

## Due Process and Accountability Under Transitional Justice: Evidence from Mosul, Iraq

*Do ordinary citizens care about due process when holding insurgent groups accountable for violence? We examine public perceptions of justice and fairness in judicial proceedings brought against suspected Islamic State (ISIS) militants and their supporters in Mosul, Iraq. We conducted a survey of Mosul residents and likely ISIS sympathizers in camps outside Mosul to evaluate public support for due process rights. Using experimental survey vignettes involving trials of ISIS detainees, we find that Mosul residents, while favoring capital punishment for ISIS involvement, are also sensitive to procedural due process rights of the accused. People with ISIS sympathies, in contrast, are more concerned with substantive due process, and do not see capital punishment as fair, regardless of procedural considerations. Although insurgency sympathizers and opponents have clashing perspectives on holding ISIS accountable under the law, we find that both sides recognize the important contribution of due process to long-term peace and security.*

Word Count: 9993

Determining the fates of captured and surrendered rebel fighters poses a key dilemma for states in the aftermath of violent insurgency. On one hand, there may be public desire for vengeance against brutal insurgent forces for the suffering they inflicted on local populations. At the same time, excessive retribution against vanquished insurgents might trigger blowback in the form of remobilization. But just how vengeful are publics really and what are the implications for transitional justice programs? We have little evidence upon which to base clear assumptions.

In this study, we consider whether ordinary Mosul civilians, many of whom suffered under ISIS rule, show any concern for the rule of law in the treatment of suspected ISIS combatants. Specifically, we ask to what extent publics regard suspected terrorists and insurgent detainees as entitled to due process and other legal protections under the law? Based on a survey of approximately 400 Mosul residents and 200 people with presumed ISIS sympathies in displacement camps, we find that Mosul civilians display a greater appreciation for detainee rights than conventional wisdom might predict. First, we show that while Mosul residents favor capital punishment for ISIS followers, they are less likely to see death penalty outcomes as just or fair when detainee due process rights are violated. Hence, while vengeful against ISIS, Mosul residents are sensitive to procedural due process norms in the treatment of ISIS combatants. People with presumed ISIS sympathies, in contrast, regard capital punishment as a substantively unjust and unfair outcome, regardless of whether procedural due process is adhered to. We also find that trust and confidence in the judiciary and beliefs about ISIS willingness to surrender help explain reactions to judicial outcomes.

Our results have important implications for the transitional justice process. We reveal how many ordinary Mosul civilians as well as ISIS sympathizers regard basic due process protections as important to demobilizing insurgents and building lasting peace. Even in an

extreme case, with a group as notoriously brutal as ISIS, we find public discomfort in doing away with due process. We interpret this as a positive sign for justice norms, reinforcing institutional adherence to the rule of law. An informed, empowered public could help secure judicial accountability, preventing the transitional justice process from degrading into a campaign of revenge that often drives people back into insurgency.

### Public Opinion on Insurgent Rights

A great deal of research focuses on international and domestic legal foundations for the rights of suspected insurgents and terrorists in criminal justice systems.<sup>1</sup> However, less attention has been paid to public perceptions of those rights. Although some combatants have been brought to justice before international war crimes tribunals, in many cases of inter-state and civil conflict, states often prefer to try combatants under domestic military commissions or criminal courts where they have potentially greater leverage over outcomes (Rudolph 2001; Smith et al. 2002; Vagts 2003; Bass 2014). This raises questions about the congruence between domestic public opinion and the judicial strategies states pursue in prosecuting terrorists and insurgent combatants.

Within domestic judicial systems, states possess a variety of prosecutorial options when holding insurgent combatants accountable to the law. On one hand, states may pursue restorative or rehabilitative strategies, granting former combatants amnesty through truth and reconciliation commissions (Braithwaite 2002; Latimer et al. 2005; Gibson 2004; Cobban 2015) or demobilization and re-education during periods of short-term incarceration (Raynor and

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<sup>1</sup> See the online appendix for a more thorough review of this literature.

Robinson 2005; Robinson and Crow 2009). More austere prosecutorial approaches emphasize retributive justice, applying both punitive and deterrent measures such as long-term or life incarceration and capital punishment (Darley et al. 2000; Darley and Pittman 2003; Hood and Hoyle 2015). In practice, states may also utilize judicial process for strategic purposes, such as in authoritarian regimes where elites often stage show trials of “enemies of the state” for political gain (Szász 1971; Koskenniemi 2002; Koestler 2015). In each case, the treatment of the accused has important implications for the success of the transitional justice process and long-term prospects for peace and stability after violence (Teitel 2000, 2015; Elster 2004). One major concern is that the willingness of the state to use retributive violence against detainees, especially civilians, will only fuel the insurgencies they are trying to circumvent (Sambanis et al. 2012; Valentino 2014; Souleimanov and Siroky 2016, though see Lyall 2009). Given these options and concerns, what might ordinary citizens, some of whom likely suffered under insurgent and terrorist violence, regard as just and fair for those accused of committing violent acts against both state and society?

Our research specifically targets this underexplored question of public support for detainee rights in the context of counter-insurgency/counter-terror campaigns. Do publics support government efforts to pursue justice through retributive prosecution of insurgent detainees? To what extent are they willing to discount violations of detainee rights for the sake of security or revenge and retribution? In criminology research, Tankebe (2009) argues that public concerns for procedural justice may diminish in insecure settings, with publics placing a premium on safety above all else, and scholars are increasingly examining public attitudes toward the treatment of insurgent and terrorist detainees. Research shows that publics who are fearful are willing to support restrictions of basic civil rights and liberties (Davis and Silver

2004; Davis 2007) as well as harsh punishment of enemy combatants including capital punishment and the use of torture (Gronke et al. 2010; Piazza 2015). We expand upon previous research by considering public support for detainee rights in the adjudication and punishment of accused terrorists and insurgents using the highly salient case of the Islamic State insurgency in Iraq. We now turn to theory and competing hypotheses about public support for detainee rights and the implications of public opinion for peace and security.

### Theory and Hypotheses

We begin by considering the important relationship between public opinion and procedural justice under the rule of law. First, the concept of rule of law is often heralded an essential pillar of democracy, and public support for due process under the law could be a critical barometer of the strength of democratic norms in a society. O'Donnell (2004) defines the rule of law as at minimum the fair and consistent application of the written law by state authorities in judicial processes. Carothers (1998, p. 96) further underscores linkages to public opinion by defining the rule of law as “a system in which the laws are public knowledge, are clear in meaning, and applied equally to everyone.” The rule of law is often contrasted with partial and capricious “rule of man” or “rule by law” which emphasizes the power of the state to interpret and carry out law as it sees fit. Fair treatment under law in accordance with established rules and procedures is commonly referred to as *due process* (Linde 1975). However, building foundations for the rule of law may be especially challenging in societies with a history of authoritarianism and violence (Diamond 2005). One of the functions of transitional justice programs is to help societies overcome such painful historical legacies (Kritz 1995; Teitel 2000; 2015), but it is

unclear the extent to which publics are willing to extend basic rule of law protections to former oppressors and perpetrators of violence against them (Elster 2004).

We push at the boundaries of public support for the rule of law by evaluating respect for due process rights of suspected terrorists and insurgents. Research in criminal justice has shown that public perceptions of due process, i.e. procedural justice, are especially vital to institutional legitimacy, effective rule of law, social cooperation, and peace (Thibaut and Walker 1975; Tyler 1994; Tyler 2003; Latimer et al. 2005; Reisig and Lloyd 2009; Loyle and Apple 2017). Public support for detainee due process should strengthen transitional justice programs and the institutionalization of rule of law norms after authoritarianism and violence. However, Tankebe (2009) suggests that publics often prioritize security over justice in volatile settings. If publics disregard due process in the treatment of detainees, it could undermine legitimacy of judicial outcomes, eroding prospects for long-term peace and stability and lead to renewed insurgent violence. A lack of public support may also encourage elites to willfully violate detainee rights for political gain and may also have the unintended consequence of fueling insurgency recruitment (Kim and Hong 2019; Cox 2019). Hence, public opinion on the treatment of detainees is not only important for holding the system accountable to basic human rights protections under the rule of law, but also for promoting institutional legitimacy, peace and security after violence.<sup>2</sup>

Within the framework of procedural justice, we focus on public perceptions of judicial *processes* and *outcomes*. As such, we unpack the concept of due process into procedural and

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<sup>2</sup> As a scope condition, we underscore how an informed, empowered public in a representative democracy is likely to have more power over judicial accountability than in (semi-)authoritarian regimes where justice lacks transparency and unaccountable to the public.

substantive components. The procedural vs. substantive distinction is important to legal scholars, where procedural due process refers to individual rights and protections in the adjudication process, while substantive due process speaks to the protection of fundamental individual rights from government interference (Tribe 1975; Rubin 2003). For example, depriving someone of the right to self-defense in a criminal trial (denial of right to attorney, the right to speak in one's defense, the right to question witnesses or cross-examine evidence) would constitute a basic denial of procedural due process. A violation of procedural due process is likely to produce an outcome that violates substantive due process: the unlawful infringement of government on life, liberty, or property. However, substantive due process can be violated even when procedural due process is followed. For example, the application of capital punishment to an innocent person may violate substantive due process even if the adjudication process was procedurally lawful (Bentele 2003).

In this study, we focus on judicial outcomes involving capital punishment: an extreme form of retributive justice, but a common fate for many insurgent fighters after capture by government forces (Jones 2006).<sup>3</sup> We begin by testing a simple hypothesis that if there is respect for detainee rights under law, then subjects will perceive judicial outcomes involving capital punishment of detainees as more just and fair when procedural due process is followed than when basic elements of procedural due process are violated. Validation of this hypothesis would suggest that ordinary citizens value due process norms even for terrorists and insurgents (Tyler 1994).

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<sup>3</sup> We anticipate that our hypotheses will hold true for other less severe types of punishment, but we leave that for others to test with future research designs where punishment outcomes are manipulated.

*H1 (Procedural Due Process): In trials of insurgent detainees, individuals will be more likely to accept capital punishment of detainees when procedural due process is followed than when it is violated.*

Next, we consider the impact of conflict-related identity cleavages on perceptions of due process rights. Scholars theorize that attitudes toward procedural justice are driven primarily by identity-based relational concerns, where “people’s sense of justice or injustice shapes what they think, feel and do in groups” (Tyler and Blader 2000, p. 9). A large body of literature underscores the willingness of individuals to favor in-groups over out-groups, especially during conflict (Balliet et al. 2014; Bauer et al. 2016). To explain public support for due process under transitional justice, we focus on public cleavages in insurgent support, which can be hard to identify in practice (Fearon 2007; Kalyvas and Kocher 2007; Lyall et al. 2013). In the aftermath of an insurgent defeat, perspectives on detainee rights could provide a useful metric for identifying insurgent sympathy within the population.<sup>4</sup> Rather than testing the hypothesis that insurgency opponents will favor harsher punishments than insurgency supporters, which is somewhat trivial, we focus on interaction effects with H1 where the acceptance of capital punishment by insurgency supporters and opponents could be conditional to procedural and substantive due process considerations. Specifically, we examine whether adherence to procedural due process has greater sway among insurgency opponents than supporters, who are

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<sup>4</sup> A counter-hypothesis might be that insurgent supporters will show no public sympathy toward insurgent detainees for fear of retribution.

more focused about the substantive justice of harsh punishments rather than the processes of arriving at those punishments. We test the following hypothesis:

*H2 (Insurgency Support and Opposition): In trials of insurgent detainees, insurgency opponents are more likely to accept capital punishment of detainees when procedural due process is followed than insurgency sympathizers.*

Next, we propose mechanisms underlying support and opposition to capital punishment with respect to treatment of insurgent detainees. First, we consider arguments from the broader literature on violence against civilians in conflict. Valentino (2014) summarizes the literature into two main camps: one focusing on psychological drivers and another focusing on strategic rationales. One psychological argument holds that publics who harbor grievances against insurgents will be more willing to inflict harsh punishments against detainees in the quest for revenge and retribution (Lyall 2009; Sambanis et al. 2012; Lyall et al. 2013; Souleimanov and Siroky 2016). Victimization at the hands of insurgent forces could make individuals especially desirous of retribution against detainees, increasing support for their execution. In contrast, insurgency supporters, who presumably experienced limited insurgency-driven victimization, could be more likely to oppose capital punishment as excessive and unfair.<sup>5</sup> Victimization-based grievances, or lack thereof, could also proxy for underlying insurgent sympathies, which are more difficult to measure. We test the following hypothesis:

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<sup>5</sup> We will explore the effects of state vs. insurgent-driven violence in greater detail in future research.

*H3 (Grievances) In trials of insurgent detainees, victims of insurgent violence are more likely to accept capital punishment of detainees than non-victims.*

A second psychological argument considers the impact of institutional trust on perceptions of justice and fairness. Tyler and Lind (1992) and Lind et al. (1997) underscore how institutional trust is important to public perceptions of legitimacy and justice, and conflict can be highly destructive to stocks of institutional trust (De Juan and Pierskalla 2016). We anticipate that individuals who are more trusting of government institutions would perceive judicial processes and outcomes as fairer than those with low institutional trust. In conflict settings, low institutional trust could be quite pervasive, which may also drive support for insurgents. Perceptions of corruption has also played a major role in eroding institutional trust (Uslaner 2004; Morris and Klesner 2010). We consider how trust and confidence in the courts impact public views on retributive punishments for insurgent detainees.<sup>6</sup> We test the following hypothesis:

*H4 (Trust and Confidence in the Judicial System) In trials of insurgent detainees, individuals who perceive the courts as untrustworthy and corrupt will be less likely to accept capital punishment of detainees.*

Next, we consider strategic security-driven rationales for supporting and opposing capital punishment. First, we examine a strategic rationale *in favor of* retributive justice. We argue that

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<sup>6</sup> The judicial process could also further erode trust. Our hypothesis is associative because we cannot sort out causation with observational trust data.

insurgent forces may still be perceived as a severe threat in the immediate aftermath of violence, with publics fearful that insurgents might remobilize and resume fighting at any time. Elites may also be wary of providing concessions to insurgents (ex. amnesty, short-term detention) when their commitment to peace is not seen as credible. Elites might also be tempted to exploit insurgent threats for political gain, signaling their commitment to combating insurgents through harsh retributive punishment of detainees (Bartolucci 2012). Capital punishment of detainees serves to underscore the credibility of elite “drain the sea” rhetoric in response public demands to stamp out insurgent threats (Valentino et al. 2004). If publics are indeed fearful of insurgents, they also may be willing to make justice vs. security trade-offs, foregoing due process to ensure insurgent threats are removed.

We also offer a strategic security rationale *against* capital punishment because it can disincentivize insurgent groups to negotiate and demobilize. Drawing on the logic of security dilemmas (Jervis 1971, Posen 1993), efforts increase one’s security can have unintended consequences of making one less secure. In the context of the treatment of detainees, capital punishment could only incentivize insurgents to continue fighting (Kaplow 2016). In contrast, negotiating with insurgents, to include offering incentives such as promises of procedural fairness and substantive protections in any adjudication processes against them, might encourage more insurgents to stop fighting (Kim and Hong 2019; Cox 2019). Hence, individuals who believe that insurgents would be more likely to stop fighting if offered concessions through negotiations may regard capital punishment as counter-productive. Otherwise, why surrender if all that awaits is the gallows? We test the following hypothesis:

*H5 (Security-Driven Rationales) In trials of insurgent detainees, people who believe insurgents would stop fighting if offered concessions through negotiations are less likely to accept capital punishment than those who believe insurgents will never stop fighting.*

To summarize, we explore how procedural vs. substantive due process concerns, informed by insurgency support vs. opposition cleavages, victimization-based grievances, institutional trust and confidence, and security-driven motivations, could impact public support and opposition to capital punishment of detainees. We now turn to our test case, the detention and prosecution of Islamic State insurgents after the liberation of Mosul Iraq from ISIS rule.

#### Rationale for Case Selection

Our research considers public perceptions of accountability and due process involving the case of Islamic State (ISIS) detainees in Mosul, Iraq. When Iraqi armed forces recaptured Mosul in 2017, they detained thousands of suspected ISIS fighters and supporters, many of whom are now standing trial in Iraqi criminal and counter-terrorism courts for their role in the 2014-2017 occupation of Mosul.<sup>7</sup> Human rights groups and reputable journalists have described the harsh treatment of suspected ISIS supporters in the Iraqi judicial system as a systematic “campaign of revenge” (Taub 2018; Human Rights Watch (*hereafter HRW*) 2017; 2019).

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<sup>7</sup> As of 2018, Coker and Hasan (2018) indicated that 2,900 of 10,000 known ISIS detainees had stood trial with a 98% conviction rate. Estimates of ISIS detentions range as high as 50,000 by 2020.

Although scholars have documented the rise of the Islamic State in Iraq since 2014 (Cockburn 2014; Weiss and Hassan 2016; Abdulrazaq, Tallha, and Gareth Stansfield 2016), the fall of ISIS and aftermath of the 2017 liberation of Mosul are only beginning to receive attention. In particular, journalists and human rights groups have reported widespread human rights violations in the arrest and detention of suspected ISIS supporters and insurgents, to include torture, rape, and extrajudicial killing: highly suggestive that a campaign of revenge is taking place (Belkis 2017; HRW 2017; 2019; Taub 2018). At present, however, little is known about how ordinary Iraqi civilians feel about holding ISIS supporters accountable for crimes and atrocities committed by the organization, though several research projects are underway. For example, in an early survey of post-liberation Mosul, Kao and Revkin (2018) find that the nature of collaboration matters in terms of public willingness to punish ISIS, with publics seeking harsher punishment for ISIS leadership and combatants over non-combatant followers.

Our work builds on this foundation by considering the importance of the rule of law and due process in the treatment of ISIS detainees and supporters. Iraq's Code of Criminal Procedure requires police to obtain a warrant for arrest, protection of habeas corpus (the accused must be brought before a judge within 24 hours of arrest), requires defendants to have access to an attorney and time to prepare a defense, as well as the right to cross-examine witnesses, but these procedures are routinely transgressed, even before the rise of ISIS (HRW, 2013). In violation of Iraqi law, suspected ISIS members have been detained and incarcerated with scant justification, confessions have been extracted under torture, trials of ISIS combatants and supporters have lasted mere minutes, where defendants lack access to defense council, have no opportunity to speak on their behalf, where witnesses are never called or cross-examined, and where prosecutors offer no evidence to substantiate claims of guilt (Coker and Hasan 2018; Taub 2018;

HRW 2019). These violations speak to the widespread problem of procedural due process violations in the prosecution of ISIS detainees.

There are also real concerns about violation of substantive due process. It is well known that death sentences are routinely handed down by presiding judges over ISIS trials, including for relatively minor offenses, often in disregard to Iraqi law, and based on scant evidence (Taub 2018; HRW 2019).<sup>8</sup> In our research we ask whether publics are willing to tolerate such systemic violations of procedural due process in punishing ISIS detainees, and whether they see capital punishment itself as a violation of substantive due process. Our research speaks to a potential wide range of cases where governments are seeking to prosecute suspected terrorists and insurgents within their domestic military and criminal court systems, and we seek to understand whether violations of procedural justice and harsh retributive punishments could have the blessing of public opinion. We now turn to details of our research design.

### Research Design

To evaluate public support for due process in the treatment of ISIS detainees (H1), we utilize a survey experiment. The experiment involves a vignette about a detainee named Mustafa, who has been accused of serving as an informant for ISIS and is being brought to trial. The text of the vignette is the same except that in Version 1, Mustafa has access to a lawyer and is allowed to speak in his defense, denying the accusations. In Version 2, Mustafa is denied an attorney or the opportunity to speak in his defense, a basic violation of procedural due process

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<sup>8</sup> The prosecution of ISIS detainees only represents the latest round of challenges for the judicial treatment of insurgents. See Castanaro (2004) for an earlier discussion.

under the Iraqi Code of Criminal Procedure. In both versions the outcome is the same, the judge sentences Mustafa to death, which in the context of a procedural due process violation should also entail a substantial due process violation: the unlawful execution of an ISIS detainee. We tailored our vignette to be consistent with judicial outcomes reported by journalists and human rights organizations about suspected ISIS detainees under Iraqi law (Taub 2018; HRW 2017; 2019). Both vignettes, provided below, were randomly assigned to subjects in the study.

- 1. After the liberation of Mosul, witnesses have come forward claiming that Mustafa was working for ISIS as an informant. Mustafa denies this. At his trial, Mustafa had no independent lawyer and was not able to speak in his defense. The judge decided to sentence Mustafa to death.*
- 2. After the liberation of Mosul, witnesses have come forward claiming that Mustafa was working for ISIS as an informant. Mustafa denies this. At his trial, Mustafa had an independent lawyer and was able to speak in his defense. The judge decided to sentence Mustafa to death.*

Our key dependent variable measures public reaction to the fairness of the trial. Following the vignette, subjects were asked a series of questions about the outcome of the trial where they assess the veracity of the following statements: “He [Mustafa] had a fair trial”, “He [Mustafa] was guilty”, “Witnesses were telling the truth”, “The judge made the right decision”, “The sentence was proportional to the crime”, and “The sentence was motivated by revenge”. Response options range from definitely yes, probably yes, probably not, and definitely not for

each response category. Individually and collectively, the items provide a measure of perceptions of judicial fairness in the treatment of an ISIS detainee. From the experimental treatment, we assess how perceptions of judicial fairness change depending on the inclusion or exclusion of a foundational element of due process: the right to defend oneself against accusations brought by the state with high stakes (life or death) outcomes. The vignette is also a realistic representation of due process violations in the treatment of ISIS detainees as documented by human rights observers (HRW 2017; 2019). If ordinary Iraqis fail to understand or appreciate the importance of due process, then we would anticipate a null treatment effect.

To test our remaining hypotheses, we rely on additional survey items and insurgency support variation in our sampling frames. We test H2 by comparing survey vignette results between subsamples of people who were presumed ISIS sympathizers to those who lived under ISIS but likely opposed their rule. To locate insurgency opponents, we sample from among ordinary citizens in Mosul who were subject to ISIS rule and have remained in the city since liberation. To identify potential ISIS sympathizers, we survey people who fled from Mosul during liberation into refugee camps outside the city, specifically to camp locations known to house former ISIS affiliates and their families. These individuals were interrogated and selected out of the general IDP population by the Iraqi army and placed in camps separately from other IDPs (Belkis 2018). Many of these IDPs, based on their own reporting to us, worked or fought for ISIS, have family members who worked or fought for ISIS, and/or have family members on trial for their role in ISIS. However, they are not detainees themselves and are not currently facing charges for their role in ISIS. They remain in these camps in part because they have nowhere else to go, and they are fearful for their security due to retaliatory attacks should they return to Mosul. We expect that people in IDP camps will be more concerned with violations of

due process rights of ISIS detainees compared to ordinary Mosul civilians, consistent with H2. We also employ measures of trust in the Iraqi government, and views of ISIS support in Mosul in general as an attitudinal proxy for ISIS sympathy, since we believe people will self-censor on questions directly related to personal support for ISIS.<sup>9</sup>

To further explore mechanisms driving perceptions of judicial fairness, we examine the role of victimization-based grievances (H3), trust and confidence in the judicial system (H4), and security-based rationales (H5). We measure grievances based on self-reported victimization by ISIS and trust and confidence in the judiciary using a battery of items about trust in the Iraqi government, trust in courts and perceptions of judicial corruption in our survey. We measure security concerns through a series of questions about what it would take to convince ISIS fighters to stop fighting and whether ISIS would stop fighting if offered meaningful concessions. We now turn to a discussion of our data collection process.

### Sampling and Data Collection

We conduct our survey in the city of Mosul, Iraq between December 23-30, 2018. Because of unknown population parameters due to massive displacement between 2014-and 2017, we are unable to make population inferences from our sample. We conduct a random route sampling of neighborhoods in both East Mosul (which was spared the worst of destruction) and West Mosul (the heart of the city which was destroyed in street-to-street battles between the Iraqi

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<sup>9</sup> Due to the sensitivity of revealing ISIS loyalties, our approach is a rough proxy at best for ISIS sympathy.

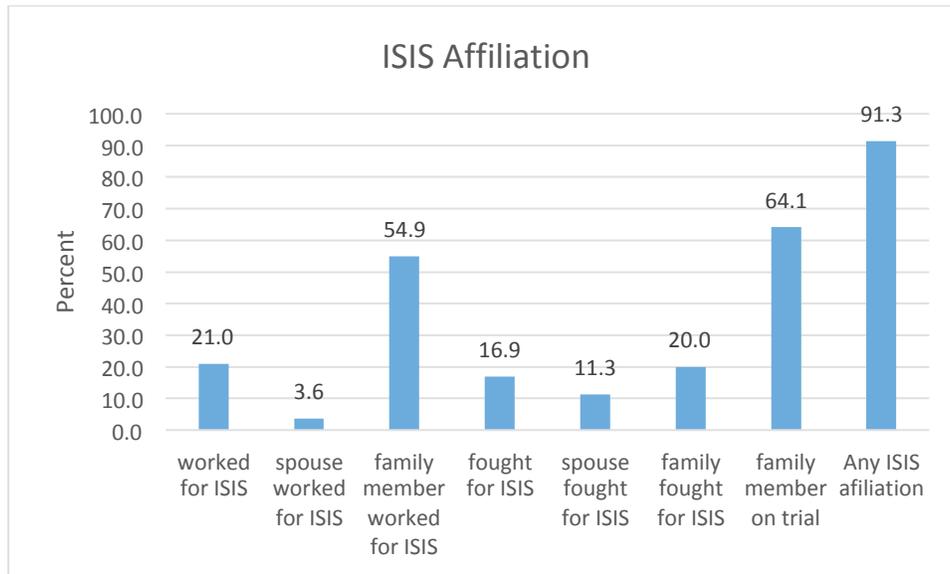
Army and ISIS), resulting in a sample of 401 subjects from across 11 neighborhoods in Mosul (See Appendix Map for Mosul sampling locations).

As a comparison group, we sample internally displaced persons (IDPs) from camps on the outskirts of Mosul, which were known to house people from ISIS-affiliated families. These people had left Mosul during or after the liberation out of fear of retribution for their involvement in ISIS. People in the camps were free to leave and were not considered to be ISIS detainees. Between January 10-25, 2019 we surveyed 195 individuals from 3 out of 15 camps outside Mosul (See Appendix Map for ISIS camp locations).

Our sampling frames thus enable a comparison of anti-insurgent and insurgency-sympathetic groupings. We treat ordinary civilians in Mosul as the anti-insurgent sample and IDPs in ISIS camps as an insurgent-sympathetic sample. To substantiate that categorization, we ask individuals in the camps directly whether they, their spouses, or their family members had ever worked or fought for ISIS and whether any family members had been or are currently on trial facing ISIS related charges. Despite concerns about self-censoring, sizable numbers indicated that they worked for ISIS (21%), fought for ISIS (17%), had family members who worked for ISIS (55%) and had family members who were brought to trial for their role in ISIS (64%). In total 91% indicated some form of ISIS affiliation, which we consider a compelling proxy for ISIS sympathies in the camp sample. In contrast, no one in our Mosul sample reported any affiliation with ISIS, which we acknowledge could be a self-censoring due to fear of

retribution. Nevertheless, people in IDP camps were much more forthcoming about their role, and we used the same interviewers in both samples for control.<sup>10</sup>

Figure 1. Percentage of Camp Sample Indicating ISIS Affiliations



As an additional check on our assertion that IDP camps were comprised of ISIS sympathizers, we analyze attitudinal differences in trust in the Iraqi government and beliefs about ISIS support in Mosul between our two samples. Figure 2 below indicates the results of logit regression where the dependent variable is coded 1 for Mosul and 0 for camps. Among independent variables, we first ask respondents how much they trust the Iraqi government using

<sup>10</sup> Several of the enumerators themselves had ISIS affiliations by virtue of family members who had worked or fought for ISIS. This helped us gain trust and access to those in camps and convinced them to be forthcoming about their family experiences.

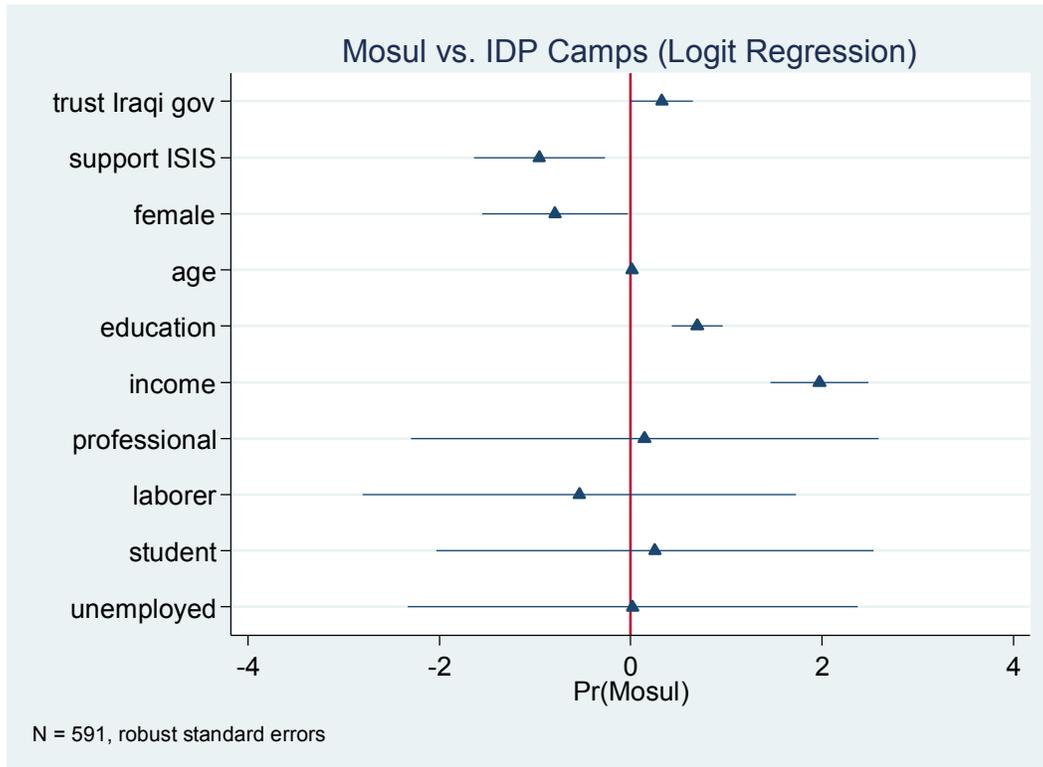
a four-point scale (1 = highly distrust to 4 = highly trust).<sup>11</sup> This serves as a potential proxy for insurgency opposition and sympathy. To measure indirect support for ISIS, we use a second item, where we ask respondents “how many people in Mosul do you think supported ISIS during the occupation?” with response options being 1 = almost no one at all to 4 = almost everyone. We expect that ISIS sympathizers will psychologically project more ISIS support onto others in the city compared to ISIS opponents.

Figure 2 shows that Mosul residents are indeed more trusting of the Iraqi government than IDP camp members, and less likely to believe ISIS enjoyed widespread support before liberation. Results also indicate that our two samples are well balanced on gender, age, and labor demographics. However, residents of Mosul are more educated, have higher income, and are more likely to have moved/left Mosul for some time during ISIS occupation. This is also consistent with the profile of ISIS-affiliates being less educated and of lower income than the average Mosul resident. We will control for imbalances between camps and Mosul citizens in subsequent analysis.

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<sup>11</sup> The item asks specifically how much they trust the Iraqi government to “follow the rule of law” as opposed to more general, less clearly defined parameters of trust.

Figure 2. Demographics and Proxies for ISIS Support Across Samples



Finally, we took seriously our responsibility for the safety and security of our respondents and enumerators when conducting field work for this study. Our research was implemented in accordance with established practices and recommendations for ethical conduct of research by the American Political Science Association and the requirements of our Institutional Review Board. We provide a more detailed discussion about ethical conduct of research in the online appendix. We now turn to testing our key hypotheses.

## Results

We begin by presenting an overview of the treatment effects from our survey vignette. Subjects received randomized versions of the vignette where the ISIS detainee, Mustafa, either had access to an attorney and was allowed to speak in his defense or did not, which reflects our experimental treatment for procedural due process.<sup>12</sup> The outcome of the trial is the same either way: Mustafa receives the death penalty, which we selected as a harsh retributive punishment to capture public reaction to substantive due process: was capital punishment proportional to the crime or is the death penalty being applied unjustly as part of a campaign of revenge?

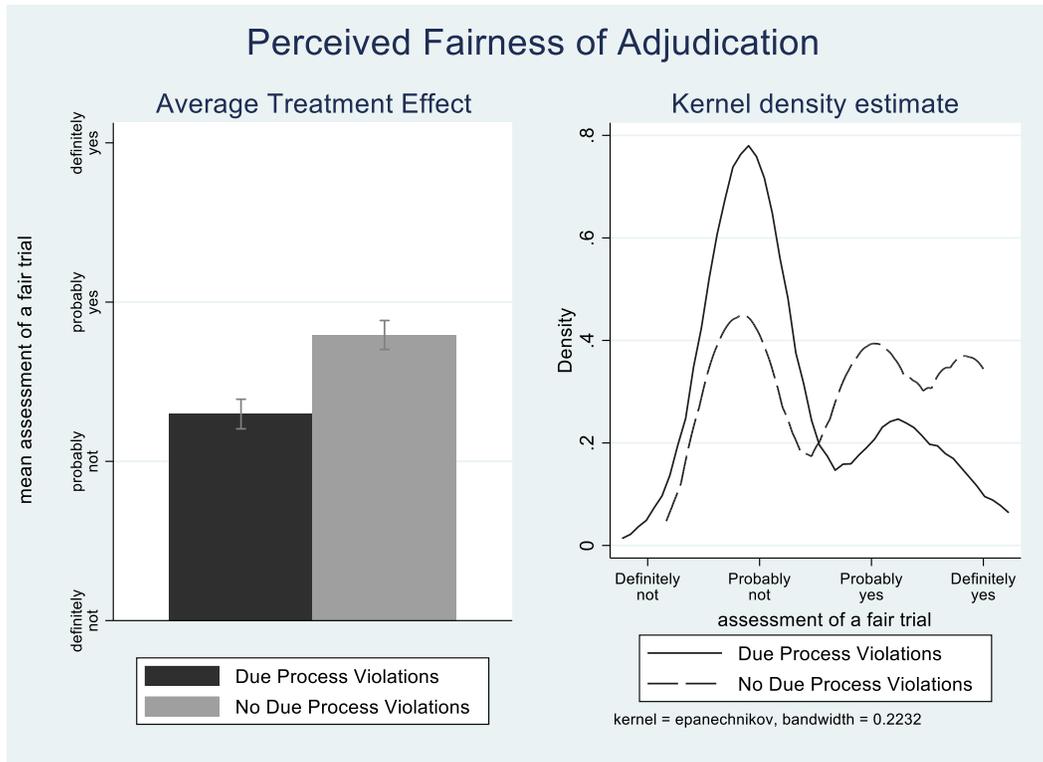
To measure perceptions of fairness in the adjudication process and outcome, we employ a series of post-treatment items. We ask respondents whether they think that 1. Mustafa had a fair trial, 2. He was guilty, 3. Witnesses were telling the truth, 4. The judge made the right decision, 5. The sentence was proportional to the crime, and 6. The sentence was motivated by revenge. All items are on a four-point scale ranging from 1 = definitely not to 4 = definitely yes. Factor analysis indicates that responses to the items score well, indicating that people responded to items consistently enough to justify combining them into an index measuring a latent variable of perceptions of fairness in the adjudication of the detainee (Factor 1 eigenvalue = 3.60; Cronbach alpha = 0.89, See Supplementary Appendix Table 1). In Figure 3 below, we report mean responses (with 95% confidence intervals) and kernel density plots for the index of judicial fairness for those who received the “no due process violations” and the “due process violations” treatment. Consistent with H1, the mean response to the perceptions of judicial fairness index is greater when due process is followed compared to when it is violated (two-sample t-test =7.50,

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<sup>12</sup> See online appendix for balance tests across treatments.

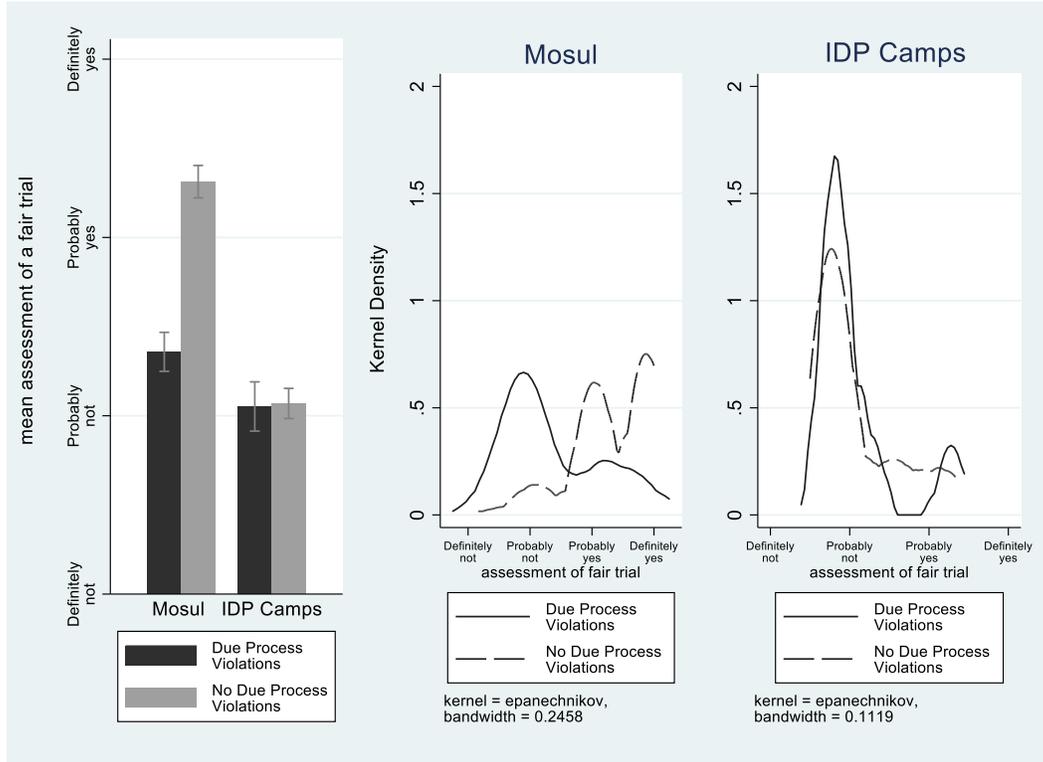
p<0.0000). Kernel density plots also show how response distributions shift toward greater perceptions of fairness in the treatment without due process violations. However, this general finding masks important subgroup variation which we now explore in further detail.

Figure 3. Fairness of Adjudication by Treatment Group



In Figure 4, we consider whether perceptions of judicial fairness are contingent on insurgency sympathies or opposition as predicted by H2. Subjects are divided into two subgroups: ordinary Mosul citizens, who represent our anti-insurgent group, and camp IDPs, who represent our insurgency-sympathizer group. The outcome variable is the same common index of “perceptions of judicial fairness” as discussed in Figure 3.

Figure 4. Fairness of Adjudication by Treatment, Location



Consistent with Hypothesis 2, residents of Mosul are more likely to consider the adjudication to be fair so long as procedural due process is followed (Figure 4). Comparing percentage responses to index items where procedural due process is followed to where it is violated leads to substantial declines in perceptions that the trial was just and fair (89% vs 33%), the accused was guilty (91% vs 49%), that witnesses were telling the truth (91% vs 46%), that the judge made the right decision (87% vs. 31%), that the sentence was proportional to the crime (87% vs 38%), and rejection of claims that the sentence was motivated by revenge (85% vs 58%). This provides one indicator of respect for rule of law. If Mosul civilians only cared about “rule *by* law”, they would have seen the state’s use of capital punishment as acceptable regardless of procedural due process violations.

In contrast, insurgency sympathizers in the IDP camps are more focused on substantive due process. For them, the violation of procedural due process in the survey treatment has no

effect on their perceptions of adjudication process or outcome (Figure 4). Comparing responses where procedural due process violations are present to when they are absent, few respondents in IDP camps, who we consider ISIS sympathizers, perceive the trial as fair (26% vs. 18%), believe the accused was guilty (28% to 35%), see witnesses as credible (28% vs. 22%)<sup>13</sup> and judges as fair (17% to 24%) or believe that the sentence is proportional to the crime (34% vs. 30%). In contrast most agree that revenge-based motives are driving the outcome of the trial (100% vs. 87%). Regardless of whether Mustafa has access to a lawyer or is allowed to speak in his defense, capital punishment is viewed as an unjust abuse of government power and a violation of substantive due process: rule *by* law, but not rule *of* law.

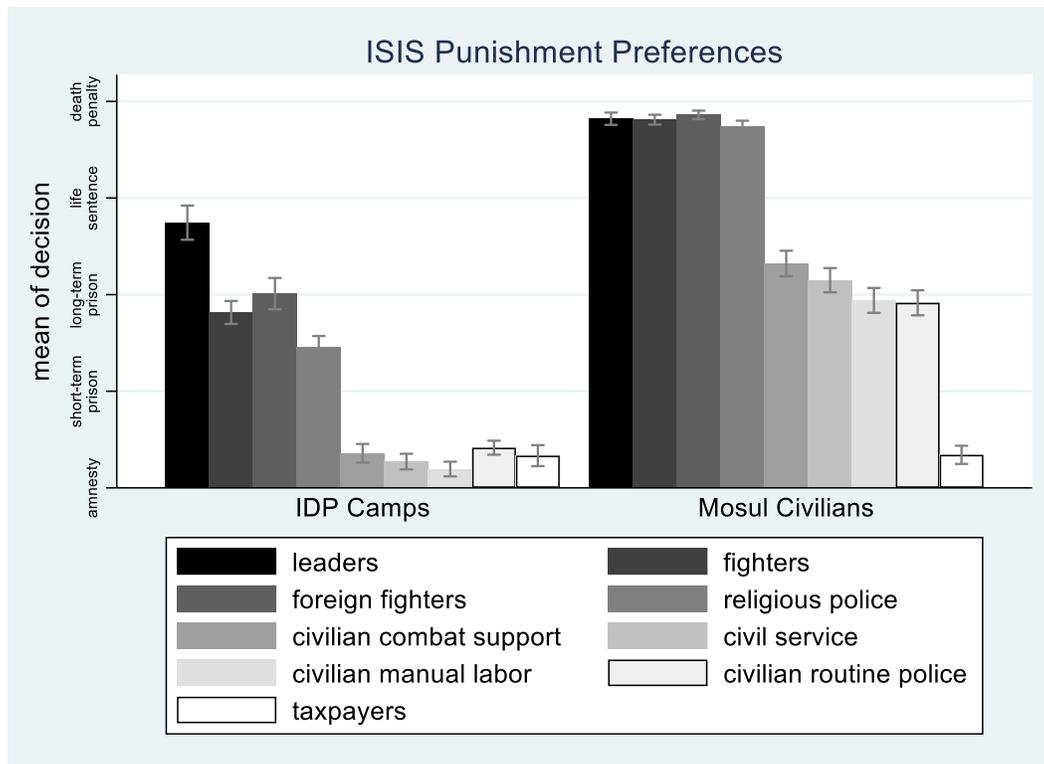
As further evidence of substantive due process concerns, we consider a range of other non-experimental items on punishment preferences for ISIS members analogous to Kao and Revkin (2018). In the survey, we asked Mosul citizens and camp IDPs to indicate what punishment they think different groups of people should receive for their role in ISIS. Response options ranged from amnesty, short-term imprisonment, long-term imprisonment, life imprisonment, to death penalty. The figure below indicates responses to these items by subgroup. Consistent with H2, Mosul civilians are willing to accept the death penalty and long-term imprisonment outcomes for people connected directly to ISIS. In contrast, IDP camp members

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<sup>13</sup> Drawing on Kaylvas (2006), people could be wary that witnesses are denouncing neighbors as ISIS supporters for ulterior motives. We incorporate concern about false accusations (i.e. witness credibility) in our dependent variable index using the item “The witnesses were telling the truth”. People in IDP camps expressed more doubt about witness credibility when accusing people of ISIS involvement than Mosul residents. However, even inside Mosul, irregularities in procedural justice raise concerns about witness credibility, consistent with the logic of ulterior motives.

lean more toward short-term imprisonment or amnesty and, regardless of procedural considerations which they consider merely pro forma, view death or long-term imprisonment as a violation of substantive due process – the punishments far exceeding the crime.

Figure 5. Punishment Preferences for ISIS Detainees by Sub-Group



### Exploring Drivers of Due Process Support

To this point, we have shown that individuals are sensitive to procedural due process in the treatment of detainees consistent with H1. When due process is followed, subjects are more accepting of harsh retributive outcomes involving the death penalty. However, tests of H2 indicate that support for due process is contingent on insurgency opposition and sympathies. Mosul residents, who are generally anti-insurgency, are more likely to see the judicial process as

just and fair than potential ISIS sympathizers, especially when procedural due process is adhered to. However, ISIS sympathizers view death penalty outcomes from the judicial process as substantively unfair, even when procedural due process is followed.

We now test hypotheses H3-5 to better understand why Mosul residents are more favorable to harsh outcomes than ISIS sympathizers. In H3, we focus on grievance-based explanations. We argue that ISIS victimization might lead to more support for capital punishment of detainees regardless of due process violations. We measure ISIS victimization using an additive index based on self-reported responses for whether one was punished for violating ISIS laws, injured by ISIS, whether a family member was injured or killed by ISIS, having been threatened or imprisoned by ISIS, having one's home occupied or looted by ISIS, or having female family members were abused or assaulted by ISIS. Responses to these items line up on a single dimension using factor analysis and were scored into a common index of increasing victimization (See SA Table 2).

For H4, we focus on whether support for capital punishment is a function of trust and confidence in the judicial system. We measure trust using an additive index built off several items in the survey based on trust in the government of Iraq and local authorities in Mosul, trust in courts inside and outside Mosul, and trust in criminal and counter-terrorism courts to follow the rule of law. Factor analysis indicates that responses to these questions align on a single latent dimension, and we coded institutional trust based on a combined index ranging from 1=low trust to 4=high trust (see SA Table 3).

We also rely on a second instrument gauging perceptions of judicial corruption. We ask respondents whether they agree or disagree that there is corruption in the Iraqi judicial system, whether judges are mainly motivated by revenge, whether trials were biased against ISIS

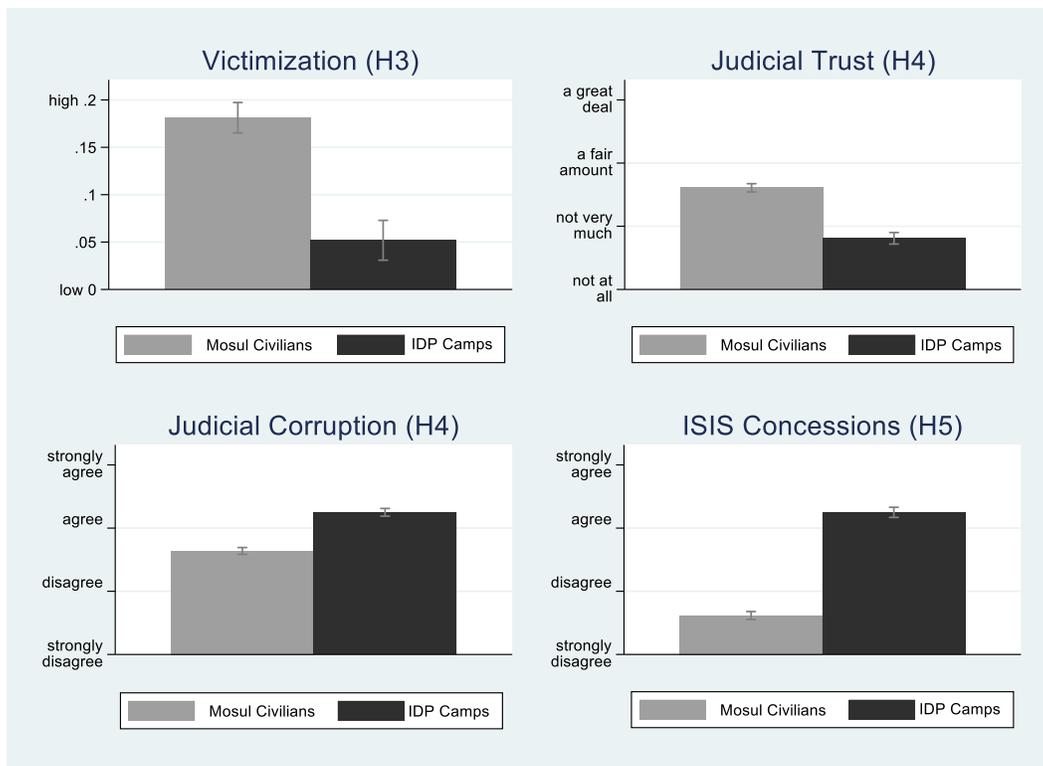
members specifically and against Iraqi Sunni more broadly, and whether some innocent people were being convicted. Responses to these items also align on a single dimension with factor analysis and were combined into a common index ranging from 1=low to 4=high levels of perceived judicial bias and corruption (See SA Table 4).

Finally, to evaluate H5, we utilize a series of items about perception of ISIS willingness to stop fighting. Among Mosul residents, we ask subjects whether they agree or disagree that ISIS would stop fighting if given amnesty, whether ISIS fighters who surrender and cooperate should be pardoned, whether ISIS would have stopped fighting earlier if given amnesty, and whether the Iraqi government should have negotiated more with ISIS to end the conflict earlier. Responses to these items are highly compatible under factor analysis and are combined into an additive index reflecting increasing beliefs in ISIS willingness to stop fighting when offered concessions (See SA Table 5). For ISIS camp members, we utilized a more detailed battery of questions about whether they think ISIS would stop fighting if given a fair trial, if promised protections from torture, if the death penalty were taken off the table, if they were promised reduced prison sentences, if there were protections put in place against revenge attacks by either ordinary Iraqis or retribution from ISIS for defection, and if they were provided temporary financial aid to resettle. Responses range from 1=definitely not stop fighting to 4=definitely yes. These items also scaled well using factor analysis and were combined into a common additive index on perceived likelihood of ISIS surrender if given concessions (See SA Table 6).

In Figure 6 below, we report mean responses to these indexed items by location (Mosul, IDP Camps). We see that Mosul civilians are more likely to have experienced victimization by ISIS than IDP camp residents. Mosul residents also have higher institutional trust in the Iraqi judiciary and perceive judicial institutions as less corrupt than IDP camp residents. Finally,

Mosul civilians are less likely to believe ISIS would stop fighting if offered concessions compared to IDP camp residents. These indices offer plausible mechanisms for explaining why Mosul residents would prefer harsher punishment of combatant detainees, regardless of procedural due process violations. They may also explain why IDP camp members are more concerned about substantive due process regarding death penalty outcomes compared to Mosul civilians.

Figure 6. Plausible Mechanisms for Explaining Judicial Punishment Preferences



We now turn to OLS regression models in Table 1 to investigate further the relationship between perceptions of judicial fairness in the treatment of ISIS detainees and grievances (H3), trust and confidence in the judiciary (H4), and strategic rationales (H5). Model 1 estimates the basic treatment effect of due process violations on perceptions of judicial fairness. Model 2 includes an interaction term for location, showing that Mosul civilians are more concerned about

procedural due process violations than IDP camp members in assessing judicial fairness. IDP camp members who received the due process violation treatment serve as the constant comparison group.

Model 3 includes extended controls. In terms of demographics, it shows that professional and working class are more accepting of capital punishment of ISIS detainees than students who represent the constant comparison group. Model 3 also reports results for potential mediator variables to help explain why Mosul residents are more accepting of harsh judicial outcomes compared to those in the IDP camps. The mediator model fails to show support for the importance of grievances (H3). Instead, there is stronger support for the mediating effects of perceptions of judicial trust and perceived corruption (H4) as well as the security-driven hypothesis (H5). Mosul residents, who perceive the courts as more trustworthy and less corrupt than IDP camp residents are more accepting of the outcome of trials, especially when procedural due process norms are not blatantly violated. In contrast, those who believe ISIS would stop fighting if offered concessions, which is the prevailing belief in the IDP camps, are more opposed to the use of capital punishment against detainees.<sup>14</sup>

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<sup>14</sup> Although causal mediation is difficult to establish, a formal mediation analysis (available online) indicates a significant mediating effect of beliefs about ISIS concessions (34%) and perceptions of judicial corruption (20%) and trust (23%) on the relationship between Mosul residents and perceived fairness of the trial, but no mediating effect of victimization.

Table 1. Explaining Perceptions of Judicial Fairness (OLS Regression)

VARIABLES	(1) Fairness of trial	(2) Fairness of trial	(3) Fairness of trial
Due Process (H1)	0.497*** (0.0662)		
Due Process x Mosul (H2)		1.261*** (0.0838)	0.883*** (0.102)
No Due Process x Mosul (H2)		0.306*** (0.0894)	-0.106 (0.136)
Due Process x ISIS Camps (H2)		0.0169 (0.0820)	0.0687 (0.0644)
ISIS Victimization (H3)			0.0798 (0.177)
Judicial trust (H4)			0.162*** (0.0489)
Judicial corruption (H4)			-0.148** (0.0637)
ISIS concessions (H5)			-0.223*** (0.0535)
female			0.0426 (0.0655)
age			-0.00272 (0.00254)
education			-0.0483 (0.0385)
income			-0.0574 (0.0448)
professional			0.307*** (0.0943)
laborer			0.260*** (0.0842)
unemployed			0.163* (0.0945)
moved			0.0497 (0.0708)
Constant	1.801*** (0.105)	2.052*** (0.0698)	2.959*** (0.339)
Observations	595	595	594
R-squared	0.083	0.395	0.484
adj. r2	0.0818	0.392	0.470

Robust standard errors in parentheses

\*\*\* p<0.01, \*\* p<0.05

In summary, we find that Iraqi civilians are sensitive to due process rights of ISIS detainees as predicted by H1. Ordinary Mosul residents are more likely to accept capital punishment as just and fair so long as procedural due process is followed. In contrast, ISIS sympathizers in refugee camps are more concerned about the inherent fairness of the judicial outcome. They oppose capital punishment against detainees regardless of procedural due process because substantively, they see the punishment as excessive and disproportionate. In other words, Moslawis are process-oriented and ISIS camp people are outcome-oriented in their understanding of judicial fairness. To better explain anti-insurgent/anti-government divisions over the treatment of combatant detainees, we considered hypotheses based on grievances (H3), institutional trust and confidence (H4), and security-based reasoning (H5). We find little support for grievances driving harsh treatment preferences for detainees. Instead, Mosul residents appear more guided by strategic security rationales. Those who think ISIS will not stop fighting favor harsh punishments, while those who believe ISIS would surrender if offered reasonable concessions are more opposed to death penalty outcomes. This belief is even more widely shared among ISIS sympathizers in the IDP camps, which suggest some common ground on the value of negotiating with insurgencies to resolve security concerns. We now discuss the implications of our main findings in more detail.

## Discussion and Conclusion

Journalists have characterized the transitional justice process in Iraq as driven by a campaign of revenge (Taub 2018; HRW 2017; 2019). We do not dispute claims that the process has involved egregious and systematic human rights violations. Our main objective is to assess

whether there is public support within Iraq for basic denial of due process in pursuit of justice. We find that ordinary Mosul civilians, who suffered greatly under ISIS rule, favor harsh punishment of ISIS detainees. However, they are also mindful of basic due process rights to include the right to legal representation and to speak in one's defense. Many of those basic rights have been consistently violated in the treatment of ISIS detainees. However, Moslawis are less likely to see capital punishment of ISIS detainees as just and fair when procedural due process rights are denied. In seeking justice for ISIS crimes, Mosul residents care about process, which shows an underlying respect and appreciation for the rule of law, even as it relates to ISIS.

In contrast, ISIS sympathizers in IDP camps are more concerned about outcomes, and they see capital punishment as a violation of substantive due process, regardless of whether procedural due process norms are followed. In their view, the Iraqi government's widespread use of the death penalty against ISIS detainees is neither just nor fair. While appeals to the rights of detainees may seem ironic given the brutality of ISIS's own judicial system, the goal of many transitional justice systems is ostensibly to promote peace and reconciliation rather than serve as opportunities for revenge and retribution (Teitel 2000; Elster 2004). Consistent with an emerging literature, ISIS sympathizers as well as many ordinary Moslawis believe that harsh punishments will likely prolong the insurgency (Kim and Hong 2019; Cox 2019). Offering concessions to ISIS fighters and supporters in the form of leniency and other guarantees of safety and security might entice them to surrender. Even so, ISIS sympathizers are wary of the Iraqi government and judicial institutions, which they see as fundamentally corrupt. A successful transitional justice process in Iraq will likely require further judicial reforms to ensure rule of law, accountability for violations, and root out corruption to gain trust from insurgent supporters. At present, transitional justice in Iraq, while handing down harsh punishments to ISIS offenders, may be also

jeopardizing long term goals of peace and reconciliation, and serves as a model not to be emulated elsewhere.

Fortunately, Mosul residents appear capable of putting aside grievances to respect the rule of law, despite the terror many endured under ISIS rule. Concern for procedural due process is an important judicial norm. Our study suggests stronger foundations for the rule of law than one would anticipate in a campaign of revenge. Hence, political leaders who wish to strengthen the rule of law need not necessarily fear a strong public backlash should they wish to apply proper due process in the adjudication of terrorists and insurgents. Our results have implications for how publics are willing to apply legal norms to hold rebel groups accountable for atrocities both within and beyond the Iraq case.

First, ordinary Iraqis may see value in reconciliatory, restorative, and transformative forms of justice over the strictly retributive approach entailed by capital punishment. ISIS followers have no incentive to surrender and demobilize if all that awaits them is death at the hands of a vengeful court. Yet, ISIS sympathizers clearly signal that many would stop fighting if the government could summon the political will to offer concessions. Some Moslawis also believe that negotiating with ISIS might bring an end to the conflict more quickly. The government's scorched earth approach to liberating Mosul ensured that it was better for ISIS fighters to fight until death rather than surrender and be taken prisoner by the Iraqi army. While Mosul was ultimately liberated, we anticipate long-term negative legacies, not only from ISIS brutality, but the way in which the transitional justice process is playing out. Our data suggest that there is tangible public support for a different path with more emphasis on due process and fair accountability when designing transitional justice regimes in the aftermath of violence.

Beyond Iraq, our research underscores how insurgency opponents and sympathizers can hold contentious interpretations of justice and fairness under the rule of law. Reconciling opposing perspectives on judicial fairness will have important implications for transitional justice outcomes in many post-conflict settings (Teitel 2015). Our findings emphasize a need for balance between procedural and substantive due process considerations in holding insurgents accountable if transitional justice programs are to promote peace and security after violence. Nevertheless, public willingness to support due process for members of an organization as brutal as ISIS is a testament to the potential transcendent power of justice norms in the face of horrific violence.

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