THE WAR DIFFERENCE: LAW AND MORALITY IN COUNTER-TERRORISM

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I. INTRODUCTION

Yes, we call it war—our struggle to fend off terrorist attacks on our nation and its citizenry. This is in its way a triumph, if a somewhat lonely one, in the overall American response to the security threats that we learned to take so seriously only after the suicide attacks of September 11, 2001. A few days of hesitation followed the attacks, as the President and his aides sought to make sense of the success of the attackers and to grasp their identities and their motives. But since then the Bush Administration has insisted on the terminology of war and an overall approach repeatedly characterized in terms of the war powers of the United States presidency.[1]

This rhetorical triumph remains somewhat more localized than the Bush Administration may have hoped: American intellectuals on the Left have resisted the war metaphor from the outset,[2] arguing that it distorts the perspective we need to succeed in counter-terrorism. In Europe as well, and most notably in Spain since the Madrid train bombings, there has been explicit avoidance of the language of war. The French, the Dutch, and many others have made a point to challenge the American insistence that we are engaged in a "war against terror." For them it is a fight, a struggle, a battle, but not a war.[3] Their overall approach has been to deploy intelligence and police personnel against

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1. *See, e.g.*, Meet the Press Transcript (Feb. 8, 2004) *available at* http://www.msnbc.msn.com/id/4179618 ("I'm a war president."). In July 2005, there was a brief shift to a new terminology: "the global struggle against the enemies of freedom . . . ." *See* Eric Schmitt & Thom Shanker, *Washington recasts terror war as 'struggle,'* INT'L HERALD TRIB., July 27, 2005, *available at* http://www.iht.com/articles/2005/07/26/news/terror.php.

2. *See, e.g.*, PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR (2003).

3. *See, e.g.*, Philip H. Gordon and Benedizte Suzan, *France, the United States and the "War on Terrorism*," *in* THE BROOKINGS INSTITUTION GLOBAL POLITICS, *available at* http://www.brookings.edu/fp/cusf/analysis/terrorism.htm (giving a very early assessment). For a more extended discussion by one of France's leading international relations scholars, see PASCAL BONIFACE, VERS LA QUATRIÈME GUERRE MONDIALE? passim (2005).

what they take to be a massive international conspiracy by al-Qaeda and its allies in the most radicalized wing of modern Islam.

Why do Americans call it a war? For the first few days after September 11, 2001, we were not sure what had happened, who was responsible, or what our response ought to be. Then President Bush spoke to both Houses of Congress and said that we were engaged in a war "unlike any other."[4] He called it that for a variety of reasons, and most Americans found it natural for a variety of reasons. He called it war because it began much as World War II did at Pearl Harbor, with an attack that was a devastating breach of national security, a military defeat, and a national tragedy. It was warlike in all its moral, psychological, financial, economic, and, above all, political effects. To cite just one example, its consequences for intelligence policy have been unfolding in a series of dramatic but unsettled reforms; these will surely continue for many years to come. These changes rival those of the Cold War in their breadth and ambition. September 11 did not change everything, despite that frequent claim, but it changed a lot.

Americans may also find it natural to call it war because it involved national surprise at the work of what for all purposes, practical and spiritual, was a very new enemy. Of course, the United States had known of al-Qaeda for years, and had been repeatedly warned of the terrorist threat by experts like Richard Clarke.[5] But for all Americans the surprise was enormous. Americans were surprised at the vulnerability of our nation and the ambition and effectiveness of our enemy. There may be an echo of the Sputnik crisis in this: a dramatic event suddenly showed American weakness in the face of international competition. But the surprise that we felt also evokes the emotion that the young John F. Kennedy captured in *Why England Slept*.[6] Americans were asleep at the switch of national and international defense and intelligence, and al-Qaeda had found us out with horrifying success.

For many decades and perhaps centuries, "war" has also connoted stringent collective effort and sacrifice to achieve a grim goal: the war on cancer, on poverty, on drugs, and on crime. My own favorite source for these uses of the implicit simile is William James's essay, "The Moral Equivalent of War,"[7] where he argued for an all-out effort, ironically, to make pacifism work. James called it a "war against war."

4. Address to a Joint Session of Congress and the American People (Sept. 20, 2001) *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

5. RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR (2004).

6. JOHN F. KENNEDY, WHY ENGLAND SLEPT (1940).

7. William James, *The Moral Equivalent of War*, *in* NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY 65 (Staughton Lynd & Alice Lynd eds., 1995).

What I want to examine in this Article is the "war difference," that is, the difference it has made in our thinking about counter-terrorism to characterize it as a war against terrorism. Some of the difference is legal, though in the age of undeclared war, that difference proves to be quite modest. Much of the difference combines law with politics, subtly and not so subtly shifting expectations and powers: towards the Executive as Commander in Chief, towards the military and away from the police, towards an emergency mentality in public affairs that tends to hurry, bully, and slight human rights and civil liberties. I will argue the largest difference is moral: the war difference brings with it different standards for the evaluation of our conduct in counter-terrorism.

My arguments lead to the question of what moral categories and concepts best fit the struggle in which the United States and other nations are now engaged—the struggle against Islamic terrorists who oppose our presence in and domination of their own regions and countries and indeed much of the world. It is often said that they want the nearly impossible, the end of globalization and commerce. Whether true or not, the terrorists plainly want some things that *are* possible. They want American withdrawal from the Middle East and from much of Asia. They want to weaken and frighten the United States, and to some extent they have succeeded in that already. The moral challenge they present to open, secular, and prosperous societies may prove greater than their military or political challenges to our way of life.

II. DEFINING WAR

First, let me clear away some aspects of this large subject. As a legal matter, what happens once we say, formally or informally, that "the nation is at war?"

The terminology is arguably much less exact than it once was. We have grown more and more accustomed to the idea that wars are not always declared in the manner of World War II. Indeed, the United States has not since declared war in the constitutional form.[8] The Korean War was called a "police action" but was, by any measure, a war. This illusory distinction simply allowed for United Nations approval of our actions there. The Vietnam War was fought for nearly a decade with tens of thousands of American casualties and hundreds of

8. The best work on this vexed subject remains John Hart Ely's WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993). For a concise survey of declared and undeclared wars, see the encyclopedia entries under "Declaration of war" and "Declaration of war by the United States" in WIKIPEDIA, THE FREE ENCYCLOPEDIA at http://en.wikipedia.org/wiki/declared_war.

thousands, possibly millions, on the Vietnamese side, yet there was no declaration of war beyond the notorious Gulf of Tonkin Resolution. Moreover, our declarations of war have been much less frequent than our military actions—we have had eleven formal declarations, five of which were against the Axis powers in World War II, and a greater number (fifteen or so) of Congressional approvals and authorizations like the most recent "authorizations." But force has been used against other nations or territories in perhaps two hundred military conflicts.

The U.S. Supreme Court decisions in the Guantanamo Bay detention cases[9] clarified that no justice now believes that a formal declaration of war is necessary to "hold" a war or take war-like measures. Both the initial Authorization of the Use of Military Force[10] and the later Authorization for the Use of Military Force Against Iraq Resolution of 2002[11] are in keeping with our modern tradition of approving overseas military campaigns. The vagueness of these resolutions covers a range of contingencies and a multitude of strategies. The reporting requirements seem to be in accordance with the War Powers strictures for Congressional approval.

But if the law of war no longer requires or utilizes formal declarations, the concept of war retains great force morally, politically, and legally. At its simplest and plainest the concept of war: a) sanctions or approves of aggression; b) by the military; c) against enemy territories, forces, and sometimes civilians; d) seeking their defeat, usually once and for all; e) together with guarantees such as treaties, disarmaments, retreats, reparations; and sometimes, f) the return or surrender of territory, populations, and so forth.

When war happens—when a war begins—we enter a new legal and moral universe. The most prominent and obvious feature of this universe is the moral shift to a position that is rarely if ever true in peacetime—large numbers of people can legitimately be harmed or killed to win the war—soldiers first, but also civilians. In the latter case, "innocents" without arms can be harmed or killed only if they meet the moral conditions that we have come to know in just war doctrine as "double effect," which is to say death and destruction that may have been foreseen but was not specifically intended. This is what the military has inured us all to calling "collateral damage."

Legally, we take a decisive turn as well. In international law, a state of war has traditionally justified aggression across national boundaries.

9. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004) *and* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

10. Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224 (2001).

11. Pub. L. No. 107-243, 116 Stat. 1498 (2002).

This continues to capture a large portion of our understanding about wars and the shift they create in relations among the warring nations. Much of this goes back to the origins of the law of war in Europe. Many features of the shift, however, have been carried into U.S. law. Thus, for example, the authorization of assassinations by U.S. intelligence, under Executive Order No. 12,333, is triggered by a state of war or imminent threat.[12]

It goes without saying that an act of terrorism is not usually understood as an act of war. Until recently, most defined terrorism as a war-like act against civilians by individuals or groups not themselves organized as a state and, thus, not capable of waging war in the strict sense. Perhaps the distinctions have blurred, but they have not disappeared. Imagine a war against the United States declared by another nation—North Korea, for example—followed by another attack on the Pentagon, only this time with a military jet. Such an attack would be outrageous, immoral even, but not likely to be classified as terrorism. Attacking another nation's military establishment is precisely what characterizes our concept of war.

III. THE CRIME MODEL

Grant that the U.S. government must respond to terrorism with force and therefore would seem to have only two alternatives for the moral evaluation of its use: treat it as a police effort under the criminal law or, as we have so far, as a war. I will come back to this later to argue that the Bush Administration has in fact chosen to follow not just the war model but the war model unhinged from its twentieth century constraints. But I turn first to the criminal jurisprudence.

If the U.S. response proceeds entirely through the criminal law, as it did, in the Oklahoma City bombing, then the jurisprudence of our criminal law remains what it is and has become. We seek to identify, charge, convict, and punish the perpetrators of terrorist acts as criminals. President Bush's early comments about September 11 captured this sentiment in the promise that "[t]hey will be brought to justice."[13] Morality in this familiar context involves extensive constitutional jurisprudence constructed, most fundamentally, out of a duty of fairness towards the accused. In the very unequal relationship between national or state governments and our defendants, this fairness is believed to

12. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2005).

13. President George W. Bush, President Marks End of Ramadan at White House Ceremony (Dec 17, 2001) (transcript available at http://www.whitehouse.gov/news/releases/2001/12/20011217-4.html).

require counsel, impartial judge and jury, confrontation of witnesses, and so on. Torture and brutality have not been sanctioned in this context since the American Revolution. The proof of guilt must in every case rise to a level of moral certainty captured in the phrase "beyond a reasonable doubt." And the punishment upon conviction should be proportionate to the crimes committed and consonant with other punishments imposed for the same or similar crimes.

Clearly many Americans feel, as President Bush does, that the criminal law is inadequate to the tasks of prosecuting terrorists. It is not immediately clear why. Conversations with prosecutors around the country yield two sorts of contentions.

First, the most general claim is that the criminal law is too deliberate, too slow, and too piecemeal for a struggle of this magnitude. Andrew McCarthy, the former Assistant U.S. Attorney for the Southern District of New York who prosecuted Sheik Omar Abdel Rahman, has commented that only twenty-nine terrorists have been prosecuted in the last eight years.[14] No one knows for sure how large an organization al-Qaeda is, but estimates range up to 20,000 adherents in numerous countries.[15] How many of them have the skills and sophistication needed to engage in terrorism in the West is unknown—but is undoubtedly changing as I write because of the war in Iraq.

These estimates suggest that a round-up of sufficient size to bring al-Qaeda "to justice" would require a criminal justice system—including police, prosecutors, judges, and juries—unimaginably large and effective. It is not yet clear how the militarization of this effort will succeed, however. Al-Qaeda is a loosely organized and widely dispersed organization, with adherents of many sorts, from the most systematic and skillful to rank amateurs seeking secure identities in a confusing world. Even with two active theaters of war, the number of prisoners held at Guantanamo has barely exceeded 750,[16] none of whom, as I write, has been tried or convicted of terrorism under militarized procedures. Many have proven to be of little interest or importance as military commissions or other mechanisms process them. Others around the world—in special detention facilities in Afghanistan, Pakistan, on Navy ships and so on—are unlikely to have numbered more

14. Mike New, *Veteran Lawyer Shares His Views On Terrorism*, DAILY TARGUM, Mar. 31, 2005, *available at* http://www.dailytargum.com/media/paper168/news/2005/03/31.

15. WIKIPEDIA, THE FREE ENCYCLOPEDIA at http://en.wikipedia.org/wiki/Al-Qaeda.

16. The U.S. Department of Defense recently reported that about 500 prisoners remain in detention at Guantanamo, with 256 having been released or transferred. Press Release, Dep't of Defense, Detainee Transfer Announced (Nov. 5, 2005), *available at* http://www.dod.gov/releases/2005/nr20051105-5073.html.

than several thousand. Again, the war in Iraq changed that number in ways that remain both uncertain and disturbing. Whatever the number, it remains suggestive of a highly dispersed but small population of possible terrorists of unknown skills and training.

A second and more technical critique of the criminal law approach is that proof of participation in terrorist crimes and conspiracies will require the use of highly sensitive intelligence gleaned from sources whose safety and usefulness will be compromised by any public testimony or perhaps even any confrontation with the accused. Imagine, for example, an undercover agent in Afghanistan or Pakistan with definite knowledge of an ongoing conspiracy. The Foreign Intelligence Surveillance Act seeks to allow the government to balance the safeguarding of its sources with the prosecution of foreign or domestic criminal suspects.[17] But there are real difficulties to surmount if foreign terrorists are to be prosecuted in criminal courts with evidence obtained from undercover sources in the United States and overseas.[18]

The claim here goes not to the numbers or to the slowness of our criminal procedures, military or civilian, state or federal, but to the purported impossibility of carrying out successful prosecutions while engaging in effective spying, nationally and internationally. Successful criminal prosecutions of terrorists will prove impossible, the argument has it, where, as is often the case, witnesses and evidence will have to be kept secret so as to sustain the struggle against terrorism and its networks around the world.

This is a fascinating and important claim. But thus far we have seen no evidence of its truth. Certainly, it is not based on American experience in the Cold War. And the historical experiences in other societies afflicted with terrorism campaigns—Israel, for instance, or England and Spain—do not seem to bear it out.[19] What is true is that trials in ongoing conspiracies often require a balancing of the government's competing interests in obtaining successful prosecutions, on the one hand, and fairness to defendants, on the other. Sometimes prosecutions will not be feasible and other methods of control—surveillance, for instance—will be required. But I can find no historical examples of massive impunity for terrorists or subversives arising from this tension between fairness and effective prosecution.

The war difference here must be the government's advantage in

17. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1829 (2000).

18. *See, e.g.*, SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CENTER FOR JUSTICE, THE SECRECY PROBLEM IN TERRORISM TRIALS (2005).

19. *See, e.g.*, Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British, and Israeli Experiences*, 62 MICH. L. REV. 1906 (2004)

dispensing with the criminal law and its institutions and safeguards. Our government thus can achieve the results of criminal convictions, namely the detention and imprisonment or even execution of many of those suspected of terrorism. But, it would do so without constitutionally governed criminal procedures. Such a result needs to be justified with the utmost care. It throws over much of our historical experience and the most important of the moral commitments that we have embedded in constitutional law.

IV. MILITARIZATION AND MORALITY

If the criminal law is inadequate, then a war strategy seems to be the sole alternative, both legally and morally. And we must take it seriously if our voices are to be heard at all in evaluating America's counter-terrorism efforts at home and abroad. Thus far the militarization of detention and prosecution of suspected terrorists has not led to the establishment of serious institutions with serious jurisprudential underpinnings. The phrase that comes to mind is Thucydides' sad comment that "[s]uspicion of prior atrocities drives men to surpass report in their own cruel innovations, either by subtlety of assault or extravagance of reprisal."[20]

Nonetheless, long and sturdy traditions of moral and legal argument in favor of war and war measures exist, and were sharpened by the Vietnam experience. We describe the tradition under the heading of "just war theory" or "just war doctrine." But neither phrase quite captures the fact that these traditions of moral evaluation of war measures have been institutionalized, since Nuremburg, in domestic and international law.

Philosophers and theologians have cited both Augustine and Aquinas as the sources of this tradition. The early modern philosophers of law such as Grotius and Beccaria also contributed significantly to its sophistication and suppleness. The worldwide revulsion for the Holocaust and its example of a bureaucratic and industrial regime intoxicated with hatred has contributed mightily to the extension of moral tradition into law. The human rights revolution of the last fifty years has succeeded in forcing a return to the tradition in a wide range of issues going much beyond war.

Just war concepts are now part of the curriculum in the U.S. military academies and belong not only to pacifists but also to those who remain

20. THUCYDIDES, THE PELOPONNESIAN WAR 3:83:2-3, *translated and quoted in* Garry Wills, *What Is a Just War?*, N.Y. REVIEW OF BOOKS, Nov. 18, 2004

convinced that at times nations need military force to defend themselves. The question is how to deploy such force *in* and *with* justice. The just war tradition has emphasized two aspects of war's morality: the *jus ad bellum*, the right to go to war, and the *jus in bello*, the rightfulness or justice of the ways in which war is conducted.[21]

I relate these elements of the just war tradition for a reason: Even if we reject the criminal law and accept the war model in counter-terrorism, we will need some moral framework under which to evaluate U.S. conduct. The United States is now undeniably at war, justifiably or not, in Iraq and Afghanistan.

Assume that America has a right to make war against its terrorist enemies. This is a controversial point and was a source of great debate in the run-up to the invasion of Iraq. I want to emphasize here that *that* debate is not the one I mean to engage in detail. I believe the President was right to argue that preemptive or anticipatory judgments of threat can justify a war. But like so many others I believe that passion overwhelmed prudence in the evaluation of the threat posed by Saddam Hussein's regime in Baghdad. The war in Afghanistan also began with arguments about its initial justification. What seems decisive to me is that the United States had been attacked by paramilitary terrorists sheltered in and directed from Afghanistan, a nation divided by civil war but ruled, in most of its territory, by a government in collaboration with, and even dominated by, the leaders of al-Qaeda.

The just war tradition has relied on two central concepts in the analysis of the morality of war measures. One is the principle of discrimination, under which civilians are protected from violence to the extent possible. The second is the principle of proportionality, the most generally deployed principle in the tradition: all measures and actions in the war must be proportional to the ends sought.[22] Generally speaking, this requires a straightforward weighing of the anticipated or probable costs of war measures and their likely benefits. Thus, in the case of the war in Iraq, for example, the anticipated costs to Iraq's citizenry were low—as the United States expected a rout of Saddam's military followed by the installation by acclamation of a civilian democratic government—while the hoped-for gains seemed considerable. It remains possible that the gains *will* prove substantial, though it appears less and less likely that they will match the astoundingly higher human costs.

21. *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 72 (2nd ed. 1992).

22. *See, e.g.*, *id.* *See also* JUST WAR THEORY (Jean Bethke Elshtain ed., 1992).

It would be a misuse of the just war tradition to confine it to the two military campaigns in Iraq and Afghanistan, problematic as they may be. If the administration seeks to reject a criminal procedure approach to counter-terrorism and to embrace a generalized war powers approach, then it seems fair to insist on an equally generalized evaluation of counter-terrorism in just war terms. And it goes without saying that counter-terrorism efforts here and abroad are not confined to the theaters of war in Iraq and Afghanistan.

Since the end of the Cold War, and even before, we have realized, painfully, that wars often involve war measures against one's own people. The tradition of just war has never, to my knowledge, focused sufficiently on the realities of war measures against domestic populations. Yet counter-terrorism, under any model, has to be understood as imposing costs domestically as well as abroad. In the United States, even more than in Western Europe, we need to face the fact that "the American people" includes many very nearly defenseless groups who reside here, with or without immigration papers, and who have an important role in our economic and social life. Questions both of discrimination between combatants and non-combatants and of disproportionate impact of war measures on certain groups should take into account these impacts and their necessity in conducting the counter-terrorism effort.

V. THE TERROR DIFFERENCE

With this dimension added, let us look more critically at the war difference in counter-terrorism, first overseas and then here in the United States.

The United States is arguably engaged in two national wars under the general banner of the war on terrorism. Grant, for the sake of argument, that both have plausible moral justifications—Afghanistan most convincingly, Iraq less so.

U.S. military officers are trained in, and likely are using, moral reasoning in the just war tradition in the decisions they make in these wars. The most serious criticisms of our conduct in both Iraq and Afghanistan have dwelt on discrete incidents of civilians killed or injured by gunfire, rocket fire, and bombings. The usual defense of American and allied actions is in terms of war's inevitable mistakes on the one hand, and the good intentions of our actions on the other.

My own preliminary judgment begins with the observation that few of us will have definite or persuasive arguments about American conduct of these wars until they are concluded and we can evaluate them in the

perspective of other wars, in our time and before. Certainly, as in torts, a pattern of gross negligence cannot be defended as a series of innocent mistakes. Equally certainly, the outcome over the years ahead will shape the judgments that future students make of what America did in the conduct of these wars. What is clear is that we have killed many civilians—and continue to do so—because our soldiers find themselves in more or less constant peril as they seek to help in the hoped-for transition to orderly democracies. The intention is plainly good, although perhaps naïve. U.S. military and intelligence leaders have clearly underestimated the costs of these two wars in the lives of civilians as well as soldiers. The moral choice was theirs, as is the moral burden.

A particularly troubling pattern has emerged since our involvements in Bosnia and Kosovo. We deliberately sacrifice civilian lives in the nations or territories we seek to help in order to safeguard our pilots and soldiers on combat missions. Thus, as Wesley Clark pointed out in *Waging Modern War*,[23] we bomb from great altitudes to reduce the risk to our pilots. But the accuracy of our technology does not compensate for the lack of "boots on the ground" or "eyes near the target." Inevitably, then, civilian lives are lost to American bombs, and enemy forces are emboldened by American hesitancy to risk our own pilots or soldiers. Protecting their own troops is something that good military officers must do, both in order to win wars and battles and on the general moral principle that lives should be spared where possible. Still, in these cases generals seem to choose strategies at once less effective and more costly in civilian lives—albeit as an unintended "double effect"—so as to spare their own troops the risks of battle. Here, then, U.S. observance of just war principles seems doubtful to me. This charge is particularly biting when, as in Bosnia, Afghanistan, and Iraq, the motive of the war is at least in part humanitarian.

A third moral concern about the war on terror goes to the now notorious question of the legal and moral status of enemy fighters or soldiers. The laws of war have long identified spies and saboteurs as special cases falling outside the rules that were codified in Geneva, The Hague, and elsewhere.[24] Terrorists attacking civilians would seem to fall fairly within that or a similar exception. But the United States may be the first nation to seek an almost universal exemption for opposing

23. WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT (2001).

24. *See, e.g.*, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of International Armed Conflicts, Protocol I, Art. 46 (1977); Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, at Ch. II (1907).

soldiers so as to deny them the traditional protections accorded to prisoners of war.

The terminology of "enemy combatant" is itself an innovation in this regard. It leaves most of us with no guidance, as the years go on, of exactly what legal status the U.S. government means to attach to its enemies in the war on terrorism. This is quite significant as we seek to understand the war difference asserted by the administration.

Were we engaged in a war resembling past wars, we would treat enemy soldiers with a special form of moral respect resting on a complex moral judgment. On the one hand, all enemy soldiers in an unjust war are engaged in a deeply immoral and offensive activity: they are making war where war was neither justified nor necessary. This justifies killing them as they engage in this activity. But the complexity of the judgment is implicit in the rules for their treatment once they are captured and made prisoners of war. Then not only are they *not* to be killed, but they are not even to be charged or criminally prosecuted unless their participation in the unjust war involved definite war crimes. They enjoy a kind of war privilege. They can engage in war, even an unjust war, and yet emerge as war prisoners entitled to respectful detention under the Geneva Conventions. And they must be released when the war itself ends.

Since the early detentions after September 11, 2001, the U.S. government has argued that this form of moral respect will not be extended to our enemies, any of them, in the conflicts or wars against terrorism. This would make sense, were we to assimilate terrorists to the "spies and saboteurs" of the laws of war. But it becomes both impractical and troubling when we characterize every Iraqi soldier or Taliban fighter as a spy or terrorist. In doing so, we rob our enemies of their reality and complexity. Many of them *are* saboteurs who kill civilians when they can. Others, however, served in military forces more primitive and inchoate than our own but like our own in their defense of a nation.

The irony here is that the U.S. government has embraced a war approach to counter-terrorism, rejecting outright the criminal law approach. But then, paradoxically, it has also rejected the law of war, and for the same reasons—it is too confining and too awkward for the struggle in question. This has brought us to the present impasse in which we have neither a moral nor a legal system with which to approach our captured enemies from abroad. We seek to invent institutions and principles on the run while all the world watches in bafflement and anger. This is a strange plight for a country that enjoys one of the oldest legal traditions in world history and that fields more

soldiers around the world than any other nation ever has.

But I have to acknowledge here that this is not really a war difference at all. It is a terror difference, echoing the cliché that "everything has changed since 9/11." When everything changes we have no bearings with which to steer, morally *or* legally. The shame that has spread from Abu Ghraib prison to many other sites of alleged torture, including the "special renditions" about which we know so little, is owed in significant part to the lack of a moral compass in this approach to terror and terrorists. Torture and humiliation are doubtlessly endemic in imprisonment, by the military or civilian authorities. Cultural and language differences, like racial differences, make it all the more likely. But clarity about the purposes of detention—for trial, for punishment, for interrogation, for incapacitation—along with openness about the identities of the detained and their access to their families and legal counsel go a long way to assuring reasonable compliance with what are after all very plain legal and moral obligations owed to all human beings whom we encounter in war or peace.

VI. THE WAR DIFFERENCE AT HOME

The questions before the Supreme Court in the *Padilla*[25] and *Hamdi*[26] cases were domestic, that is, questions about the treatment of U.S. citizens either suspected of terrorist conspiracies against the United States or of collaborating with enemy forces in battles abroad with American troops and their allies. From *Milligan*[27] in the Civil War to *Quirin*[28] and his hapless saboteur colleagues during World War II on to the several cases resolved or still to be resolved in the present crisis,[29] the precedents are confusing at best. The Supreme Court's decisions last year did not dispel the confusion. Jose Padilla, was taken into custody at Chicago's O'Hare International Airport, while Yaser Esam Hamdi, like the more notorious John Walker Lindh, was captured in Afghanistan. In Lindh's case,[30] the questions of status and treatment were never seriously argued—he was charged, he pled guilty, and he was sentenced

25. Rumsfeld v. Padilla, 542 U.S. 426 (2004).

26. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

27. *Ex parte* Milligan, 71 U.S. 2 (1866).

28. *Ex parte* Quirin, 317 U.S. 1 (1942).

29. *See, e.g.*, Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004); *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005); *and* Hamdan v. Rumsfeld, 415 F.3d 33 (D.D.C. 2005) *cert. granted*, 126 S. Ct. 622 (Nov. 7, 2005). *See also Hamdi*, 542 U.S. 507, *and Padilla*, 542 U.S. 426.

30. United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002).

under the criminal law.

What difference does it make that we consider some American citizens suspected of terrorist collaboration or conspiracy to be subject to the criminal law and others to be subject to the shifting rules of interrogation and detention that we have improvised at Guantanamo and elsewhere? Lindh's treatment was rough from his capture onwards. His claims of torture were muffled by his plea bargain and conviction for carrying arms as part of an enemy force. His sentence of twenty years without parole was meted out to him when, more or less alone as "the American Taliban," he faced a hostile country in a district court known for its sternness. Certainly Hamdi, who is now living under restrictions at his family home in Saudi Arabia, has no reason to envy Lindh's privileges under American criminal procedure. On the other hand, Hamdi spent more than two years first in Guantanamo and then in a Navy Brig, interrogated but uncharged, with no effective rights to counsel, to habeas proceedings, or to liberty. Padilla never went to Guantanamo but spent three years of uncertainty in the Navy Brig in South Carolina. His rights to counsel and habeas proceedings were upheld by the Supreme Court[31] but then postponed until mooted by his recent indictment.[32]

From the perspective of these cases, we might conclude that it makes very little difference in practice whether or not our nation adopts a criminal law or a war approach to its counter-terrorism efforts. But I am convinced that this is the wrong conclusion. The war difference at home has had enormous consequences for residents of the United States who have aroused our government's suspicion for much less reason than Lindh or Hamdi or Padilla.

Within days of the September 11 attacks, the United States took a series of steps to detect and deter terrorists. The first of these was the "sweep" that rounded up some 1,200 adult men residing in the United States but from countries where Islam has many adherents. There is no doubt that the sweep involved ethnic profiling. The men were identified by age and country of origin as belonging to groups from which terrorists might be recruited into al-Qaeda cells. In reviewing this mass detention, the Office of the Inspector General made clear that no particularized suspicion of criminal behavior (not to mention suspicion of involvement in terrorism) was required.[33] If you were, say, a 25-

31. *Padilla*, 542 U.S. 426.

32. *See* Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. TIMES, Nov. 23, 2005, at A1.

33. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN

year-old male from Yemen, and not a U.S. citizen, your chances of being detained were very high. Indeed, it may have been a certainty that the Department of Justice *wished* to detain you at that time. If they did not, they probably had missed you somehow in their rush to stop anyone falling within the profile from roaming America freely. Michael Chertoff, now the Director of Homeland Security, spoke of holding people "until we find out what is going on."[34]

Part of what the department found was that many of these young men had immigration violations with which they could be charged and deported. They were then held with little access to their families or to counsel. Later orders from the Attorney General made *all* immigration violations a basis for indefinitely prolonged detentions during the crisis.

The profiling here is undeniable, but I suspect that it was, for a time, at least arguable. What is offensive about profiling is not just that it burdens all who fit the profile—an innocent category such as Yemeni males—with the consequences that usually flow only from definite or particular suspicions. An innocent person fitting any description of a crime suspect will likely suffer such consequences, including arrests and searches. And of course the individuals in question do nothing to deserve these consequences: They look a certain way, are a certain age, and share a certain background. Profiling is a form of generalizing. What makes it insidious is its infectious nearness to outright prejudice.

In post-9/11 America, the consequences of fitting a terror profile can be strikingly harsh. Average detentions in the initial sweep were about eighty days, usually in secret, with little or no contact with families or lawyers.[35] Worse, like a vulnerable patient subjected to an unnecessary or unhelpful operation, the detainees were often in precarious social and employment circumstances that worsened during their detentions. Many were found to have other legal problems that could quickly cascade into the legal disaster of deportation.

Is profiling ever acceptable? Much depends on the definition we give to it. Certainly, the police generalize from descriptions, circumstances, and resemblances. They do it whenever they investigate a crime under conditions of uncertainty. When the pressures of emergency grow, as in wartime or immediately following a terror attack, the temptation to generalize suspicion to larger and larger categories—lazier categories, if you will—also grows. These categories of general suspicion then blur into categories of general prejudice. It happened during the Japanese

CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 (April 2003), *available at* http://www.usdoj.gov/oig/ special/0306/full.pdf.

34. *Id.* at 39.

35. *Id.* at 46.

removal and internment; it happened—and it continues to occur—on a smaller but still disturbing scale in the present situation.

Put the case of a nationwide or statewide pursuit of conspirators in the September 11 attacks. Assume, for the sake of argument, that we knew that several conspirators were not on the planes. We might find moral justification for a brief period of general questioning across, say, Manhattan or the counties surrounding Washington, D.C. Some might even find a narrowing but very general category like "males from Yemen between the ages of 16 and 45" to be acceptable as a kind of emergency hypothesis. Surely the perpetrators can be assumed to be in flight. Is it too much to assume further that they are likely to come from places where Osama bin Laden had influence? Our knowledge of them will accrue only very slowly—flight can be successful in hours or a day. Still, even for a brief time it would seem important to ask on what basis Yemeni origins became sufficient to arouse such intense suspicion.

Detention only intensifies the moral concern about the categories of what I am calling "general suspicion." A person is detained for an hour of questioning and then released. There is inconvenience in this and, much worse, anxiety, perhaps terrible anxiety. In the case of an immigrant to the United States, the anxiety will not irrationally go to the most basic conditions of life, including safety for oneself and one's family. Were the government to detain everyone in Manhattan for a week or even a month of investigation, most of us would draw reassurance from the generality, the neutrality, and the lack of prejudice. Yes, the inconvenience and the loss of liberty would be objectionable. But assuming a sufficient emergency purpose, the government might well be justified, morally if not legally. The effort, as Bruce Ackerman suggests, would resemble a quarantine under conditions of infection.

But these hypothetical variants of what has gone on since September 11 bring out what is at once most morally objectionable and least practically effective in the new war difference in investigating Arab and Muslim immigrants and visitors. The initial sweep was followed by "voluntary" interviews that led to many more detained.[36] Investigations have intensified on every front of immigration enforcement where men and women and families come from our regions of concern or adhere to the religion that concerns us. Three points seem to me objectionable. First, we have in fact targeted populations that remain highly vulnerable to prejudice and isolation. They are almost all recent immigrants without significant allies in American politics. Their religious

36. Jodi Wilgoren, *A Nation Challenged: The Detainees; Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, 'Why?'*, N.Y. TIMES, Nov. 25, 2001, at B1.

attachments make them suspect to many Americans, for whom our newfound religious diversity is unsettling. And, like most recent immigrant populations, these new immigrants are extremely likely to have non-criminal immigration violations that make them ultimately deportable. Second, as if to intensify these pressures, we have resorted to extreme, almost Cold War-like, measures of secrecy about their detentions. These measures have deprived this targeted population of some of its few natural allies in the press. Third, we have seemed to prolong the arguable and perhaps morally defensible "state of emergency" approach to these investigations far beyond what seems reasonable. As with the overseas detentions, the Administration argues that it can have it both ways. It asserts both the urgency to justify extreme measures of secrecy, suspicion, and detention, and the unwillingness to set any limit on the amount of time required to investigate or interrogate people who are almost all innocent of any terrorist inclinations. Thus, on and on the crisis goes without even a concession of a need to adjust to a more extended timeframe in the interests of the innocent.

Long after the fact, we recognized that the Japanese Internments had swept up almost no disloyal residents or citizens.[37] The overall immigration detentions have thus far produced only a handful of terror-related prosecutions and only one conviction, that on a highly technical charge.[38] We have thrown nearly the entire burden of investigation and suspicion on a nearly defenseless population. The disproportion of the burden would only be acceptable were it necessary over a very short time to achieve definite and urgently important ends. But it is not necessary, it is no longer urgent, and it has not achieved the ends in question. Indeed, it may well have made these ends harder to achieve by inflicting consequences such as deportation and uncompensated job losses on people without any ties to terrorism beyond the profile with which we began. Their trust and cooperation, along with their language skills and cultural sensitivities, are among the most valuable advantages that we Americans have to detect terrorist cells. In effect, we have thrown these advantages to the winds.

37. *See* U.S. Comm'n on Wartime Relocation and Internment of Civilians, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* 88 (Civil Liberties Pub. Educ. Fund 1997).

38. *See, e.g.*, United States v. Koubriti, 336 F. Supp. 2d 676 (E.D. Mich. 2004) (granting new trial following terror-related convictions); United States v. Faris, 388 F.3d 452 (4th Cir. 2004), *cert. granted, judgment vacated*, 125 S. Ct. 1637 (2005); United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005).

VII. CONCLUSION: FIGHTING TERROR

So I return to my initial question: Is it really a war that we are engaged in? I think that the honest answer is that it is not. Then what is it? In my view, it is a novel form of policing, of criminal work, on a global scale that we have not known before. It has and must have military elements within it—small wars within it, even—but it extends beyond those elements in time and methods. Its legal dimensions are new as well, but not wholly new. These are essentially matters of international criminal law and jurisdiction in settings where intelligence and its secrets will need to be protected even as we prosecute and punish international criminals. Above all, its moral dimensions do not conform easily or well to the model of war or war crimes. In most instances, the terrorists are not soldiers and should not be treated as such. They are international criminals, and their human rights should conform to an international standard for investigation, prosecution, and punishment.

What is truly warlike is that terrorists may gain access, or may have already gained access, to the same weapons that states and their armies possess: nuclear or junk nuclear bombs, biological and chemical weapons, the latest or nearly latest missiles and explosives. We know that terrorism can take hundreds and thousands of lives by using the most primitive of weapons to hijack planes or ships or even factories. We have yet to know how many lives terrorists can take with more potent weaponry.

Our enemies in the global wars we have fought before, including the Cold War, were organized as the military forces of large states with large economies rivaling our own. In theory at least, they were capable of conquering us or our allies. It is true that we have also fought bitter wars—perhaps our bitterest wars—in smaller states beset by insurgencies such as the ones in Afghanistan or Iraq. Vietnam comes quickly to mind, though there we encountered all at once a perfect storm of nationalism, socialist revolution, and a failing ally in a civil war. It is a lesson of these smaller wars that insurgencies *can* conquer states, if not likely our own. And terrorism is certainly one weapon of rebellion and insurgency.

Islamic terrorism, and al-Qaeda specifically, has sought to ally itself with insurgency in Chechnya, in Iraq, and elsewhere in the Islamic world. In Afghanistan, for a time, it succeeded in dominating the Taliban regime. But I do not think this makes either al-Qaeda or Islamic terrorism the equivalent of a warring state arrayed against us. No doubt there is a movement within Islam, one with real potency in threatening us in the West and even more potency in threatening governments and nations in the Middle East, in Asia, and in Africa. There are remote but

chilling analogies here to seagoing piracy. Thus, for two or three centuries the Vikings terrorized coastal Europe from Ireland and Scotland all the way to Russia and Spain until methods were found to contain and assimilate them.[39] Similarly, the Barbary pirates terrorized American shipping from their captive ports along the North African coast. They were defeated by military action when we built the USS Constitution and sent our new navy after them.[40] The Barbary cities were failed states much like Taliban-ruled Afghanistan. Had the war on terror ended with victory in Afghanistan, this last analogy would have been complete. But of course, it is nowhere near that.

What we face in Islamic terrorism is a uniquely modern form of piracy, if you will, one with a reach into all nations, threatening all of us—in New York, London, Madrid, Bali, or Beslan. Its ideology is new and remarkable; its weaponry, ironically, is often our own.

Our moral and legal standards will be tested by terrorism and the prosecution of terrorists. We will need to make adjustments. But we should not have recourse to such innovations as military commissions or indefinite detention under the pretense of the law of war. They do not, in fact, conform to the laws of war even for the detention and prosecution of the most flagrant war criminals.[41]

And our treatment of innocent civilians, not least here at home, must take better account of the great traditions of both just war and criminal law. In both perspectives, the protection of the most innocent, the most defenseless, should be our first duty. It is a duty we have shirked in many respects since the earliest days after the attacks of September 11.

The astounding miniaturization of technology in all fields suggests that smaller and smaller weapons of greater and greater destructiveness will be available to fanatics as long as human beings remain free on this planet. We could end technology or we could end freedom, but nothing will end fanaticism. We cannot defeat terrorism once and for all. But we can contain it, I believe, and prevent the worst of its harms even as we convict and imprison the worst of its perpetrators.

39. *See* THE OXFORD ILLUSTRATED HISTORY OF THE VIKINGS (Peter Sawyer ed. 1997).

40. *See* FRANK LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD (2005).

41. *See* AMERICAN CIVIL LIBERTIES UNION, CONDUCT UNBECOMING: PITFALLS IN THE PRESIDENT'S MILITARY COMMISSIONS, *available at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15165 (Mar. 2004).