the facts of a particular case are fairly adjudicated, but they have largely avoided scrutinizing the substance of criminal laws themselves.<sup>193</sup> As William Stuntz put it, there is a great disparity between the judiciary’s robust role in consti-

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188. See 18 U.S.C. § 3553(a) (2012).

189. *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006).

190. 438 U.S. 586 (1978).

191. *Id.* at 604.

192. Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. 329, 344–45 (2013).

193. Shery F. Colb, *Freedom From Incarceration: Why Is This Right Different From All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 (1994).

tutionalizing criminal procedure and its hands-off approach to criminal law's substance.<sup>194</sup>

Sentencing, when not constrained by statutory mandatory minimums (which are unaffected by *Booker*), provides judges with an opportunity to mitigate the harsh effects that can result from broad criminal laws.<sup>195</sup> Sentencing can thus play an important role in protecting the noninnocent: those who may fall within a criminal law's wide scope but who may nevertheless warrant less severe treatment under a theory of retribution, incapacitation, deterrence, rehabilitation, or some combination of sentencing rationales.

Judicial review of AUMF detention has so far followed a similar pattern: deference to a broad substantive standard defining eligibility for confinement coupled with the imposition of baseline procedural safeguards to ensure adequate factfinding.<sup>196</sup> Subject to habeas review of its factual assertions, the government can detain individuals indefinitely based on their loosely defined membership in or provision of unspecified (but more than *de minimis*) support for al-Qaeda or an associated group, regardless of whether they committed a hostile act or engaged in any terrorist plot or activity.<sup>197</sup> Yet, habeas judges have failed to address the AUMF's potentially harsh and unnecessary effects on those who barely meet its detention threshold. Even though, as one district judge explained, the evidence against a particular Guantánamo detainee was "gossamer thin" and "of a kind fit only for these unique [habeas] proceedings," he felt compelled to uphold the petitioner's indefinite confinement because it appeared more likely than not that the petitioner was part of an enemy force.<sup>198</sup> The habeas judge, in short, lacked any power to do what a sentencing judge can: compensate for the law's broad substantive reach by tailoring the length of confinement to the particular facts of the case.

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194. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 6–7, 40–41 (1997).

195. See Barkow, *supra* note 179, at 100–01. Mandatory minimums have been widely criticized for giving prosecutors too much power and eliminating judicial discretion in sentencing. See, e.g., *United States v. Dossie*, 851 F. Supp. 2d 478, 484–85 (E.D.N.Y. 2012).

196. Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of Boumediene*, 57 *WAYNE L. REV.* 99, 119–21 (2011); Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 *COLUM. L. REV.* 1013, 1016 (2008) (describing the Supreme Court's focus on procedural questions at the expense of attention to hotly debated issues around the substantive scope of the executive's detention authority). The procedural protections applied by courts engaging in habeas review of AUMF detention are significantly less rigorous than those required in criminal prosecutions. See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 876 (D.C. Cir. 2010).

197. See, e.g., *Salahi v. Obama*, 625 F.3d 745, 746–47 (D.C. Cir. 2010); *Al-Bihani*, 590 F.3d at 873.

198. *Awad v. Obama*, 646 F. Supp. 2d 20, 27 (D.D.C. 2009).

#### D. Flexibility of Sanctions

Sentencing can provide a range of sanctions in addition to or in lieu of incarceration. Under some sentencing regimes,<sup>199</sup> defendants may receive parole after serving a period of incarceration.<sup>200</sup> Probationary sentences generally release the offender into the community following sentencing but limit the offender's freedom and activities.<sup>201</sup> Supervised release is another variant, whereby a defendant is released under conditions following a term of incarceration.<sup>202</sup> Violations of probation or supervised release conditions can trigger revocation and incarceration. Probationary sentences are the most common type of criminal sanction imposed by courts today.<sup>203</sup>

Sentencing regimes can provide for less restrictive incursions on liberty, including home confinement, boot camp, and electronic monitoring.<sup>204</sup> They also can provide for alternatives to incapacitation, including community service, substance abuse treatment, and shaming sanctions.<sup>205</sup> Such alternatives are typically designed to serve the utilitarian ends of reducing recidivism and rehabilitating offenders. Rising rates and costs of incarceration have made these alternatives a common focus of criminal justice reform,<sup>206</sup> while advances in

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199. While the Sentencing Reform Act of 1984 eliminated indeterminate sentences and parole in federal sentencing, many states have retained them. Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 135 (2005).
  200. Sentences may be for a specified length of time (determinate sentencing) or for a range of time within a statutorily permissible spectrum (indeterminate sentencing). See Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 382–84 (2005). A determinate sentence for armed robbery might thus be twelve years imprisonment, whereas an indeterminate sentence might be five to fifteen years, with the possibility of parole after five years.
  201. Probation conditions can include complying with a substance abuse treatment program, maintaining gainful employment, limitation on travel, and consenting to searches of one's person, premises, or vehicle. See 18 U.S.C. § 3563(b) (2012).
  202. *Id.* § 3583 (providing for supervised release of federal prisoners).
  203. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 236019, PROBATION AND PAROLE IN THE UNITED STATES, 2010 (2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2239> (noting that at the end of 2010, there were more than four million people in the United States on probation).
  204. Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 238 (2009).
  205. *Id.* at 237 (“The current manifestation of [alternative to incarceration] programming began in the 1980s in response to the emerging recognition that prison populations were growing out of control and in response to a reconsideration of the efficacy of rehabilitation.”).
  206. See *id.* at 235–36; see also Developments in the Law, *Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1866–67 (1998); J.P. Hanlon et al., *Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing*, CRIM. JUST., Winter 2010, at 26, 26–27.

surveillance have enhanced the government's ability to monitor individuals without incapacitating them.<sup>207</sup>

Alternatives to incarceration have been employed in various noncriminal contexts. Electronic monitoring, for example, has been used to decrease reliance on detaining immigrants facing removal from the United States.<sup>208</sup> The United Kingdom and other countries have developed a system of control orders that authorize restrictions on terrorism suspects short of incarceration.<sup>209</sup> Control orders can include curfews and limitations on communication and travel, as well as allowing law enforcement to search a suspect's premises on demand.<sup>210</sup> Although such orders have proven controversial for imposing significant restraints on individual liberty<sup>211</sup> without adequate procedural safeguards,<sup>212</sup> they represent a less serious infringement on individual freedom than incarceration.

Alternatives to incarceration could help alleviate the plight of Guantánamo detainees facing long-term confinement without trial. These nonsentenced detainees may be divided into two general categories. The first consists of individuals whom the Obama administration has cleared for transfer but who remain confined because the administration has been unable to arrange their repatriation consistent with the United States' security interests and its *nonrefoulement* obligations, which prohibit transfer to a country where a detainee is likely to suffer from torture or other persecution.<sup>213</sup> This cleared-for-transfer group

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207. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1328–29 (2008) (“With the advent of surveillance methods less costly than physical restraint, the standard binary of incarceration and liberty has unfurled into a broad continuum on which those two choices mark only the extremes.”).
208. See, e.g., Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 605 (2010) (advocating increased use of electronic monitoring in lieu of mandatory immigration detention).
209. See Prevention of Terrorism Act, 2005, c. 2, § 1(1) (U.K.) (describing a “control order” as “an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism”); see also *Criminal Code Act 1995* (Cth) s 104.4 (Austl.) (authorizing the issuance of an interim control order when a court finds it “reasonably necessary” to protect the public from a terrorist attack); Jonathan M. Coady, *Conditional Release of Terror Suspects in Canada: Lessons From the United Kingdom*, 36 QUEEN'S L.J. 251, 261–62 (2010) (describing Canada's adoption of a system of conditional release of immigrants detained under security certificates that includes curfews, limitations on visitors, restrictions on communication, and geographic boundaries on movement).
210. Prevention of Terrorism Act, 2005, c. 2, § 1(4) (U.K.) (describing possible restrictions).
211. See Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 37 (2011).
212. See *Sec'y of State for the Home Dep't v. AF*, [2009] UKHL 28 (H.L.) (appeal taken from Eng.) (requiring that those subject to control orders be afforded greater access to the government's evidence so that they could meaningfully challenge the orders with the assistance of a special advocate).
213. See William Thomas Worster, *Between a Treaty and Not: A Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases*, 21 MINN. J. INT'L L. 253, 254 (2012).

constitutes approximately one-half of the 166 remaining prisoners at Guantánamo. It includes individuals whom the administration believes are still subject to lawful detention under the AUMF but whose continued confinement is no longer in the United States' interests.<sup>214</sup> In clearing a prisoner for transfer, the administration assesses both the potential future threat the detainee poses and the extent to which that threat can be "sufficiently mitigated through feasible and appropriate security measures."<sup>215</sup>

The second category of nonsentenced detainees consists of individuals designated by the administration for continued law-of-war detention under the AUMF. This category includes not only those Guantánamo prisoners slated for law-of-war detention by the Obama administration (who number more than one-quarter of the current total detainee population)<sup>216</sup> but also those prisoners who were initially referred for prosecution but who will never be charged with an offense.<sup>217</sup>

The present framework sharply limits a court's ability to impose less restrictive measures than incarceration on both categories of nonsentenced prisoners. The most significant constraint is a habeas judge's inability to order a detainee's transfer to the United States. Congress has barred the transfer of any Guantánamo detainee to the United States for any purpose,<sup>218</sup> and the D.C. Circuit has held that courts have no authority to order the release of detainees into the United States, even subject to supervisory conditions and even when there is no basis for their continued confinement under the AUMF.<sup>219</sup> Despite

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214. See DEPT OF JUSTICE ET AL., *supra* note 2, at 10–11 (providing a breakdown of the cleared-for-transfer group).

215. *Id.* at 7; see also DTM-12-005, *supra* note 25, at 7–8 (describing relevant factors regarding conditions in the potential transfer country in determining whether a detainee should be released, including that country's ability to mitigate any potential security threat).

216. DEPT OF JUSTICE ET AL., *supra* note 2, at 12.

217. *Id.* at 11 (noting that the cases of twenty-four of the forty-four detainees referred for prosecution remain under review and that there has yet been no determination "as to whether or in what forum" they will be charged).

218. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1027 (2011) (enacted). For prior versions of congressional restrictions on the transfer of detainees to the United States, see, for example, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351, which bars transfer of Guantánamo detainees to the United States for any purpose, and Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 552, 123 Stat. 2142, 2177 (2009), which bars the use of agency funds to bring Guantánamo detainees to the United States for any purpose, except for criminal prosecution.

219. *Kiyemba v. Obama*, 605 F.3d 1046, 1048–49 (D.C. Cir. 2010) (holding that the court does not have the authority to order the release of Guantánamo detainees into the United States even when there is no lawful basis to continue the detainees' confinement under the AUMF).

the traditional flexibility of the habeas remedy<sup>220</sup>—a flexibility recognized in *Boumediene*<sup>221</sup>—judges thus have little ability to craft alternatives even when they believe a perceived threat could be addressed through some measure short of incarceration.

So while alternatives to incarceration available in criminal sentencing (as well as in various forms of noncriminal confinement) could reduce unnecessary reliance on AUMF detention, they will remain of limited value unless either judges or an administrative review board such as the PRB has the power to order the temporary release of detainees into the United States and to impose conditions on that release.<sup>222</sup>

## E. Incentivizing Cooperation

Sentencing plays an important role in facilitating cooperation by defendants and convicted prisoners. The prospect of a reduced sentence is critical to persuading criminal suspects to engage in plea bargaining and to provide information that may assist future law enforcement or other investigative efforts. For those incarcerated following conviction, the possibility of a reduction in the time that must be served, through measures such as good-time credits, offers an incentive to adhere to institutional rules.

### 1. Plea Bargaining

A defendant who enters into a plea bargain in a criminal case typically agrees to a reduction in charges in exchange for an admission of guilt. Plea bargaining enables a defendant to receive a lower sentence than he would have

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220. See, e.g., PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010); see also Caroline Wells Stanton, *Rights and Remedies: Meaningful Habeas Corpus in Guantanamo*, 23 GEO. J. LEGAL ETHICS 891, 898 & n.60 (2010) (noting that the habeas remedy grew broader over time to include other relief beyond an order of release); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 978 (2011) (reviewing HALLIDAY, *supra*, and stressing the “flexibility, adaptability, and vigor of habeas”).

221. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (“[T]he habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted.”).

222. Such an order of release would not itself grant a detainee lawful status under the nation’s immigration laws, but merely provide them relief from continued incarceration. See Laura J. Arandes, Note, *Life Without Parole: An Immigration Framework Applied to Potentially Indefinite Detention at Guantánamo Bay*, 86 N.Y.U. L. REV. 1046, 1049 (2011) (noting that court-ordered release of Guantánamo detainees into the United States should be considered as a form of parole, and not admission under the immigration laws); cf. *Leng May Ma v. Barber*, 357 U.S. 185 (1958) (noting that an individual paroled into the United States is not deemed to have been admitted or obtained immigration status).

received had he gone to trial and been convicted. From the government's perspective, plea bargaining conserves limited prosecutorial resources<sup>223</sup> and avoids the risk of acquittal.<sup>224</sup> It also can induce cooperation from defendants who provide information in exchange for a reduction in their sentence through judicially enforceable agreements.<sup>225</sup> Cooperation may be used to prosecute other individuals, to gain information for investigative purposes, or both.<sup>226</sup> Providing sentencing reductions to those who provide prosecutors with substantial assistance has long been a cornerstone of the Guidelines.<sup>227</sup>

Prosecutors have proven as successful in persuading terrorism suspects to cooperate as they have proven with other criminal suspects.<sup>228</sup> A prosecutor's ability to obtain a terrorism suspect's cooperation through the possibility of a reduced sentence, moreover, does not appear to vary based on whether the suspect is tried in federal court or in a military commission.<sup>229</sup> Indeed, commission prosecutors have begun offering defendants the prospect of reduced sentences in exchange for their cooperation in helping convict other, more high-level defendants.<sup>230</sup>

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223. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–71 (2004).

224. *Id.* at 2471–72.

225. See, e.g., Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 12 (2010) (describing how long and obligatory sentences required by mandatory minimums encourage plea bargaining and cooperation); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 993 (2008) (noting that “prosecutors have similarly unfettered discretion to trade charging and sentencing concessions for cooperation”).

226. Luna & Cassell, *supra* note 225, at 12 (“[T]he possibility of a long sentence provides a powerful incentive for members of a criminal group to provide information to law enforcement and to assist in the prosecution of other offenders.”); see also Kris, *supra* note 156, at 23 (discussing the criminal justice system's use of a “proffer agreement,” under which a target and his lawyer may provide information to the government that cannot be used directly to prosecute the target but can be used for its intelligence value or to investigate others).

227. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2012); see also Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1523 (2000) (analyzing the significance of prosecutors' discretion to seek section 5K1.1 motions in federal sentencing).

228. Kris, *supra* note 156, at 20–23. Indeed, terrorism suspects have “powerful incentives to . . . cooperate and obtain a somewhat shorter sentence or improved conditions of confinement” given the potentially lengthy prison terms and harsh conditions they would face if convicted. *Id.* at 22–23.

229. *Id.* at 20 (“[T]argets cooperate (or do not cooperate) within the criminal justice system much as they do (or do not) outside of the criminal justice system.”).

230. See Scott Shane, *Testimony on Al Qaeda Is Required in Plea Deal*, N.Y. TIMES, Feb. 29, 2012, <http://www.nytimes.com/2012/03/01/us/majid-khan-pleads-guilty-to-terrorism-plots-in-military-court.html> (describing the plea agreement under which Guantánamo detainee Majid Khan would be eligible for a reduced sentence in exchange for his provision of testimony against self-described 9/11 mastermind Khalid Shaikh Mohammed). Congress, however, recently constrained the ability of military commission prosecutors to negotiate plea agreements by eliminating a provision that exempted detainees who entered into such agreements from the transfer restrictions that apply to

## 2. Compliance During Incarceration

The prospect of a reduction in a prisoner's sentence also can help foster compliance during incapacitation.<sup>231</sup> Under the federal system, convicted prisoners are eligible for a reduction in their sentence if they demonstrate exemplary conduct during their incarceration.<sup>232</sup> Many states have more generous good-time credit schemes.<sup>233</sup> Good-time credit provides an important prison management tool directed at ensuring institutional security and safety, while also serving rehabilitative goals.<sup>234</sup>

The current framework for AUMF detention lacks any comparable formal incentive structure for maximizing cooperation through the possibility of release. Government officials may, for example, consider a detainee's compliance with institutional rules under administrative review procedures such as the PRB.<sup>235</sup> But there is no requirement that such information be taken into account nor any standard specifying how institutional compliance should be measured in determining a prisoner's release. Detainees thus perceive that there is no way to affect the length of their confinement, contributing to a sense of hopelessness and despair. The persistence of widespread hunger strikes and suicide attempts at Guantánamo highlights one consequence of a detention regime divorced from any formalized incentive structure.<sup>236</sup> Seemingly powerless to affect the length of their confinement, detainees may view such actions as the only way to show they retain some control over their lives.<sup>237</sup>

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other detainees. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1028, 126 Stat. 1632, 1914-17.

231. See Frase, *supra* note 134, at 77 ("Incarcerated defendants sent to prison or jail must have an incentive to cooperate with institutional rules and programs.")
232. 18 U.S.C. § 3624(b) (2012) (setting forth the calculation of credit toward service of a prisoner's sentence for "exemplary compliance with institutional disciplinary regulations"); see also Barber v. Thomas, 130 S. Ct. 2499, 2502 (2010) (describing the purposes of good-time credit).
233. Barkow, *supra* note 179, at 135.
234. Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 545 n.23 (2002).
235. See DTM-12-005, *supra* note 25, at 8 (noting that the PRB may take into account a detainee's conduct while in custody, including whether the detainee was considered a danger to other detainees or individuals).
236. See Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 21, 2009, <http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html> (describing hunger strikes and suicides at Guantánamo); Amy Davidson, *A Hundred Hungry Men at Guantánamo*, NEW YORKER, May 1, 2013, <http://www.newyorker.com/online/blogs/comment/2013/05/guantanamo-hunger-strikes-hundred-hungry-men.html>.
237. Kristine Huskey & Stephen N. Xenakis, *Hunger Strikes: Challenges to the Guantánamo Detainee Health Care Policy*, 30 WHITTIER L. REV. 783, 798 (2009) ("A hunger strike is typically a prisoner's only means to assert some personal control over a situation in which he has little else."); see also Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the*

Criminal sentencing suggests the value of requiring consideration of a detainee's cooperation and compliance with institutional norms in assessing whether he should continue to be held and devising a more formalized structure for making that assessment.

#### F. Sentencing's Expressive Purpose

Sentencing provides an outlet for the expression of social and community norms. As Dan Kahan has observed, the positions that criminal law takes "become suffused with meaning."<sup>238</sup> When society imposes punishment, it expresses the community's moral condemnation not merely of the offender but of the underlying conduct as well.<sup>239</sup> Through sentencing, society affirms both its need and its right to punish.<sup>240</sup> Sentencing communicates what David Garland has termed "meaning . . . about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters."<sup>241</sup> The expressive function of criminal law is thus reflected not only in the type of conduct society chooses to criminalize but also in how it chooses to punish.<sup>242</sup> A term of imprisonment that is too lenient may fail to capture the appropriate degree of social condemnation, while one that is excessive may overstate the degree of social opprobrium.

Criminal law's expressive function has greater salience in prosecutions for war crimes and other international law offenses.<sup>243</sup> The magnitude and collective nature of the crimes (which often affect not merely individuals but also groups), the multiple communities served, and the resource and political constraints on the number of prosecutions that can feasibly be brought differentiate in-

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*War on Terror*, 57 BUFF. L. REV. 347, 372–73 (2009) (explaining how hunger strikes allow detainees to "seize the initiative" and play a role in affecting their fate).

238. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362 (1997).

239. A growing body of literature provides an expressivist account of criminal justice. See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 27–30, 79–80 (2001); R.A. DUFF, TRIALS AND PUNISHMENTS 233–39 (1986); VON HIRSCH, *supra* note 142.

240. STITH & CABRANES, *supra* note 168, at 78.

241. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 252 (1990).

242. *Id.* at 252–53; see also Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 498 (2006) (discussing the signaling function of criminal sanctions).

243. See, e.g., MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 173–79 (2007) (describing the importance of international criminal law's expressive function); Conor McCarthy, *Victim Redress and International Criminal Justice*, 10 J. INT'L CRIM. JUST. 351, 365 & n.61 (2012).

ternational criminal law from domestic prosecutions.<sup>244</sup> The crimes that are prosecuted—and the sentences imposed following conviction—are laden with symbolic value. Punishment for international crimes helps craft historical narratives and embeds the normative value of law within a society.<sup>245</sup> It also expresses the outrage of the international community.<sup>246</sup>

Prolonged detention without charge, particularly when unnecessary or grossly disproportionate to the detainee's conduct, can dilute the expressive potential of terrorism prosecutions, especially of war crimes prosecutions in military commissions.<sup>247</sup> A sentence communicates the relative degree of social opprobrium for the conduct. Yet, when noncharged detainees are held for long periods—in some cases, for considerably longer than convicted defendants—it risks undermining the message criminal sentences are meant to convey. From an institutional design perspective, it is therefore important to consider the signaling effect that occurs when many detainees who are not charged with an offense are held for significantly longer than others. Examples include the cases of Salim Hamdan and David Hicks, who were sentenced to little more than time-served and then released following their convictions for war crimes by a military commission.<sup>248</sup>

The more indefinite detention becomes untethered from necessity and proportionality, the more it distorts the message those prosecutions are intended to communicate. Increased scrutiny of the necessity and propriety of continued detention can help minimize this distortion.

### G. Crime, Sentencing, and the Community

By having questions of guilt and innocence adjudicated in a public forum, criminal trials seek to protect the interests of the community as well as the defendant. Public trials not only help ensure more accurate factfinding, which helps

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244. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 40–42 (2007).

245. DRUMBL, *supra* note 243, at 61, 173.

246. See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, ¶ 185 (Mar. 24, 2000).

247. Mark Drumbl, for example, argues that “expressivism is the most plausible justification for punishing convicted al Qaeda terrorists.” Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1187 (2007).

248. See Jess Bravin, *Hamdan to Go Back to Yemen as Saga Ends*, WALL ST. J., Nov. 25, 2008, <http://online.wsj.com/article/SB122758316243255805.html>; Sara Wood, *Hicks Pleads Guilty to Terror Charge*, U.S. DEPT OF DEF. (Mar. 26, 2007), <http://www.defense.gov/News/NewsArticle.aspx?ID=32595>.

safeguard defendants from wrongful conviction.<sup>249</sup> They also help fulfill the need for community catharsis, which goes unsatisfied when justice is meted out behind closed doors.<sup>250</sup> Akhil Amar has highlighted how constitutional safeguards in criminal cases, including the rights to counsel, compulsory process and confrontation, which are intended to ensure a fair trial, protect the public's interest by promoting a more informed exercise of collective moral judgment.<sup>251</sup>

Sentencing is a critical step in the public adjudication process. A court's pronouncement of sentence—particularly when accompanied by an explanation from the trial judge<sup>252</sup>—serves a community's interests no less than does a jury's rendering its verdict. An affected segment of the community, moreover, may also have the opportunity to participate directly in sentencing through the presentation of victim impact statements.<sup>253</sup> Indeed, given the high rate of plea bargains in both the federal and state systems,<sup>254</sup> sentencing takes on greater importance as the stage of a criminal proceeding in which the offender is judged before the community.

The current detention review framework lacks this communal aspect. Habeas hearings are often closed to the public in whole or in part to protect against disclosure of classified or sensitive information.<sup>255</sup> Judicial opinions frequently redact important aspects of the government's asserted factual basis for detention.<sup>256</sup> While the PRB does address the necessity of continued detention,

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249. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 643 (1996); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (describing how public access assures that proceedings are conducted fairly, including discouraging perjury and the misconduct of participants).

250. *Richmond Newspapers*, 448 U.S. at 571.

251. Amar, *supra* note 249, at 643 (“Counsel, confrontation, and compulsory process are designed as great engines by which an innocent man can make the truth of his innocence visible to the jury and the public.”).

252. Michael M. O’Hear, *Appellate Review of Sentence Explanations: Learning From the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 760 (2009) (describing the value of sentencing explanations).

253. See Paul G. Cassell, *The Victims’ Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301, 325 (2012) (noting that the federal system and all fifty states generally provide victims with the opportunity to make a statement).

254. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

255. See Lucas Tanglen, *Detained in the Dark: Secrecy in the D.C. District Court Habeas Corpus Proceedings*, 23 GEO. J. LEGAL ETHICS 937, 951 (2010) (noting that “[c]losed sessions are routine in the habeas corpus proceedings” and suggesting that important portions of opinions are often redacted even when the redacted information is not classified).

256. See *id.* at 951–52.

it does not provide for public access and still lacks even the limited transparency of the habeas review process.<sup>257</sup>

Criminal sentencing suggests the utility of reforming detention review procedures to allow for greater public participation, thus facilitating the exercise of communal judgment in determining how long a person should be held.

### III. INCORPORATING SENTENCING PRINCIPLES INTO A DETENTION REVIEW FRAMEWORK

This Part describes how aspects of criminal sentencing may be incorporated into AUMF detention review. It addresses the forum, timing, and standard for length-of-detention review. It then considers several possible paths of implementation.

#### A. The Forum for Detention Review

Several possible forums exist for assessing the length of AUMF detention. Review could take place within the executive branch, as it does currently under the PRB. Alternatively, it could occur before a federal district judge, as habeas proceedings addressing eligibility for detention at Guantánamo now do; before a military judge, as review procedures addressing eligibility for detention at Parwan now do; or before a nonjudicial body followed by judicial review, a model that has been used for parole boards in criminal cases.<sup>258</sup> The most straightforward application of a sentencing model would require a judicial determination of the length of detention. If appended to the existing habeas litigation, this model would thus entail a bifurcated process: review of whether a prisoner falls within the AUMF, followed by review of the propriety of continued detention for those found to fall within the AUMF's scope.

*Boumediene*, *Hamdi*, and *Rasul* all emphasize the judiciary's structural role in checking executive overreaching and its functional value in correcting errors in individual cases. While those cases do not address judicial constraints on the executive's determination of how long an AUMF-covered prisoner should be

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257. See Carol Rosenberg, *Guantánamo's Forever Captives to Make Pitch for Freedom in Secret*, MIAMI HERALD, Nov. 15, 2013, <http://www.miamiherald.com/2013/11/15/3755883/guantanamos-forever-captives-to.html> (describing lack of media access to the PRBs).

258. See, e.g., *Jones v. Cunningham*, 371 U.S. 236, 236, 241–43 (1963) (holding that a federal district court has jurisdiction, upon writ of habeas corpus, to hear the case of a prisoner who has been placed in the custody of a state parole board); *In re Rosenkrantz*, 59 P.3d 174, 184 (Cal. 2002) (finding that parole board decisions are subject to limited judicial review to ensure they “are supported by a modicum of evidence and are not arbitrary and capricious”).

held, the absence of any back-end review increases the risk that some detainees will be held for longer than necessary or warranted by the circumstances. The concern with executive overreaching and error expressed in these cases is applicable not merely to mistaken detention but to overdeterrence as well.

Theories supporting judicial review of liberty restraints imposed in the criminal justice system apply with even greater force to AUMF detentions.<sup>259</sup> Guantánamo detainees, who are all noncitizens, do not merely lack formal representation and a political constituency. They also are members of an extremely small group that inspires deep-seated public fears and hatred. Indeed, it is difficult to imagine a subgroup more despised than the alien terrorist. The isolation and marginalization of this subgroup is far more pronounced than prisoners in the criminal justice system: A substantial number of Americans have relatives or friends who have been in prison, while virtually none has relatives or friends who have been detained at Guantánamo. Moreover, unlike prisoners in the criminal justice system, no detainee at Guantánamo has ever been allowed a visit from a family member or relative, heightening the sense of extraordinary isolation.

Public officials, moreover, tend to err on the side of security and thus are predisposed to detain individuals rather than to release them if there is some chance they will engage in harmful activity. The extensive media coverage of supposedly recidivist former Guantánamo detainees magnifies the tendency toward risk avoidance, as it exposes officials to attacks for being “soft on terrorism.”<sup>260</sup>

The existing body of habeas detention caselaw underscores that judges have similar fears about releasing individuals who might reengage in hostile activity.<sup>261</sup> Judicial review does, however, have the potential to mitigate counterterrorism’s

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259. For a discussion of those theories, see Murphy, *supra* note 207, at 1394–98.

260. See, e.g., *Al Qaeda, Ex-Gitmo Detainee Involved in Consulate Attack, Intelligence Sources Say*, FOX NEWS (Sept. 20, 2012), <http://www.foxnews.com/politics/2012/09/19/top-administration-official-says-strike-in-libya-was-terror-attack> (reporting that a former Guantánamo detainee was behind the deadly attack on the U.S. Consulate in Benghazi, Libya). This particular report was never corroborated, and the administration has denied that any former Guantánamo detainee was involved. Adam Serwer, *Obama Official Says No Evidence Gitmo Detainee Behind Benghazi Attack*, MOTHER JONES, Sept. 20, 2012, <http://www.motherjones.com/moj/2012/09/obama-admin-says-no-evidence-gitmo-detainee-behind-benghazi-attack>.

261. The comments of D.C. Circuit judge Laurence Silberman are instructive:

When we are dealing with detainees [as opposed to ordinary criminals], candor obliges me to admit that one can not help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. One does not have to be a “Posnerian”—a believer that virtually all law and regulation should be judged in accordance with a cost/benefit analysis—to recognize this uncomfortable fact.

*Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring).

natural tendency toward overdetention. Judges routinely make predictions about future dangerousness, such as in determining whether to release a pretrial detainee on bail.<sup>262</sup> Federal judges also possess life tenure, protection from salary diminution, and other guarantees designed to provide them with greater independence from the vagaries of public opinion and political backlash. Further, the approach of lower courts in assessing eligibility for detention, which has led to the denial of habeas petitions under a loosely defined standard and, in some cases, based on little evidence, would not necessarily carry over to length-of-detention review. Some judges reluctant to confine the category of people who may be detained temporarily in armed conflict may be more willing to impose constraints on how long those individuals may be held given the armed conflict's duration.

In the absence of habeas corpus, a neutral and independent military judge could conduct review of continued detention. Congress now requires review by a military judge of long-term detention at Parwan in Afghanistan (as well as at any other U.S.-operated detention center where habeas corpus is unavailable).<sup>263</sup> But the Defense Department has limited the military judge's review to whether a detainee falls within the scope of the AUMF and expressly excludes any determination of the detainee's future threat level.<sup>264</sup> Expanding the scope of military judge review would not only help bring U.S. detention practice closer in line with international law<sup>265</sup> but would also allow for consideration of factors relevant to a sentencing judge in assessing how long a particular prisoner should be held.

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262. *See* *United States v. Salerno*, 481 U.S. 739, 742–43 (1987) (describing factors judges consider in determining whether to grant release on bail).

263. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1024(b) (2011) (enacted). The Defense Department has interpreted this requirement not to apply to Afghan detainees who, pursuant to a 2012 Memorandum of Understanding between the United States and Afghanistan, will be transferred to Afghan custody. *See* DEPARTMENT OF DEFENSE REPORT ON THE PROCEDURES FOR UNPRIVILEGED ENEMY BELLIGERENT STATUS DETERMINATIONS, *supra* note 96, at 2.

264. DEPARTMENT OF DEFENSE REPORT ON THE PROCEDURES FOR UNPRIVILEGED ENEMY BELLIGERENT STATUS DETERMINATIONS, *supra* note 96, at 3. Additionally, the review need not be conducted for up to three years following the National Defense Authorization Act's (NDAA's) passage, though it could be conducted sooner. *See* Daphne Eviatar, *Obama Administration Writes Rights out of New Indefinite Detention Law*, HUFFINGTON POST (Apr. 18, 2012, 1:05 PM), [http://www.huffingtonpost.com/daphne-eviatar/obama-administration-writ\\_b\\_1434176.html](http://www.huffingtonpost.com/daphne-eviatar/obama-administration-writ_b_1434176.html).

265. While international humanitarian law, unlike human rights law, does not require judicial review for security detentions because of the practical realities of armed conflict, *see* Hakimi, *supra* note 27, at 1413–14, it does require that the review be neutral and independent. *See* Pejic, *supra* note 67, at 384–90 (describing requirements for detention in noninternational armed conflicts); *see also* HUMAN RIGHTS FIRST, FIXING BAGRAM: STRENGTHENING DETENTION REFORMS TO ALIGN WITH U.S. STRATEGIC PRIORITIES 7 (2009) (describing the need for neutral and independent review of U.S. detentions in Afghanistan).

## B. The Form and Timing of Review

Length-of-detention review hearings can employ either a pure sentencing model or a periodic review model similar to those used in other forms of noncriminal detention. The Article argues that a modified periodic review model provides the best method for assessing the length of detention in a manner that incorporates criminal sentencing principles while retaining central elements of law-of-war detention.

### 1. A Pure Sentencing Model

A pure sentencing model would provide each prisoner subject to detention under the AUMF with a separate hearing designed to impose a term of confinement. The length of detention could be for a fixed number of years (as in a determinate sentencing scheme) or for a range of years, such as a two-to-four-year term (as in an indeterminate scheme).<sup>266</sup> The duration of the armed conflict would represent the maximum time any prisoner could be held. If the conflict ended before the term of confinement was completed, the prisoner would be released. While the executive would retain discretion to release a prisoner at any point, detention would be authorized for the term imposed, as long as the conflict continued.

### 2. Periodic Review Model

Period review models are commonly employed in civil commitment schemes and other forms of noncriminal detention.<sup>267</sup> For AUMF detention, a periodic review model presumes that those found detainable will not receive a fixed term of confinement but may instead be held indefinitely, with the end of the conflict providing the outer limit of detention. A periodic review model also presumes, however, that not all detainees should be held for the duration of the conflict. Hearings would thus be provided at specified intervals to determine whether detention should continue in an individual case. Hearings may, for

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266. For a description of each, see *supra* note 200.

267. See Brian J. Foley, *Reframing the Debate Over Excessive Sentences to Move Beyond the Eighth Amendment*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 51–52 (2012) (noting a “rich history” of periodic review of civil commitment systems); see also *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997) (describing the requirement of continued periodic review in upholding the civil commitment of sexually violent predators).

example, be held semiannually (the Geneva IV requirement),<sup>268</sup> annually (the ARB requirement),<sup>269</sup> or according to some other time frame (the PRB, for example, requires triennial reviews after an initial review conducted within the first year of detention).<sup>270</sup>

While the proposed model thus resembles administrative hearings employed by the Bush administration (the ARB) and the Obama administration (the PRB), it differs in important respects. Hearings would take place before Article III judges, who would have the power to order—and not merely recommend—the detainee’s release; and the release determinations themselves would be made under a standard that draws on criminal sentencing rationales and would not be limited to an assessment of future dangerousness.

### 3. Proposal for a Modified Periodic Review Model

A pure sentencing model offers several advantages. It would not only allow for judicial review of the length of detention but would also require judges to impose a specified term of confinement. A pure sentencing model would thus alleviate much of the durational uncertainty surrounding AUMF detentions. It would also help ensure that the length of confinement reflects an individualized determination not merely of whether but also of how long a particular prisoner should be held.

A pure sentencing model, however, is in tension with a central premise of law-of-war detention, which allows for confinement until the end of hostilities. It also means that law-of-war detainees would effectively be sentenced without the heightened protections that accompany a criminal trial. At the same time, a pure sentencing model diminishes the symbolic value of criminal trials. Giving all prisoners a term of imprisonment—including those held in law-of-war detention—would undermine the link between trial and punishment that is essential to criminal adjudication.

A periodic review model, by contrast, adheres to the basic principle underlying law-of-war detention—that individuals may be held indefinitely to prevent their reengagement in hostilities. It also helps maintain a distinction between those who are detained without prosecution (nonsentenced detainees) and those who are charged and convicted of crimes (sentenced detainees).

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268. Geneva IV, *supra* note 107, art. 43 (requiring that hearings for persons interned be held at least semiannually by a court or administrative board).

269. England Memorandum, *supra* note 116, encl. (3) paras. 1(a), 3(i) (requiring that ARB proceedings be held at least annually to review the status of enemy combatants held at Guantanamo).

270. PRB, *supra* note 23.

Yet, the problems engendered by superimposing a combatant paradigm on AUMF detentions suggest the need to tailor a periodic review model to take account of the seriousness of the liberty deprivation, the inherent potential for prolonged confinement, and the quasi-punitive nature of those detentions. One modification would be procedural: For example, the government could be required to satisfy a higher burden over time to warrant continued detention.<sup>271</sup> There might even be a presumption of release after a specified period—one proposal suggests a default limit of two years<sup>272</sup>—that can be overcome only by the strictest showing of necessity.

This Article focuses on another modification: the incorporation of substantive sentencing principles into the determination of whether a particular prisoner should continue to be held. The next Subpart discusses how those principles might be incorporated into periodic detention review.

### C. Applying Sentencing Principles to Review of Continued Law-of-War Detention

Structuring review of AUMF detention to incorporate sentencing principles offers an opportunity to draw on a broad range of factors, including proportionality, uniformity, cooperation, and rehabilitation. Following an initial determination of detainability, a prisoner's suitability for continued law-of-war confinement would be reviewed periodically. This review should take place before a federal judge if the detention is subject to habeas corpus jurisdiction and, if not, before a military judge or other neutral and independent decisionmaker. But regardless of who conducts the review, each prisoner's suitability for continued detention would be examined under a standard that considers: (1) the need for continued incapacitation to counter the specific security threat posed by the detainee; (2) the degree to which continued confinement is proportional to the detainee's prior conduct; (3) the detainee's cooperation and other postconfinement conduct; (4) whether alternatives to imprisonment can address or mitigate any future security risk; and (5) whether continued confinement is consistent with the treatment of other similarly situated detainees. Additionally, the detention-review proceedings should be presumptively open to the public, subject to closure only when necessary to protect classified information.

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271. See, e.g., *CrimA 6659/06 Anonymous v. Israel* 47 I.L.M. 768, 779–80 [2008] (Isr.) (requiring clear and convincing evidence for administrative detention); *Lind v. Russia*, App. No. 25664/05, Eur. Ct. H.R. 11 (Dec. 6, 2007), <http://hudoc.echr.coe.int/webservices/content/pdf/001-83817?TID=pqvelbyvyf> (“[A]fter a certain lapse of time [reasonable suspicion] no longer suffices.”).

272. See *Hakimi*, *supra* note 27, at 413.

Initial eligibility for detention would thus remain subject to a rule-based approach, which authorizes law-of-war detention under the AUMF based on a determination that a prisoner is part of or substantially supported al-Qaeda or an associated force. Continued eligibility for detention of AUMF-covered prisoners, however, would be assessed under a standard, drawn from criminal sentencing, that examines a range of factors, including, but not limited to, future security risk.<sup>273</sup>

### 1. Incapacitation and Assessing Risk

If incapacitation is an important aspect of criminal sentencing, it is the animating concern of law-of-war detention. It is also the central focus of periodic review under various civil commitment schemes, which consider the danger that release would pose to the community.<sup>274</sup> Consideration of future risk must therefore remain part of periodic review of law-of-war detention.

Criminal sentencing nevertheless suggests some lessons for assessing future risk in the AUMF detention context. To begin with, sentencing cautions against overreliance on any model for projecting future behavior, as predictions about recidivism are frequently wrong.<sup>275</sup> Sentencing also underscores that, to the extent predictions are made, they must be based on an individualized assessment of each detainee and the threat he poses. A detainee's group—whether al-Qaeda or an associated force—may continue to pose a threat, but the focus must remain on the necessity of continuing to hold that particular person to prevent him from reengaging in hostile activity, as opposed to the more generalized definition of security threat under the PRB.<sup>276</sup> The success and increasing popularity of

273. On the distinction between rule- and standard-based approaches, see generally Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–60 (1992).

274. See Foley, *supra* note 267, at 51–52. Such review has been described as a requirement of due process. See, e.g., *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (“So long as civil commitment is programmed to provide treatment and periodic review, due process is provided.”). The periodic review’s ability to generate release decisions has, however, been questioned in the civil commitment context, particularly as applied to sexual predators. See Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1026 n.5 (2002).

275. See, e.g., John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to “Disinvent the Wheel?”*, 29 LAW & HUM. BEHAV. 55, 81 (2005) (“[I]n the current sample of Texas inmates, only 5% of capital defendants predicted by experts to constitute ‘continuing threats to society’ in fact committed subsequent serious acts of violence in prison over a relatively long follow-up period.”); Lindsey S. Vann, Comment, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1273 (2011) (noting that “juror and psychologist predictions of future dangerousness are rarely correct”).

276. PRB, *supra* note 23, § 2 (focusing on whether continued detention “is necessary to protect against a significant threat to the security of the United States” but not specifying the narrow focus of the inquiry); see also Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas*

various deradicalization programs, moreover, suggests the viability of reducing the risk of future violence posed by an individual, even if the particular group to which he belongs continues to remain a threat.<sup>277</sup>

Criminal sentencing also highlights the importance of considering the nature of the conduct and not merely the likelihood of its recurrence. Sentencing distinguishes between individuals based on the nature of their respective crimes. A person convicted of shoplifting or other minor theft ordinarily receives a much lower sentence than someone convicted of armed robbery not simply because society deems the former's conduct less morally reprehensible (the just desert rationale) but also because the harm that results if a shoplifter reengages in similar conduct is much lower. A similar rationale should inform review of continued AUMF detention.

Assume, for example, that two individuals found to be part of al-Qaeda and thus eligible for AUMF detention are determined at a subsequent stage to each pose the same low risk of reengaging in hostile activity. Assume, however, that the potential harm caused by detainee A is substantially greater than that posed by detainee B—a risk, for example, of committing or substantially assisting the commission of a terrorist attack on a civilian population as opposed to rejoining insurgent forces in Afghanistan as a cook or medic. That difference in the quantum of potential harm—separate and apart from the likelihood of harm reoccurring through reengagement in hostilities—should be considered in determining whether, as time passes, the prisoner should continue to be held. Future risk, in other words, should be viewed in the broader context of what precisely that risk is.

Criminal sentencing thus underscores that the focus of the assessment must remain on the individual detainee, not the risk posed by his group or terrorism generally. It also suggests that attention must be given not merely to the likelihood that the detainee will engage in future hostilities but also to the nature of those activities and the relative harm they could cause.

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*Lens*, 52 B.C. L. REV. 769, 780–81 (2011) (advocating incorporation of a more nuanced and calibrated assessment of future dangerousness).

277. See CHRISTOPHER BOUCEK, SAUDI ARABIA'S "SOFT" COUNTERTERRORISM STRATEGY: PREVENTION, REHABILITATION, AND AFTERCARE 1 (2008) (noting the success of Saudi Arabia's counterradicalization program and the adoption of similar programs by other countries facing terrorist threats). The numerous examples of individuals who have disengaged from terrorism similarly underscores that individuals can sever their connection to terrorist organizations. See generally JOHN HORGAN, WALKING AWAY FROM TERRORISM: ACCOUNTS OF DISENGAGEMENT FROM RADICAL AND EXTREMIST MOVEMENTS (2009) (describing examples).

## 2. Proportionality

Proportionality under a criminal sentencing model traditionally focuses on an individual's blameworthiness in relation to the length of incarceration. Classic law-of-war detention, by contrast, aims not to punish but to prevent future harm. While consideration of a person's past conduct may be relevant to both models, this information has tended to serve different goals—in the criminal model, to determine whether continued detention is excessive in relation to that conduct and, in the law-of-war model, to assess the future threat the person poses.

International humanitarian law already incorporates the principle of proportionality into the use of military force. The challenge is incorporating this principle into detention review, and doing so in such a way that captures criminal sentencing's focus on whether continued detention is warranted in light of past conduct and not merely in relation to the question of future threat.

The quasi-punitive nature of AUMF detention supports incorporating criminal sentencing concepts of proportionality into detention review. Proportionality can provide an external limit on state power by requiring that restrictions on liberty bear some logical relationship to the conduct that justifies the restriction. It can also serve the utilitarian end of promoting respect for the law and thereby enhancing security. Assessing the fairness of continued detention based on a person's prior conduct—particularly as that detention stretches into years—need not displace consideration of future risk but rather can be considered alongside it. Proportionality thus becomes one of several factors to consider in assessing whether continued AUMF detention is warranted. It is most likely to make a difference in situations in which an individual poses some future security risk—measured in terms of the likelihood of reengagement in hostilities and the gravity of potential harm—but continued detention is excessive in relation to that individual's past conduct.

Assume, for example, that detainee A, who is found to be part of al-Qaeda because he once briefly attended an al-Qaeda-affiliated training camp, is determined to present a future risk of engaging in similar activity even though he never previously committed or aided in the commission of a terrorist attack. That detainee would present a strong case for continued AUMF confinement based on a preventative, law-of-war rationale. If detainee A, however, were instead prosecuted and convicted of material support for terrorism, a sentencing judge applying a just desert rationale would consider the degree to which the individual's past conduct—mere attendance at a training camp without participation in any terrorist act—warranted future imprisonment. Just desert might dictate a lesser sentence for this defendant than for one who had

committed a terrorist act but who posed little or no future risk. Incorporating proportionality into law-of-war detention review would not necessarily require detainee A's release given the future threat, but it would make blameworthiness a factor to be considered and weighed in the balance.

Assume now that detainees B and C, also found to be part of al-Qaeda, both present approximately the same risk of reengaging in AUMF-covered activity. Detainee B, however, has engaged in more harmful past behavior (providing support for a terrorist attack against civilians) than detainee C (serving as a foot soldier or a medic in an al-Qaeda-affiliated military unit in Afghanistan). Proportionality provides another way of evaluating the two detainees. If a court (or administrative body) incorporated a proportionality rationale into its inquiry, it might find an additional basis for releasing detainee C even though he poses the same future risk of returning to the fight as detainee B.

### 3. Cooperation

Consideration of whether a detainee provides information that can aid in future counterterrorism efforts furthers the AUMF's goal of preventing future attacks.<sup>278</sup> The nature and extent of a detainee's cooperation also may be relevant to assessing his future risk, as a detainee who is willing to provide useful information may be less likely to reengage in hostilities if released.

Currently, a detainee's cooperation may influence internal executive-branch determinations about whether he should continue to be held. But there is no requirement that the government consider such cooperation in its release decisions—in contrast, for example, to the formalized structure for considering a defendant's cooperation under the Guidelines. Formalizing consideration of cooperation as a factor in a detention review standard will not only create a greater incentive for detainees to provide information but will also help ensure that release decisions reflect a more balanced assessment of each prisoner. A detainee's cooperation, moreover, need not be made public and may be shielded both to protect the detainee and to ensure that the security gains obtained from any information provided by the detainee are not compromised.

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278. See Ernesto Hernández-López, *Guantánamo as a "Legal Black Hole": A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 189 (2010) (describing the Defense Department's assessments of Guantánamo's role in intelligence gathering).

#### 4. Postconfinement Conduct

Good-time credit and other criminal justice mechanisms that reduce a prisoner's term of incarceration based on adherence to institutional rules cannot simply be transposed to law-of-war detention, in which the prisoner does not receive a fixed term of confinement that can be reduced by specific increments of time in exchange for good behavior. But postconfinement conduct could be made an explicit factor that a judge (or administrative body) must take into account in determining whether a prisoner should continue to be held. Mandating consideration of such conduct could give prisoners at least a modicum of control over their own fate and thus help mitigate the sense of total hopelessness that pervades Guantánamo. It could also provide a greater incentive for prisoners to comply with institutional rules and thus advance institutional security.

#### 5. Alternatives to Detention

Review of law-of-war detention could benefit substantially from incorporating criminal sentencing's focus on alternatives to incarceration. In assessing the need for continued detention, a court should be required to consider whether the future risk posed by a detainee may be addressed through means other than incapacitation. In some cases, no circumstances short of imprisonment can mitigate the threat because the risk a detainee poses—measured by the likelihood and gravity of future harm—is too great. But in other cases, the risk may be lessened through alternative measures, such as the imposition of postrelease conditions.

As noted above, however, unless Guantánamo detainees are transferred to the United States or federal courts are empowered to order their temporary release into the United States, the possibility of utilizing the various forms of conditional release drawn from criminal sentencing (and from some noncriminal confinement schemes) will remain limited.<sup>279</sup> A judge could, in theory, order a detainee's release to another country based on that country's representation that it would impose conditions following transfer, such as restricting the detainee's travel and monitoring his movements for a period of time. But, in contrast to a court's power to revoke a prisoner's supervised release in the United States, the judge would lack authority to ensure compliance with those conditions once the prisoner had been transferred to a foreign country.<sup>280</sup>

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279. See *supra* notes 218–219 and accompanying text.

280. 18 U.S.C. § 3583(e) (2012) (authorizing courts to modify or revoke a term of supervised release).

## 6. Uniformity

As H.L.A. Hart cautioned, significant inconsistencies in criminal sentencing can undermine the coherence and legitimacy of the punishing institution and, in turn, the rationality of the system itself.<sup>281</sup> Erratic outcomes regarding the length of confinement can have the same deleterious impact on other forms of incarceration. One reason Guantánamo detentions appear arbitrary is that detainees with similar profiles are often held for widely disparate lengths of time. This disparity is due partly to the degree to which release decisions are influenced by a prisoner's nationality and, relatedly, the degree to which a prisoner's home country is willing and able to place sufficient political pressure on the United States.<sup>282</sup> Nationality also influences release decisions because certain countries (Saudi Arabia, for example) are viewed as more stable than others (Yemen, for example), and thus better able to contain a potential security threat.<sup>283</sup>

Incorporating uniformity into review of AUMF detention could help mitigate these disparities. The detention review standard would thus require consideration of the length of time detainees who engaged in similar conduct had been held. Making uniformity a goal of periodic detention review would not preclude consideration of conditions in the receiving country insofar as they affect the likelihood that a particular detainee would reengage in hostilities. But it would require greater efforts to achieve consistent outcomes and thus help ameliorate the problem of widely divergent lengths of detention for individuals who, apart from their nationality, appear similarly situated.

### D. Paths to Implementation

Criminal sentencing principles can be incorporated into review of AUMF detention in different ways. Three possible paths are alteration of the existing administrative review scheme, implementation through the existing habeas corpus litigation, and statutory reform. Each is discussed in turn.

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281. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 25 (1968).

282. See Denbeaux et al., *supra* note 99, at 1299–1301.

283. See Farah Stockman, *Nationality Plays Role in Detainee Release*, BOS. GLOBE, Nov. 22, 2007, [http://www.boston.com/news/nation/articles/2007/11/22/nationality\\_plays\\_role\\_in\\_detainee\\_release](http://www.boston.com/news/nation/articles/2007/11/22/nationality_plays_role_in_detainee_release) (contrasting disparate treatment of Saudi and Yemeni detainees at Guantánamo and noting the role that nationality plays in release decisions).

### 1. Expanding Current Administrative Review

One way to incorporate criminal sentencing principles into periodic administrative review is to expand the prior focus on the future security threat a Guantánamo detainee poses to include express consideration of the other factors described above. While recent implementing guidelines take an important step in that direction by elaborating on a range of factors to be considered by the PRB, those factors must ultimately be viewed through the narrow lens of future risk rather than through sentencing principles such as proportionality. In addition, the PRB's assessment of future risk could be refined to require that the government satisfy a more demanding burden over time to justify detention.<sup>284</sup>

But even if sentencing principles were more directly incorporated into periodic administrative review, that review would still lack the exercise of judicial judgment regarding the length of time an individual should be imprisoned. There remains the possibility of judicial review of PRB determinations under the Administrative Procedures Act (APA).<sup>285</sup> Arguments for APA review, however, would have to confront the APA's exemption for "military authority exercised in the field in time of war or in occupied territory,"<sup>286</sup> which has thus far been found to apply to review of Guantánamo detentions.<sup>287</sup> Additionally, PRB determinations would be accorded substantial deference, even if they were reviewable under the APA.<sup>288</sup>

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284. Additional changes should be made to the current framework for periodic review (by a military judge) of long-term U.S. detentions at Parwan in Afghanistan, which, unlike the PRB, does not include an assessment of the necessity of continued detention to address future risk. *See supra* note 264 and accompanying text.

285. 5 U.S.C. § 706(2)(A) (2012) (authorizing review of agency action to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

286. *Id.* § 701(b)(1)(G).

287. *See* *Al Odah v. United States*, 321 F.3d 1134, 1149 (D.C. Cir. 2003) (Randolph, J., concurring); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480–81 (D.D.C. 2005), *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008), *vacated sub nom.* *Al Odah v. United States*, 282 F. App'x 844 (D.C. Cir. 2008); *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002), *aff'd sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd and remanded sub nom.* *Rasul v. Bush*, 542 U.S. 466 (2004), *rev'd sub nom.* *Al Odah v. United States*, 103 F. App'x 676 (D.C. Cir. 2004).

288. *See generally* 5 U.S.C. § 706. Another potential avenue for review of PRB determinations is nonstatutory review of agency findings. *See* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 526–29 (2006). Such review, however, would likely focus narrowly on whether the relevant officials exceeded the scope of their legal authority and exclude the type of discretionary, fact-bound decisionmaking associated with traditional judicial sentencing models. *See id.* at 519–20 (describing the traditional scope of nonstatutory review of military action).

## 2. Incorporation Within Existing Habeas Review

Another possibility is for habeas judges to broaden the scope of their inquiry beyond the limited question of eligibility for detention to examine whether the United States should continue to hold AUMF-covered prisoners.

To date, one district court has held that it may review whether the government should continue to hold an AUMF-covered prisoner. In *Basardh v. Obama*,<sup>289</sup> the district court ruled that the petitioner could no longer be detained because, given his postdetention conduct and cooperation with the U.S. government, he no longer presented a realistic threat of rejoining the enemy.<sup>290</sup> The court explained that the scope of the government's detention power under the AUMF must be read in light of the statute's purpose of preventing individuals from rejoining the fight. If that purpose is no longer served, the court reasoned, the prisoner must be released, even if the conflict itself continues.<sup>291</sup>

Other courts, however, have disagreed. In *Awad v. Obama*,<sup>292</sup> the district court "acknowledge[d] the power" of *Basardh's* reasoning and said that it was "ludicrous to believe that [the petitioner] poses a security threat now."<sup>293</sup> The court nevertheless concluded that it lacked the authority to inquire into the necessity of the petitioner's continued detention as long as the armed conflict continued.<sup>294</sup> In *Anam v. Obama*,<sup>295</sup> another district judge reached the same conclusion, finding that its inquiry was limited to whether the petitioner was "part of" al-Qaeda and that it could not consider the threat the petitioner currently posed to U.S. security.<sup>296</sup> In *Al-Bihani v. Obama*,<sup>297</sup> the D.C. Circuit rejected the petitioner's argument that because the international armed conflict with the Taliban had ended, the government needed to prove that he presented a future danger of joining the insurgency to hold him in the distinct nonin-

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289. 612 F. Supp. 2d 30 (D.D.C. 2009).

290. *Id.* at 34–35.

291. *Id.*; see also *Al Gincio v. Obama*, 626 F. Supp. 2d 123, 127–30 (D.D.C. 2009) (finding that the petitioner's relationship with the enemy organization had been vitiated after he was imprisoned by the Taliban for eighteen months, tortured, and falsely accused of being a U.S. spy).

292. 646 F. Supp. 2d 20 (D.D.C. 2009).

293. *Id.* at 24 (noting that the petitioner "is a marginally literate [redacted] who has spent more than seven of his twenty six years—since he was a teenager—in American custody").

294. *Id.*

295. 696 F. Supp. 2d 1 (D.D.C. 2010).

296. *Id.* at 4 (concluding that the "Court's hands are tied" and that the government may continue to detain a person who was "part of" al-Qaeda even if that person poses no threat to the United States, as long as the armed conflict continues).

297. 590 F.3d 866 (D.C. Cir. 2010).

ternational armed conflict in Afghanistan that followed.<sup>298</sup> The D.C. Circuit has since rejected similar arguments in other cases.<sup>299</sup>

The reasoning in *Basardb* is more persuasive than the reasoning of the cases that reject a court's authority to review an AUMF-covered prisoner's continued detention. The purpose of law-of-war detention under the AUMF is to prevent enemy fighters from returning to the battlefield and taking up arms again.<sup>300</sup> Once detention is no longer necessary to serve that purpose—either because the conflict has ended *or* because a particular detainee no longer poses a threat—it is no longer authorized.<sup>301</sup> Put another way, even if the war continues, an individual detainee's personal war may have ended.<sup>302</sup> The *Al-Bihani* panel relied exclusively on Article 118 of Geneva III, which requires release and repatriation upon the “cessation of active hostilities.”<sup>303</sup> While the panel correctly determined that this objective criterion—rather than formal statements regarding a war's termination—provides the outer limit on detention in an international armed conflict, it did not explain why Geneva III should govern all release decisions in a noninternational armed conflict (particularly if the U.S. government disputes the applicability of Geneva III's protections to AUMF detainees). Nor did it address the support under international law for releasing prisoners—other than prisoners of war, who are subject to their own separate and specific detention regime—

298. *Id.* at 874 (rejecting petitioner's claim that because “the current hostilities are a different conflict, one against the Taliban reconstituted in a non-governmental form,” the government must therefore “prove that Al-Bihani would join this insurgency in order to continue to hold him”). The panel in *Al-Bihani* also concluded—in a highly controversial statement—that international law was not relevant to determining the scope of the president's wartime detention authority under the AUMF. *Id.* at 871–72. In a brief opinion concurring in the denial of petitioner's request for rehearing en banc, the D.C. Circuit's seven active judges (excluding the two active judges on the *Al-Bihani* panel) explained that they had voted to deny rehearing to determine the role of international law-of-war principles in interpreting the AUMF because the panel's determination of that question was “not necessary” to the disposition of the case. See *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., Ginsburg, Henderson, Rogers, Tatel, Garland and Griffith, JJ., concurring in denial of rehearing en banc). While this opinion casts some uncertainty over the panel's treatment of the length-of-detention issue, subsequent D.C. Circuit decisions have cited *Al-Bihani* in concluding that individuals determined to be part of or to have substantially supported an AUMF-covered force may be held until the end of hostilities regardless of whether they personally pose a future threat. See *Khairkhwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012); *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010).

299. *Khairkhwa*, 703 F.3d at 550; *Awad*, 608 F.3d at 11.

300. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

301. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2125 (2005) (advocating review of continued detention authority on a case-by-case basis that focuses on whether the conflict continues with respect to a particular detained individual and looks at that person's “past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile”).

302. I am grateful to Michael Risinger for his suggestion about framing the issue in these terms.

303. *Al-Bihani*, 590 F.3d at 874 (quoting Geneva III, *supra* note 36, art. 118).

before the end of hostilities absent a finding of future dangerousness.<sup>304</sup> Geneva IV's provisions on civilian internment require release as soon as the reasons that necessitated a person's internment no longer exist.<sup>305</sup> Noninternational armed conflicts, which do not contain the same bright-line rule requiring release at the cessation of hostilities as international armed conflicts,<sup>306</sup> nonetheless still treat detention without trial as an exceptional measure and require that detention be necessary to address a continuing threat posed by a particular detainee and that such determination be made on an individualized basis.<sup>307</sup> So does the government's administrative periodic review process, which provides for release when a detainee no longer poses a threat to national security.<sup>308</sup> *Al-Bihani's* determination that habeas courts cannot consider future risk in determining the legality of continued AUMF detention is thus in tension with international law as well as the government's own administrative framework and rationale for holding individuals to prevent their return to hostilities.<sup>309</sup>

Constitutional due process, moreover, requires a reasonable relationship between the basis of confinement and its purpose.<sup>310</sup> The Supreme Court has applied this rationale to other forms of noncriminal confinement, including civil

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304. See Pejic, *supra* note 67, at 376 (noting that there is a “specific and separate regime of deprivation of liberty” for POWs in international armed conflicts).
305. See *supra* notes 110–112 and accompanying text.
306. Compare Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 2, adopted June 8, 1977, 1125 U.N.T.S. 609 (“AP II”) (discussing length of detention in a noninternational armed conflict), with Geneva III, *supra* note 36, art. 118 (addressing length of detention in an international armed conflict). The ICRC’s statement of the customary international law principle for detention in a noninternational armed conflict, however, demonstrates a concern with avoiding unwarranted delays in release. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451 (2005).
307. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 876–77 (Yves Sandoz et al. eds., 1987); Deeks, *supra* note 67, at 431–33 (summarizing state practice on detention in armed conflict); Pejic, *supra* note 67, at 380, 382–83.
308. See *supra* notes 116–120 and accompanying text (describing the ARB and PRB).
309. See *Al-Bihani v. Obama*, 590 F.3d 866, 871, 874 (D.C. Cir. 2010) (discounting *Al-Bihani's* “future dangerousness” argument on the ground that, under the Geneva Conventions, “release is only required when the fighting stops”). *Al-Bihani* may also be distinguished from cases in which the executive branch has cleared a detainee for release and not found, as in *Al-Bihani*, that continued detention was necessary to prevent the detainee’s return to hostilities. See *id.* at 883 (stating that the “petitioner’s detention is legally permissible,” in part because “[t]he AUMF authorizes the President to use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States”).
310. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that an individual “charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future”).

commitment of the mentally ill,<sup>311</sup> those found not guilty by reason of insanity,<sup>312</sup> and sex offenders.<sup>313</sup> It has applied the same logic to the prolonged detention of noncitizens found removable under immigration law.<sup>314</sup> The D.C. Circuit has, to be sure, suggested that the Due Process Clause does not apply to Guantánamo detainees and that *Boumediene* is limited exclusively to habeas rights under the Suspension Clause.<sup>315</sup> But *Boumediene* repudiates any such categorical approach to determining the extraterritorial application of constitutional rights<sup>316</sup> and, as various commentators have suggested, supports the application of the Due Process Clause to Guantánamo detainees.<sup>317</sup> Assuming those detentions must

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311. See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that it violates due process for a state to continue to detain a harmless mentally ill person even if the initial commitment was permissible on that basis).
312. See *Foucha v. Louisiana*, 504 U.S. 71, 80–83 (1992) (holding that it violates due process to continue to detain a person civilly committed following a verdict of not guilty by reason of insanity if that person is no longer mentally ill); *Jones v. United States*, 463 U.S. 354, 368 (1983) (holding that a person civilly committed following a verdict of not guilty by reason of insanity “is entitled to release when he has recovered his sanity or is no longer dangerous”).
313. In *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997), the Supreme Court upheld a state statute providing for the civil commitment of sex offenders based on a finding that they are dangerous to themselves or others and suffer from a mental abnormality or personality disorder that makes them likely to engage in predatory acts of sexual violence. The Court noted, however, that the “confinement’s duration is . . . linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.” *Id.* at 363.
314. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (concluding that a statute permitting the indefinite detention of an alien would raise serious constitutional problems when the detention no longer bore a reasonable relation to the purpose for which the individual was committed, such as preventing flight when the alien’s removal seems at best a remote possibility).
315. *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010), *reinstated by* 605 F.3d 1046 (D.C. Cir. 2010).
316. *Boumediene v. Bush*, 553 U.S. 723, 759–64 (2008) (articulating the basis of a test that determines whether it would be “impracticable” or “anomalous” to extend a particular constitutional right extraterritorially); see also Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 871 (2010) (describing *Boumediene*’s embrace of a functional “impracticable” and “anomalous” test that looks to the particular circumstances in determining whether to recognize the extraterritorial application of a particular constitutional right).
317. See, e.g., Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 286 (2009) (“The characterization of Guantanamo as effectively U.S. territory for constitutional purposes probably means that the Due Process Clause and the Eighth Amendment apply there . . . .”); Benjamin J. Priester, *Terrorist Detention: Directions for Reform*, 43 U. RICH. L. REV. 1021 (2009) (arguing that for habeas review of Guantánamo detentions to be meaningful, due process guarantees must also apply); Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2143 (2009) (“It is possible—if not likely—that [Justice] Kennedy’s analysis of the Suspension Clause [*Boumediene*] controls the due process question as well . . .”).

conform to due process—whether as a matter of constitutional law or government policy<sup>318</sup>—they must therefore bear a reasonable relationship to their purpose.

But even if habeas judges can examine the propriety of continued detention, it is uncertain whether they can consider factors except as they relate to assessing future threat. In particular, consideration of a sentencing-based conception of proportionality would likely require statutory change since it does not relate directly to the idea of preventing a detainee's return to the battlefield and thus does not relate to the lawfulness of the confinement under a traditional armed conflict model. By contrast, it would not require legislation to alter the administrative periodic review model to include consideration of these factors along the lines suggested in this Article.

### 3. Statutory Reform

Legislation would allow for the most comprehensive and direct incorporation of sentencing factors into review of long-term terrorism detentions under the AUMF. The existing framework could be altered to provide for judicial review of the propriety of continued detention and provide a list of criteria to be considered.<sup>319</sup> Statutory amendments could, moreover, make explicit that the detention of covered persons may last for no longer than necessary to prevent a future threat. Additionally, they could define the timing of this review as well as specify rules regarding the allocation of the burden of proof, admission of evidence, and other procedural issues.

Legislative reform could also eliminate the current bar on a judge's ability to order a detainee's temporary release into the United States.<sup>320</sup> Such changes would represent a significant departure from the status quo, likely face stiff political opposition, and require a dramatic reversal by Congress, which has repeatedly imposed barriers on bringing Guantánamo detainees to the United States for any purpose. Providing for this remedial authority would, however, give judges greater leeway to create alternatives not only for those designated for long-term detention but also for those administratively cleared for release. Judges could thus do in habeas cases what they routinely do in criminal prosecutions:

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318. President Obama has insisted, for example, that detentions by the United States must be consistent with “the rule of law and due process.” See President's Remarks on National Security, *supra* note 11.

319. Cf. Chesney, *supra* note 33, at 55 (suggesting that Congress consider judicial involvement in “the back-end process of making periodic determinations of whether specific individuals ought to be released notwithstanding their initial eligibility for detention”).

320. See *supra* notes 101, 218 and accompanying text.

determine whether suitable conditions short of incarceration may be imposed to ensure the public safety.

### CONCLUSION

In November 2012, the media reported that Guantánamo detainee Adnan Farhan Abd Latif, who had died two months earlier, had committed suicide.<sup>321</sup> Mr. Latif, a Yemeni national, was the ninth detainee known to have died at the prison.<sup>322</sup> He almost certainly will not be the last. Mr. Latif had been cleared for release three times—twice by the Defense Department under President Bush (in 2006 and 2008) and later by President Obama’s Task Force.<sup>323</sup> His habeas petition had failed to secure his release.<sup>324</sup>

Mr. Latif’s case painfully highlights the continuing absence of an effective process focused on how long prisoners should be held. The hunger strike that swept through the Guantánamo prison starting in February 2013 dramatically underscored these concerns.<sup>325</sup> While U.S. military officials have disputed the prisoners’ allegations of mishandling of the Koran by guards that ignited the hunger strike, they have acknowledged that the strike’s underlying cause is prolonged indefinite detention.<sup>326</sup>

The Article argues that in designing a system of periodic detention review, the United States should look to insights offered by criminal sentencing. In particular, sentencing suggests the potential value of judicial consideration of the length of time a person should remain confined as well as consideration of multiple factors about an individual beyond the question of future security threat. Both aspects of sentencing would be appropriate to incorporate into review of

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321. Charlie Savage, *Investigators Said to Question How Detainee Died of Overdose*, N.Y. TIMES, Nov. 28, 2012, <http://www.nytimes.com/2012/11/29/us/yemeni-detainee-at-guantanamo-died-of-overdose.html> (reporting suicide); Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. TIMES, Sept. 11, 2012, <http://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html> [hereinafter Savage, *Military Identifies Guantánamo Detainee Who Died*] (reporting death).

322. Savage, *Military Identifies Guantánamo Detainee Who Died*, *supra* note 321.

323. *Id.*; see Baher Azmy, Op-Ed, *The Face of Indefinite Detention*, N.Y. TIMES, Sept. 14, 2012, <http://www.nytimes.com/2012/09/14/opinion/life-and-death-at-guantanamo-bay.html>.

324. *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011).

325. The hunger strike continued for approximately six months. See Charlie Savage, *Guantánamo Hunger Strike Is Largely Over, U.S. Says*, N.Y. TIMES, Sept. 23, 2013, <http://www.nytimes.com/2013/09/24/us/guantanamo-hunger-strike-largely-over-us-says.html>.

326. Jane Sutton & David Alexander, *Guantánamo Hunger Strike Stems From Frustration: U.S. General*, REUTERS (Mar. 20, 2013, 6:03 PM), <http://www.reuters.com/article/2013/03/20/us-usa-guantanamo-idUSBRE92J0MI20130320> (reporting statements of General John Kelly, head of U.S. military forces in Latin America).

AUMF detention given that detention's quasi-punitive nature and inherent potential for prolonged confinement.

The United States need not adopt a binary approach that requires selection between a criminal justice and law-of-war model, but rather it can develop a framework that incorporates elements of both. Such borrowing already characterizes the front-end process of habeas review to determine who should be held. Yet, there remains a gap for back-end review of the length of detention. We can learn from a centuries-old process devoted to the question of how long an individual should be imprisoned, even if the review process pursues a path in which detainee prosecution is not required. Criminal sentencing, in short, offers lessons for striking a better balance between the AUMF's potentially draconian impact on individual liberty and the security concerns that underlie this new—and novel—form of law-of-war confinement.