CONTENTS

Preface..............................................................................................................................................

Plenary Session Papers/Articles:

LESS SAFE, LESS FREE: A PROGRESS REPORT ON THE WAR ON TERROR
David Cole........................................................................................................................................1

THE PERFECT STORM: ARE WE HEADED FOR A RESURGENCE OF RIGHT-WING DOMESTIC TERRORISM?
Mark James .......................................................................................................................................9

ASYMMETRIC THREATS IN THE GLOBAL FIGHT AGAINST TERRORISM
Stefan Lorenzmeier .............................................................................................................................20

INTERROGATION USING FUNCTIONAL MRI AND COGNITIVE ENGRAMS
Donald H. Marks .................................................................................................................................31

COMMUNITY-BASED PEACEBUILDING: A CASE STUDY FROM NORTHERN IRELAND
Harry Mika .........................................................................................................................................38

IMPACT OF THE WAR ON TERROR ON HUMAN RIGHTS TERRORISM AND JUSTICE
Jumana Musa ......................................................................................................................................55

Panel Session Papers/Articles:

Jessie Blackbourn ...............................................................................................................................63

POLITICAL PARTIES IN NEPAL: OPPORTUNITIES AND CHALLENGES
Keshav Bhattarai and Darlene Budd ..................................................................................................75

TERRORISM AND MEDIA IN KOREA
Yeok-il Cho and Franklin Wilson .........................................................................................................89

PROSECUTING DOMESTIC TERRORISTS IN THE AMERICAN COURT SYSTEM: A STUDY OF THREE CASES
Gregg. W. Etter, Sr. ............................................................................................................................99

HAMILTONIAN AND MADISONIAN DEMOCRACY, THE RULE OF LAW AND WHY THE COURTS HAVE A ROLE IN THE WAR ON TERRORISM
Arthur H. Garrison ............................................................................................................................120

AN INSIDE VIEW OF DUTCH COUNTERTERRORISM STRATEGY: COUNTERING TERRORISM THROUGH CRIMINAL LAW AND THE PRESUMPTION OF INNOCENCE
Marianne Hirsch Ballin .......................................................................................................................139
<table>
<thead>
<tr>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>IS TORTURE EVER JUSTIFIED?</td>
<td>Robert J. Homant, Michael J. Witkowski, and Megan Howell</td>
<td>152</td>
</tr>
<tr>
<td>COLLEGE STUDENTS’ ATTITUDES TOWARD COERCION/TORTURE</td>
<td>H. Martin Jayne</td>
<td>166</td>
</tr>
<tr>
<td>TERRORISM AND HUMAN RIGHTS:</td>
<td>Joanne Katz and David Tushaus</td>
<td>182</td>
</tr>
<tr>
<td>THE SOUTH AFRICA AND NORTHERN IRELAND EXPERIENCE</td>
<td>H. Martin Jayne</td>
<td>166</td>
</tr>
<tr>
<td>TERRORISM IN PERSPECTIVE: REALITY, FEAR, AND THE THREATS</td>
<td>Sheldon G. Levy</td>
<td>200</td>
</tr>
<tr>
<td>TO CIVIL LIBERTIES FROM THE WAR AGAINST TERRORISTS</td>
<td>H. Martin Jayne</td>
<td>166</td>
</tr>
<tr>
<td>TERRORISM AND ASYMMETRIC WARFARE:</td>
<td>Kiran Mohan</td>
<td>211</td>
</tr>
<tr>
<td>STATE RESPONSIBILITY FOR THE ACTS OF NON-STATE ENTITIES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>– NICARAGUA, TADIC, AND BEYOND.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ASPECTS OF TERRORISM:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THREAT AND USE OF TOXIC CHEMICAL SUBSTANCES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RIGHTS OUTSIDE THE CONTRACT AND CONVENTION</td>
<td></td>
<td></td>
</tr>
<tr>
<td>WHY DO THEY HATE U.S.? EXPLORING THE ROLE OF MEDIA IN CULTURAL</td>
<td>Divya Sharma</td>
<td>246</td>
</tr>
<tr>
<td>COMMUNICATION</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THE PHENOMENON OF XENOPHOBIC VIOLENCE:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A HISTORICAL AND SOCIAL PSYCHOLOGICAL REVIEW</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OF AMERICA IN THE WAKE OF TERROR</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THE WAR ON TERROR’S IMPACT ON HABEAS CORPUS:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>THE CONSTITUTIONALITY OF THE MILITARY COMMISSIONS ACT OF 2006</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RESIST OR COMPLY: AN EXAMINATION OF STUDENT ATTITUDES ON</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SURVEILLANCE AND GOVERNMENT ACCESS OF PERSONAL RECORDS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>REFLECTIONS UPON SOME PEDAGOGIC ISSUES ARISING FROM THE TEACHING</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OF SECURITY-RELATED SUBJECTS IN UK UNIVERSITIES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DEFINING TORTURE: THE POTENTIAL FOR ‘ABUSE’</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

iv


**PREFACE**

The scope of the February 2008 Terrorism & Justice: The Balance for Civil Liberties Conference was enunciated in the Call for Papers:

This conference seeks to investigate the breadth of issues underscoring the impact of counter-terrorism efforts upon the diverse concepts of justice at both domestic and international levels. Domestically, in the efforts to counter the threats of terrorism, many observers see an inherent conflict between the broad interests of security and the protection of individual rights and freedoms. A shift away from civil liberties during periods of emergency was predicted by James Madison in his debate with Thomas Jefferson on the ratification of the Bill of Rights when he wrote that “experience proves the inefficacy of a bill of rights on those occasions when its control is most needed.”

Thus, we have seen some counter-terrorism measures, such as the USA Patriot Act, being exceeded by those that have not been enacted by Congress but by Presidential order. U.S. courts are being challenged in the wake of 9/11 to accede to government claims of wartime authority that tilt against longstanding fundamental rights. Indeed in his reply to Madison, Jefferson considered the strongest reason for enacting a bill of rights: The legal check which it puts into the hands of the judiciary.

Yet, not only their impacts upon justice, but the effectiveness of the post 9/11 counter-terrorism responses may be difficult to assess. In this regard, lessons can be learned by the experiences of other countries with their counter-terrorism/insurgency measures.

The U.S. might now, both in its foreign policy and its domestic counter-terrorism measures, be entering a period of transition in how it views the proper response of justice to the atrocities inflicted by terrorist acts.

The national strategy for combating terrorism, according to the FY 2007-2012 Department of State and USAID Strategic Plan:

> stresses the advancement of democracy, the rule of law, and a global environment inhospitable to violent extremism. Diplomacy and foreign assistance will support peace and security-related activities that create the necessary space and time for longer-term developmental solutions to terrorism to develop and take hold.

In these statements of policy, the U.S. appears to be joining other countries to invoke a theme of transitional justice as a key aspect of establishing a lasting peace and building effective and just societies. Restorative justice principles may be invoked in these efforts of longer-term developmental solutions.

The paper proposals received in response to this Call for Papers came from a wide-variety of academic disciplines. An incomplete listing would include: psychology, sociology, geography, history, political science, philosophy, communication, safety sciences, criminal justice, disaster management, legal/justice studies. This response resulted in over 70 presentations scheduled for the Conference. These represented the work of over 90 authors and co-authors (from over 3 dozen non-academic and academic institutions in addition to UCM students and faculty members). There were many international perspectives on these issues represented in many of the papers, presented by individuals from four continents and eight countries.

The development of this event relied upon the cooperation of several academic, administrative, and support units at Central. Individuals from the Office of Academic Affairs,
the Office of International Programs, the Office of Academia Media Services, and the Office of Sponsored Programs provided assistance for this Conference. The assistance of Central students involved in the many needed details of putting this conference together must be acknowledged with deepest gratitude.

This issue of the journal represents a tangible enduring product of this Conference. The presenters were invited to submit extended papers for consideration for publication. We are fortunate to have a majority of the plenary session speakers providing either extended papers or edited remarks based on their presentations. Further, the submissions from the conferees were submitted to peer reviewers. These reviewers provided extraordinary and needed guidance on the selection process that resulted in this special Conference issue of the Journal of the Institute of Justice & International Studies. Many thanks go to these reviewers and all those who were solicited for advice and comments. The result is an extraordinarily diverse and quality set of views on this subject-matter.

Don Wallace
Director
Institute of Justice & International Studies
Department of Criminal Justice
University of Central Missouri

THE JOURNAL OF THE INSTITUTE OF JUSTICE & INTERNATIONAL STUDIES is a multi-disciplinary, peer-reviewed journal devoted to the dissemination of information regarding a wide variety of social issues, both national and international, and a wide variety of research and presentation techniques.

MANUSCRIPTS
Manuscripts are typically the outcome of a presentation by the author at the annual academic conference hosted by the Institute. These manuscripts should be submitted via email to cjinst@ucmo.edu. Only original, unpublished manuscripts not under consideration by other journals will be considered. Submissions should follow either in the latest editions of the Publication Manual of the American Psychological Association or the Uniform System of Citations.
LESS SAFE, LESS FREE:
A PROGRESS REPORT ON THE WAR ON TERROR

David Cole*
Georgetown University Law Center

Address to the Terrorism & Justice Conference
University of Central Missouri, February 18, 2008

Steven Spielberg film, Minority Report, based on a science fiction short story by Philip K. Dick, is set in the not-so-distant future in Washington D.C. at a time when we have miraculously solved the problem of crime or at least apparently so. The government has captured three witches who can predict the future with almost perfect accuracy. They predict who will commit crime so accurately that Congress enacts a “pre-crime law” that makes it a crime to think about committing a crime. With the help of these witches’ predictions, the government can convict people before the crimes ever occur. All is rosy—until, of course, someone figures out how to trick the witches into predicting that the protagonist will commit a murder that he does not in fact intend or plan to commit.

As far as I can tell, we do not have witches in the Justice Department, predicting who will commit crimes in the future. Nonetheless, the Bush Administration since 9-11 has adopted a strategy, which in some sense depends upon the ability to predict with incredible accuracy at what will happen in the future. It is that strategy that I want to discuss this afternoon. It was given its name by the U.S. Attorney General during the first Bush Administration, Missouri’s John Ashcroft, who argued that what we need in the wake of 9-11 is a “preventive paradigm.” The argument is understandable: when facing foes who are willing to commit suicide in order to inflict mass casualties on innocent civilians, it is not enough to bring them to justice after the fact. The perpetrators are dead—and so are many innocent civilians. Thus, the goal must be to prevent the next terrorist attack from occurring.

Of course we all want to prevent the next terrorist attack from occurring. No one wants to see another 9-11 or anything like it. But the preventive paradigm as it has been employed in this particular conflict has a particular character. It deploys the state’s most coercive authorities, based not on objective evidence of past or even ongoing wrongdoing, but based on predictions about future harms we want to prevent. It is the use of coercive preventive measures that most characterizes the preventive paradigm as outlined by John Ashcroft and overseen by the Bush Administration in the war on terror.

Consider, for example, This notion of using coercive measures based not on objective measures of past or ongoing wrongdoing, but on predictions about future
harm, includes preventive detention. In the first two years after 9-11, the government locked up by its own count over 5,000 foreign nationals in preventive detention anti-terrorism measures. These are people locked up, not to hold them responsible for things they have done in the past, not based on objective evidence of past wrongdoing, but out of a concern that they might commit a terrorist act in the future. So they are locked up to prevent that possibility from occurring.

The preventive paradigm also includes what President Bush calls “alternative interrogation tactics,” but what the rest of the world knows as torture. The argument that has been made to justify coercive interrogation or torture is inevitably based on the fear of an imminent terrorist attack. This fear is used to justify strapping men down and pouring water over their faces so they cannot breathe and fear they will drown in order to encourage them to talk. No one argues that it is necessary to use such torture to punish someone for a crime after the fact. Even if it can be established beyond a reasonable doubt that a person has committed a heinous crime for which he can be executed, we would not torture him. The pro-torture argument is that to prevent the ticking time bomb from going off, surely it is justified then to use a little bit of torture. So here the preventive paradigm makes what was unthinkable, thinkable.

As a third example, consider preventive war, the notion that led the U.S. into Iraq. During the run-up to the war with Iraq, the Pentagon criticized the traditional international law view that a country may unilaterally attack another country only in self-defense -- that is, only when the country has been attacked or is facing an imminent threat of attack. This standard requires justifications that are objectively verifiable. The Administration argued that this standard does not make sense in the era of weapons of mass destruction, rogue states, and international terrorist organizations. The country needs to be able to act unilaterally and preventively where it has not been attacked and does not face an imminent threat but there is a gathering storm that needs to be dealt with. The invasion of Iraq was justified on those grounds.

Let me make it a little more concrete by talking about one of my clients who was a victim of the preventive paradigm. His name is Maher Arar, a Canadian citizen born in Syria and therefore a dual national. Arar moved with his family from Syria when he was a teenager and he has been living in Canada for the last two decades. He was returning home to Canada from Europe in September 2002 when, while changing planes at JFK Airport in New York, he was pulled out of line by immigration officials, locked up for two weeks, denied access to an attorney, interrogated at length, and ordered deported on the basis of secret evidence that claimed he was a threat to national security. He denied he was such a threat, stating that he had been coming to the U.S. for years (in fact he had worked for years in Boston at a computer company). Furthermore, on this trip he was not trying to enter the U.S. but was just trying to change planes to go home to Canada. The United States not only ordered him deported, but placed on a federally chartered jet that took him not to Canada, but to Syria.

Why would the U.S. take a Canadian, who is simply returning home to Canada, and forcibly redirect him and send him to Syria? The answer lies in the fact that Canada does not have a record of torturing its suspects. Syria does. And Syria did. While interrogating him with questions virtually identical to those which the U.S. authorities had asked him at JFK Airport, Syrian officials beat him with an electric cable. They, ultimately locked him up for a year without charges, most of the time in a cell the size of a grave—3 feet by 6 feet by 7 feet.
At the end of a year, Syria released him because they found no evidence that he had engaged in any wrongdoing whatsoever, much less terrorism. He went back to Canada. This time he did not change planes at JFK Airport. Canada launched a massive inquiry into his case, which resulted in an 1100-page report fully exonerating Arar. Canada paid him ten million dollars in damages for that country’s part in the wrongdoing, having provided the U.S. with some negligent misinformation. Canada did not, as far as we know, cooperate with the U.S. in deciding to send Arar to Syria to be tortured. That was the call of the U.S.

Maher Arar was a victim of the preventive paradigm. The U.S. did not have any evidence that he engaged in any wrongdoing. If the U.S. had, the government would have tried him, or might have sent him to Guantanamo. But U.S. officials had suspicions about Arar, and when he could not dispel those suspicions through the interrogations without a lawyer for two weeks at JFK, U.S. officials delivered him to Syria so that the Syrians could use more extreme tactics. These tactics were justified of course in the name of prevention. The U.S. wanted to prevent Arar from doing something dangerous in the future.

I will make three points about this preventive paradigm. The first is that it puts tremendous pressure on the values that we associate with the rule of law, the Constitution, and the American society at its best. Second, I will argue that while this preventive paradigm has been adopted in the name of making us more secure, it has in fact made us less secure and more vulnerable to terrorist attacks. Third, I will suggest that this was tragically unnecessary. Prevention is possible without compromising our most fundamental principles and without inspiring the kind of backlash that the preventive paradigm has occasioned.

I.

Let me first talk about the sacrifices brought on by the prevention paradigm. The rule of law is a critical element in the legitimacy of the state’s monopoly on coercive authority. We give the state the authority to lock us up, to fine us, and in this country, to execute us, on the condition that it abide by certain basic principles of the rule of law. But the rule of law may appear to be an obstacle when the state does not have evidence that anyone has done anything wrong, but seeks to take action nonetheless. When the Administration wanted to use coercive force against Maher Arar, as to whom there was no evidence that he had done anything wrong, the rule of law seemed an obstacle, so there was tremendous pressure to push it to one side.

We have seen compromises in all of the most fundamental commitments of the rule of law: equality, the notion that everybody is equal before the law; transparency, the notion that procedures must be public so we can make sure the government is following the rules; fair process, which requires before the government takes away a person’s liberty, life, or property, it has to provide a fair hearing where one can defend oneself; checks and balances, because in order to have a functioning rule of law, there needs to be separation of powers so that each of the branches can check each other; and, a commitment to fundamental human rights because the rule of law is ultimately about a collective commitment to respect for human dignity.

Since 9/11, we have seen major compromises in each of these values. I can only touch on a few examples here; I address the compromises more exhaustively in my book, Lee Safe, Less Free. With regard to equality, consider the government’s response to Maher Arar’s lawsuit. The government argued that since Arar is not an
American, he does not deserve the constitutional rights that a U.S. citizen would have if a U.S. citizen had been sent to Syria to be tortured. The double standard that “they” (mostly foreign nationals, mostly Arabs and Muslims) do not deserve the same rights that “we” (White Americans) deserve or enjoy, has been a constant theme in the post 9-11 war on terror. The same argument is made at Guantanamo. “They” do not have any rights because they are foreign nationals held outside of “our” border. So much for equality.

What about transparency? There have been secret arrests, involving thousands of people picked up right after 9-11, and essentially “disappeared” off the streets of the U.S. into this country’s prisons. U.S. authorities have disappeared other suspects around the world into CIA secret prisons; still secret to this day. The U.S. government has asserted the “state’s secret” privilege as a bar to any accountability for constitutional violations. Thus, another argument that the government made in Arar’s case was that even if he has some constitutional rights, and even if these limited constitutional rights might have been violated by sending him to Syria to be tortured, the case cannot go forward because it involves “secret secrets.” The Administration made the same argument with respect to challenges to his warrantless wiretapping program. Even though it is been reported on the front page of the New York Times, the Administration claims that the program is a secret, and therefore the courts cannot adjudicate whether he acted illegally when he ordered the NSA to engage in warrantless wiretapping in violation of a criminal statute. So much for transparency.

Fair process has also been thrown aside. The detainees at Guantanamo, have never had a fair proceeding. The government’s initial position was that it could pick up anybody anywhere in the world, foreign national or U.S. citizen, on the battlefield or at O’Hare Airport, and if the President determined that they were an enemy combatant or as President Bush put it a little more colloquially, “a bad guy,” then they could be locked up forever, without hearings or any process whatsoever.

With respect to checks and balances, President Bush has essentially revived what I call the Nixon doctrine. In an interview with David Frost after his forced resignation, President Nixon famously defended his order authorizing warrantless wiretappings of Americans during the Vietnam War on the ground that “if the President does it, that means it is not illegal.” President Nixon learned the hard way that that view of Presidential authority is not the American way. But President Bush has essentially revived this view with one little tweak, that if the President does it and invokes the magic words, Commander in Chief, then it is not illegal. The President has made this argument with respect to NSA wiretapping, which under federal statutes is a crime. He has taken the view that as Commander in Chief, he cannot be constrained by Congress in deciding how to engage the enemy. Similarly, a Justice Department memo argued that the federal law making torture a crime cannot apply to the President as Commander in Chief because he has to have the freedom to decide how to “engage the enemy,” and he cannot be restricted by the other branches in making that decision. So much for checks and balances.

Concerning the commitment to basic human rights, I do not need to make an extended argument. One need only contemplate two images--Guantanamo on the one hand and Abu Ghraib on the other. Images for which, unfortunately, the U.S. is probably better known around the world today than for the Statue of Liberty.
II.

When I make these points in debate with my friends in Washington who defend the administration, they always respond with some version of what my colleague, Viet Dinh, has said. Professor Dinh who teaches with me at Georgetown, previously served in the Bush Administration and is credited as the author of the Patriot Act. In one of our early debates, Viet replied, “David, you’re so September 10,” effectively asking, “Did you see what happened to us on September 11? We were attacked in a vicious and unprecedented way. We face new threats to security that require us to make some new compromises. Of course there have been some new compromises. But these compromises have been taken in the name of your security.”

I assume that for the most part, these measures were adopted in good faith by people who believe that they were needed to keep America safe. However, they are terribly misguided, on principle and on pragmatic grounds. There is very little evidence to believe that they have made America safer and a good deal of evidence to believe that we are in fact, less safe.

Are we safer? A couple of years ago, the State Department issued a report that counted the number of terrorist incidents worldwide for that year had decreased. Richard Armitage, the Deputy Secretary of State declared that the global war on terror is working. But about two months later Secretary of State Colin Powell had to admit that they had miscounted and in fact, the number of terrorist incidents had increased not decreased. In fact, every year since 9-11 terrorist incidents worldwide have increased both in frequency and lethality. Meanwhile our own national intelligence agencies tell us that Al Qaeda has fully reconstituted itself on the border of Pakistan.

Further, it is not just Al Qaeda anymore. New groups have sprung out that did not even exist on 9-11. They have sprung up out of animosity toward the U.S. and sympathy with Al Qaeda, in places like Iraq, Spain, and the United Kingdom. Al Qaeda in Iraq was created in response to the U.S. attack on that country; it did not even exist before we invaded that country. Additionally there are the homegrown groups in England, Spain, and the like, who attack Western targets and who may be even more challenging to defend against than Al Qaeda itself.

Still, there have been no terrorist attacks at home since 9-11. That of course is one of the Bush Administration’s most frequent and strongest arguments. Whenever they make that argument, it brings to mind Tom Ridge’s speech upon stepping down as first head of Homeland Security. He noted that under his watch there had been no terrorist attacks since 9-11, and then knocked on the podium. That night, Jon Stewart played that clip on the Daily Show, and he asked his audience, “Did I just see the Director of Homeland Security for the most powerful nation in the world, knocking on wood?”

Indeed he did. We argue in our book that Tom Ridge may as well have been knocking on wood for all the good that many of these coercive strategies have done in terms of identifying actual terrorists, disrupting actual plots, and bringing actual terrorists to justice. For example, take those 5,000 foreign nationals subjected to preventive detention in the United States in the first two years after 9-11. How many of those 5,000 today stand convicted of a terrorist offense? Zero. Or consider the 8,000 young men that the FBI sought to interview after 9-11, simply because they were recent immigrants from predominantly Arab or Muslim countries. How many of those 8,000 stand convicted of a terrorist offense today? Zero. Then the Administration decided to spread the net wider and called in all the Arab and Muslim
immigrant men, regardless of age, and required them to participate in “Special Registration,” which included fingerprinting, photographing, and interviewing by the INS. 82,000 came in. How many stand convicted of a terrorist offense today? Zero. When these initiatives are put together, they make up what was surely the most extensive campaign of ethnic profiling in the U.S. since World War II. And the government’s record? 0 for 95,000. That does not make us safer. What it does is alienate and create distrust in the very communities with which the government needs to be building trust if there is any hope of identifying actual terrorists should any ever actually come.

You won’t find those statistics on the government’s website for how it is winning the war on terror, www.lifeandliberty.gov. Instead, one sees other statistics. Such as the assertion that the government has indicted over 400 people in “terrorism-related” cases, and has had over 200 convictions in those cases. That sounds impressive. The preventive paradigm appears to be working. Until one examines these cases, and it turns out that the vast majority of them are not terrorism cases at all. They are terrorist-related only because the Justice Department has labeled them as related under some theory that is not evident on the face of cases. Most of the cases do not have any charges of any kind of terrorism whatsoever. The vast majority are for charges such as credit card fraud, check writing fraud, immigration fraud, lying to an FBI agent, or falsely filling out a federal form. The Washington Post examined these convictions and found that only 39 had any terrorism charges in them whatsoever. For our book, we looked at those 39 in more detail and find that virtually all of those cases involve the very broad statute targeting material support for terrorist organizations. This law basically allows the government to get a so-called “terrorism conviction” without proving that the defendant, engaged in any terrorist act, conspired to engage in any terrorist act, aided or abetted any terrorist act, or ever intended to further any kind of terrorism. All the government needs to show is that the defendant did something to benefit some group that has been put on a blacklist by the State Department or by the Treasury Department under an essentially unreviewable listing authority. No showing of a connection to terrorism is required for a conviction. Convictions under such a broad statute do not identify actual terrorists either, absent proof – lacking in most of the government’s cases – that the individual actually posed a threat of engaging in terrorism.

There has been exactly one Islamic terrorist who has been convicted of attempted terrorist activity since 9-11. That is Richard Reid, the “shoe bomber,” who was captured not by virtue of any brilliant preventive paradigm strategy but simply because an alert airline attendant saw this strange looking guy trying to light his shoe. The government has found no Al Qaeda cells. Despite massive infiltration, surveillance, ethnic and religious profiling, and harassment of the Arab and Muslim communities, the government has not yet found a single Al Qaeda cell in the United States. Meanwhile at Guantanamo, there have been 775 people locked up whom the government initially identified as the worst of the worst. We now know that more than 500 have been released suggesting perhaps they were not the worst of the worst. The military’s own tribunals have identified only eight percent of these people as fighters for either Al Qaeda or the Taliban.

I do not want to suggest that we are not safer in any respect. I think that airline security has improved, and substantially increased resources have been put into national security and counterterrorism. That has had to make us somewhat safer. Attacking Al Qaeda’s headquarters and training camps in Afghanistan made us safer,
at least for the short term. Although of course, by diverting our attention to Iraq, Al Qaeda has been allowed to reconstitute itself. For a time, however, those attacks were very significant in terms of responding to and preventing further terrorist acts. If the U.S. closes their training camps and headquarters that will make it more difficult for them to attack. But note, that was not a preventive measure. That was not a preventive war. The war in Afghanistan was a legitimate response in self-defense to an attack. NATO treated it as such, the UN treated it as such, and 120 nations signed on.

By contrast when you look at the war in Iraq, the preventive war, has that made us safer? It has let Al Qaeda reconstitute itself, but worse than that, though we closed the training camps in Afghanistan we created the best possible training ground the terrorists could ever hope for in Iraq. We have had over 3,000 Americans and ten to twenty thirty times as many Iraqi civilians killed in Iraq in the name of our security, fighting against a country that did not attack us and did not threaten to attack us. It has become a magnet for terrorist recruitment and a magnet for terrorist training. Porter Goss, as head of the CIA, testified in Congress that the real danger is that these people will come out of there and be better trained and better armed to attack us in the future. The war in Iraq played right into Al Qaeda’s playbook, not only by distracting us, but because the U.S. did exactly what Al Qaeda said the U.S. would do: attack a predominantly Muslim country that never attacked the U.S.

It is not just the war in Iraq. Each of these preventive measure has compromised our principles by taking the low road rather than the high road. And those compromises redound to our detriment as a security matter because they undermine our legitimacy in fundamental and long-lasting ways. The enterprise of trying to protect ourselves from attack by Al Qaeda is unquestionably legitimate. But if we pursue Al Qaeda through illegitimate means, our entire enterprise loses its legitimacy. By losing that legitimacy, the U.S. loses the ability to get needed cooperation. So India is now less willing to go along with nuclear nonproliferation with the U.S. because its people are so critical of anything the government may do that is seen to be cooperative with the U.S.. That makes us less safe as we go forward. In addition, Al Qaeda and its allies have many more recruits because of the actions that the U.S. has taken. If Al Qaeda had taken all of the best minds on Madison Avenue, locked them up in a room, and said “You cannot come out until you come up with an advertising campaign for us that will get the world to take on the victim here, America, and be sympathetic to us, the perpetrator,” those folks could never have come up with anything half as good as Abu Ghraib. We gave that to them.

III.

Finally, let me just suggest that this was tragically unnecessary. I am not against prevention. I believe in prevention as a general rule. I brush my teeth on a regular basis but I do not believe in random root canals. I do not believe in the use of heavy-duty coercive force based, not on objective evidence of wrongdoing, but on speculative fear, often grounded on prejudice, about what might happen in the future. There are many things that we can do that are preventive within the rule of law that are likely to succeed in terms of making us safer and much less likely to have the kind of negative blowback consequences that we have seen from our own strategies.

One need go no further than the 9-11 Commission itself, which heard from all the nation’s experts on national security and wrote a report detailing how to prevent
the next attack. There were 42 recommendations made and none of these include sending people to Syria to be tortured, conducting secret trials, denying people a fair hearing, creating secret black sites and disappearing suspects into them, and torturing people. Instead, among these 42 recommendations are sensible proposals, such as safeguarding nuclear stockpiles in the former Soviet Union so that terrorists cannot get hold of them, and improving the screening of cargo on passenger planes and of containers coming into shipping ports. Yes, this costs money but it costs a fraction of what is spent in a month in the war in Iraq. This money could result in better information sharing, improved public diplomacy, the use of State Department efforts rather than military intervention, which tends to inspire terrorists to take action against us. There could be support for moderate Muslims around the world instead of presuming they are guilty until proven innocent.

About a year ago, the 9-11 Commission issued a report card on how the Bush administration was doing in fulfilling these 42 sensible recommendations. It was like no report card that a child would want to bring home to parents. The Bush administration received five F’s, twelve D’s, eight C’s, several incompletes, and only one A-. From this we learn two things. First, the 9-11 Commission is not guilty of grade inflation. But more seriously, we see that the Bush administration, while talking tough and acting tough and water boarding suspects, has failed to do the very sensible measures that might actually prevent terror without causing the kind of blowback effects that we have seen.

Let me close with a quote that reflects on the proper understanding of the relationship between national security and the rule of law. The quote comes from a person who has a great deal more experience with this issue than do Americans. This person is Justice Aharon Barak, who until recently was the President of Israel’s Supreme Court, which has presided over more issues involving the conflict between human rights and national security than any other court in the history of mankind. Justice Barak wrote in a decision on the use of coercive interrogation tactics, far less violent than water boarding, declaring them impermissible in interrogating Palestinian terror suspects. He wrote “a democracy must sometimes fight terror with one hand tied behind its back. Even so a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”

That observation I think is the appropriate understanding of the rule of law. It sees the rule of law as an asset, not an obstacle in fighting and preventing terror. It recognizes that the rule of law gives a state all sorts of legitimate responses to the threats that terrorists pose. If we take that high road then we strengthen our spirit and can prevail in the long run. But, thus far, I fear that we have taken the low road, and by doing so, undermined our spirit, undermined our character, and undermined our security.

Thank you very much.
THE PERFECT STORM: ARE WE HEADED FOR A RESURGENCE OF RIGHT-WING DOMESTIC TERRORISM?

Mark James, Director of Missouri Department of Public Safety

Address to the Terrorism & Justice Conference:
The Balance For Civil Liberties Conference
University Of Central Missouri, February 20, 2008

It is very important that we Missourians and students of criminal justice and homeland security issues be aware of what our historical experience has been is in Missouri. To paraphrase the observation of George Santayana, societies that fail to pay attention to their history are doomed to repeat it.

History of Hate In Missouri

› Post- Civil War- Klan became very active

› 1920’s – Klan boasts of “huge” membership through KKK, FoK, and IKA

› 1950’s- American Nazi Party activity

We have had quite a lengthy history of hate, in the state of Missouri, dating back to the post-Civil War era, where the Ku Klux Klan was very active in the state. This continued to grow through the 1920s and even into the 1950s as it transformed into the American Nazi Party.

Below is a picture from 1923, in St. Joseph, Missouri, of a Klan rally. It is telling, how extensive this organization was in 1923 in just this one city in the state of Missouri, with the large number of robed figures. This provides some evidence that it
was not just a couple of guys who got together on a Saturday night somewhere, but this is an indication of the level of membership that once existed in Missouri.

In the 1960s there was a brief stint of left winged extremism coming to fruition. For example there were the Black Panther Party and Students for a Democratic Society. The Weather Underground was notably involved in bombings of ROTC buildings and the burning of the Record Center in St. Louis. These groups were fairly short lived. By and large, however, Missouri is most known for its right-wing extremist activity. In the 1970s, we saw a rise of new right wing groups, tax protesters, and religious extremists. A movement, which has come to be known as the Christian Identity movement, brought with it a very strong anti-government and anti-police sentiment.

I want to examine some of the dynamics that were in play in the 1980s and 1990s, and then take a look at what we are starting to see occurring in this decade and
see if there is any correlation. Considering the economic conditions in the 1980s we had high unemployment and soaring interest rates. Our farmers were facing an unprecedented amount of foreclosures. They had borrowed a lot of money from banks that were federally insured and overextended themselves. We had some bad weather that occurred during that time, along with over-speculation and double-digit inflation, resulting in numerous farm foreclosures. There was a large influx of Japanese investors, because their economy was very robust at that time and they were buying farmland in Missouri. These factors set a receptive stage in Missouri for developing this Christian Identity and right wing extremist mentality.

With the sociological conditions that began to evolve, there developed a very strong Anti-Semitism that the Christian Identity movement translated into a Jewish banking conspiracy, which goes back to the farm foreclosures. These farmers were frustrated. They were losing their homes, their farms, and livelihood. The enemy in their view was the bank that was foreclosing on them. They accepted the conspiracy theory that it was not all those who run the banks but it was just the Jewish banker. Unfortunately the U.S. Marshals service often got the responsibility to conduct the foreclosure sales and to actually evict the people from their farms. Therein lies the dynamics that fed into the anti-federal government perspective.

There were some who really gained advantage from the plight of the farmers and these were the common law practitioners offering common law solutions to these foreclosures. Of course, these common law solutions were not really solutions at all. They were not remedies that could stop the foreclosures. All they did was give the farmers a false sense of hope. For a fee of two or three hundred dollars one could go to one of these common law seminars that would supposedly provide these so-called remedies. All they did was take another two or three hundred dollars from people who could not afford to lose this to start with.

With the political conditions that were in play we were transitioning from President Jimmy Carter. It could have been argued that the country was in quite a malaise. Plagued by the debacle of the handling of the Iranian hostage situation, the country’s overall morale was very low at that point in time.

The conspiracy theories that evolved through the 1980s began to abound as we headed into the Reagan administration. We had the Iran Contra Scandal where arms were traded with Iran in an attempt to ward off the communist gains going on in Nicaragua. There were scandals or conspiracy theories that were quite prevalent involving the CIA or offshoots of the CIA where supposedly CIA airplanes were being used to smuggle arms to Nicaragua to help fight the communists there. In doing so, supposedly drugs were coming back on these planes. All these conspiracy theories were showing up in newspapers, and talk shows and helped to feed this mentality of the Christian Identity and right-winged extremism and to foment this anti-government sentiment.
History of Hate In Missouri cont’d

- 1980’s – Missouri a “hotbed” of extremists groups
  - Dan Gayman’s Church of Israel - Shell City, MO
  - George Gordon School of Common Law – Isabella, MO
  - Christian Patriots Defense League (CPDL) opens paramilitary training camp near Licking, MO
  - The Covenant, Sword, and Arm of the Lord (CSA) builds compound on Arkansas-Missouri border

Missouri really became a hotbed of this activity arising from this sentiment. There was Dan Gayman’s Church of Israel, down in Shell City, Missouri, which is still there, though quiet for years. But in the 1980s, national-level right-wing extremist groups, spent time there, attending seminars and worshipping. Additionally there was George Gordon’s School of Common Law in Isabella, Missouri, who is still in business selling these ineffective common law remedies. Gordon was one of the individuals who built up a clientele in the 1980s selling common law remedies.

The Christian Patriots Defense League (CPDL) was more of a paramilitary organization, and bought a piece of land in Licking, Missouri, where it ran paramilitary training grounds. The state of Missouri ended up enacting a statute, which prohibits paramilitary training, and resulted in putting the CPDL out of business. However, there were people coming from all over the United States who were down there training in arms, maneuvers, and explosives. The Covenant, Sword and the Arm of the Lord (CSA), built a compound on the Arkansas Missouri border.

Common Law

- Evolved from Posse Comitatus
- Issues are all based on their interpretation of Constitution
- Anti-government beliefs
- “Paper terrorism”
- Presence in Missouri (constantly changing)
The Missouri Common Law evolved from some of the basic tenets of the Posse Comitatus. Again much of what they believed and espoused was a very pure and literal interpretation of the Constitution. They have a narrow view of what constitutes legitimate law. Any federal law that was not a direct result of the Constitution, was not an enforceable law in their view. One of the tactics they used was “Paper Terrorism.” They will come and file liens on government officials, police officers, and harass them through filing all kinds of paper in Missouri’s courts. None of which holds up but they put an official, who happens to be one of the people named in their documents, through real difficulties in having to deal with them. They believe that government is illegitimate, with the exception of the county government. They recognized the county government because sheriffs are elected officials. They believe that the sheriff is the only true legitimate law enforcement officer because the position is recognized back to the historical common law courts. In filing false liens and foreclosures, they will issue arrest warrants. Just last year there was an individual who came into the state capitol in Jefferson City and filed an arrest warrant for some of the state legislators. The capitol police had to remove this individual. There is actually a state crime for filing this type of false document, and this fellow is waiting trial in Cole County. As can be seen there are still residuals of this activity today.

The Christian Identity Movement was by far the most dangerous mentality that was faced in the 1980s. It is a religion, but it is a perverse religion. If you look at what they believe: Whites are the Israelites of the Old Testament, Jews are the literal descendants of Satan, Adam and Eve were not the first people but they were the first white people, and all non-whites are the descendants of the pre-Adamic race. In their heyday they literally referred to non-white people as the mud races. They believed firmly that the Armageddon was going to come in the form of a race war. They believed that the race war would come in the 1980s. This gave rise to all their paramilitary training and to groups like the CSA, which literally established a military compound on our southern border.

They wanted to make this country an all white country. They believed that was how the country started and that was what was needed to be achieved. The goal to eliminate all unconstitutional authority was directed at the federal government, particularly federal law enforcement.
Considering all the groups that have gained notoriety, the Klan, the Militias, the Posse Comitatus, and the Common Law group, for any of those groups, the tie that binds is this Christian Identity. One sees that as a constant denominator through any of these groups, whether it is the neo-Nazis or skin-heads. One hears Christian Identity as that bottom line of hate that motivates all of them.

The CSA is the most pertinent group that ever impacted Missouri. It started down on the Arkansas-Missouri border, down in the Bull Shoals Lake area. It grew to as many as 150 members. Families literally moved onto the compound and maintained their residency there. It really did start as a Bible study group, and in the early years the members were very peaceful minded, and most of the neighboring people down there viewed them as very harmless and respectful. As time grew on, their mission began to really change from a Bible worshiping group, which had just returned to the country to have the freedom to practice their religion, to a much more hate-mongering group. Actually with more proactive terroristic type training, they began proactive surveillance missions on a local Missouri trooper. They would run surveillance missions on his house because they began to view him as an enemy because he was a part of the state police organization.
They became associated nationally with some very dangerous groups of people, a primary one being the Order. The Order was a splinter group of the Aryan Nations. The Aryan Nations has a similar compound in Hayden Lake, Idaho, founded by Pastor Richard Butler. The Order became frustrated with the rhetoric of the Aryan Nations, and believed that it was time to go ahead and provoke the Armageddon with the expectation that the white race, which would normally sit on the fence, would jump into the battle. The CSA became associated with the Order as the Order ended up coming to their compound and conducted training there and they supplied each other with firearms and explosives.

In 1984, Richard Snell, who was a splinter member, certainly a frequent visitor of the CSA, shot and killed Arkansas trooper Louis Bryant during a car stop. During 1984, the CSA was visited by James Wickstrom who was a national leader of the Posse Comitatus, again showing just how interrelated these groups were at this time. Then in November 25, 1984, the CSA and the Order united. Shortly thereafter, Robert Mathews, the head of the Order, signed a Declaration of War against the United States. Within that declaration of war they began engaging in armored car heists and bank robberies. They shot and murdered a Denver radio talk show host, Allen Burg, who was Jewish and very vocal and critical on his talk show against this rightwing extremist type activity. They just murdered him in cold blood.

In April 1985, I was a trooper with no rank, but working undercover and had an informant who had engaged in preliminary meetings with the CSA. The CSA had some counterfeit United States currency plates that had come from the Order and feared it might bring in federal involvement. The CSA wanted to get these plates removed. I became involved in negotiations and had a deal set up with them on the compound to try to negotiate the purchase of these plates from them. Unknown to me was the fact that federal indictments had been handed down in the northwest part of the United States on members of the Order and federal authorities had started to put into effect arrest warrants on several members of the Order and ended up in a shoot out in Whidbey Island, Washington, and killed Robert Mathews in the shootout. His house, in which he was hiding, burned down, and his body never recovered. There was a federal army consisting of FBI and ATF agents amassing in Branson, Missouri, anticipating that they were going to have to execute search warrants on the CSA compound. I was unaware of any of this and none of the uniformed troopers knew this was going on.
On April 15, 1985, two Missouri Troopers were holding a spot check on US 65 highway in the Branson area, just to have contact with the public. It ended up in tragedy, because they stopped David Tate a member of the Order, who had a federal arrest warrant for him from Washington State. As Trooper Linegar began to run some radio checks on Tate they got a hit but the radio operator could not relate what the full story was but could tell it involved a federal firearms violation. As Trooper Linegar began to talk to him and get him out of the vehicle, Tate shot him with a machine gun 13 times and killed him instantly. Then he started to shoot at Trooper Heinz who returned fire. Heinz was shot a few times but was able to make Tate stop shooting and run. There was a five- to six-day manhunt ending in the capture of Tate.

**CSA (continued)**

- April 23, 1985 – CSA compound was searched. Police seized machine guns, silencers, 70 rifles, 30 handguns, dozens of hand grenades, C-4, dynamite, LAW rockets, grenade launcher, 60mm mortar, 22 land mines, 30-gallons cyanide, and a tank!
- Jim Ellison sent to prison with several other members

I was actually in Jefferson City, at the highway patrol headquarters when this shootout occurred, it was during the day. I actually was planning to meet with the folks that evening to buy the counterfeit plates. In the siege that occurred, considerable negotiations followed. The members of the CSA did ultimately surrender to federal authority. Jim Ellison was the head of the CSA.

In the 1990s, the right-wing extremist movement greatly subsided. The U.S. became involved with the first Gulf War. The Gulf War brought about a foreign focus for these people. Now the U.S. had a foreign enemy to worry about, so the extremist activity died down for a period of time. In this decade there were many other concerns. These included economic conditions and globalization. There were paranoia concerning the effects of NAFTA, increasing taxes, gas prices, and distrust from farmers because of the economic conditions of the country.

There were changes in sociological conditions, as the Democratic Party took over the Presidency and Congress, and brought a change in political climate. There were more liberal views toward abortion, which seemed to aggravate the right wing extremists and with that came the burning of abortion clinics and Planned Parenthood offices. School prayer issues were a major problem, along with increased acceptance of homosexuality.
Following the Gulf War there were now returning veterans from a real shooting war, with new problems that we had not been seen as a society for quite some time. Few knew what post-traumatic stress disorder was or how to treat it.

Concerning political conditions, the assault rifle ban, in my view was the catalyst that sparked new life into rightwing extremist paranoia and fear. The conspiracy theories begot new conspiracy theories and the New World Order was a phrase that was on all of their lips. It actually started with George Bush Sr., being viewed as bringing in the New World Order. It was believed that there were Russian troops in America. There were reported sightings of Russian armored cars on trains, being moved about in the United States. There were also suspicions of internment camps or plans for internment camps. All of these fears brought about because it was thought the government was taking the country down and had joined the New World Order to spread this secret conspiracy afoot globally.

This gave rise to the militias and a return to the paramilitary training, the wearing of fatigues, and firearms training. There was ambitious recruiting from the ranks of law enforcement and National Guard. Often times they would claim a state as their militia, such as the Montana Militia. Leaders in these types of groups are very caught up in the titles they have, there are no corporals. They are all generals.

In the 1990s there was some extraordinary activity, which included David Koresh, the Branch Davidian Cult, in Waco, Texas, and Randy Weaver in the shootout at Ruby Ridge. One of the most notorious events in the history of our country was Timothy McVeigh and the Oklahoma City bombing. The Phineas Priesthood was a group much like the Order. Ten years later they were involved in many bank robberies, bombings, and violent crimes out in the west. The Kehoe brothers looked to reinvigorate the Aryan Nation hoping to lead its next generation. These people engaged police in a shootout in Ohio, on their way to a big Aryan Nations meeting.

The Midwest Trench Coat Bandits operated out of the Kansas City area into Iowa over the course of several years robbing banks. For a long time law enforcement thought they were just bank robbers, and in it solely for the money. It turned out that they were very active in the rightwing extremist activities.
In the 2000s the focus has been on foreign enemies as a nation. We again are seeing unprecedented home foreclosures, soaring gas prices, foreign oil dependency, and have the potential for an African American President or a woman President. The Democratic Party has the chance to maintain control of Congress. For a rightwing fanatic this poses a huge concern. This poses the possibility of a return to the 1990s where the most stringent gun laws in the history of the country were passed.

Soon, we will be having hundreds of thousands of veterans returning from Iraq and Afghanistan. Depending on who gets in the Whitehouse it may be sooner than later. Depending on who gets in the Whitehouse, homeland security may be downplayed. What is the legacy of these returning troops, what are they going to come back to? Will they be viewed as the heroes and patriots that they are? Or will there be a view that they were occupational forces in a country where we were the aggressors, and so forth? This has potential for some dangerous things to occur.

Obviously, illegal immigration is a huge political issue right now. Depending on what happens with the current legislative initiatives it will have a great effect on the rest of the decade.

"The Perfect Storm"  
Comparing the variables:

- Common economic concerns:
  - Foreclosures
  - Recession
- Common political concerns:
  - Return of Democratic Party/liberal agenda to White House and Congress
- Common sociological concerns:
  - Stem cell research may be the new “abortion threat” to the right wing
  - Abandoned war vets

Examining the economic and political variables of the 1980s and 1990s and comparing them to what is presently happening—recession, home foreclosures and liberal viewpoints taking over Congress—there is room to note that these rightwing extremists will be more likely to take action. Looking at the common sociological concerns, stem cell research may be as volatile as the abortion issue depending on how things happen.

If we make the wrong decisions as a nation to our returning veterans and if they do not get the kind of medical care that they need, and we do not recognize, as a nation, their sacrifice with their service, that could set the stage for some sort of return to a right-wing extremist movement.

According to the Southern Poverty Law Center, that gathers information on right-wing extremist groups, there are 844 active groups in the United States. In Missouri there are many of these groups represented. These groups are still here, they
still meet. They have not done anything criminally violent for some time. They are still actively engaged and still doing things.

I believe it is not if, but when. I think there will be a new resurgence of right wing extremism in the United States and I think it will occur over the next four years. I think that it is going to occur regardless of whether it is the Democrats or Republicans who win the Whitehouse. We are hearing a lot of discontent from the ultra-conservatives with Senator McCain being the political candidate because they think he is too liberal.

I believe there will be a resurgence of right-wing extremism in the United States over the next four years. Although we are monitoring all these known existing groups, I do not think that the next Timothy McVeigh is someone we know. I do not think we have the intelligence to know who the next one is. The point is that these right-wing extremists have been in it for a long time. They have the networks and they communicate, interact nationally and internationally. They are there now to act as advisors for whoever is that next generation of the group.

My admonition is that we do not develop tunnel vision in having our whole national security apparatus be overly focused on how Al Qaeda is going to return here and do us further harm. We may lose track of someone from right in our own midst who will do some terroristic event sooner or later. I think all the dynamics are brewing together to create the perfect storm.
The purpose of this paper is to elaborate on whether the notion of self-defence under International Law has to be redefined and broadened in light of the increasing spread of international terrorist movements. This issue became prominent in the discussion among legal scholars and practitioners in the aftermath of the 9/11 attack and the international response to this attack.

Introduction

At the heart of the international legal order is the state as its main and pre-eminent legal subject. This international legal order has evolved after the Peace of Westphalia in 1648, when only public bodies were recognized as legal subjects. Individuals and private groups, like international companies and non-governmental organizations, have not been conferred with legal personality until recently and even in today’s world both subjects enjoy only a very limited range of international legal personality. Generally speaking, even with new developments in the concept of legal personality, private individuals are still governed by their states in International Law. As a consequence, the international right of self-defence, as it is enshrined in Article 51 of the UN Charter, is only applicable if attacks from other international subjects occur.

International terrorism is a rather new development. Until recently, the aim of terrorist groups was the changing of the existing legal, political, and social regime of a state and was directed internally, i.e. terrorists came from within the state and were home-bred. Hence, terrorist activities had to be regarded as part of the internal affairs of that state. Any state that would harbour such a group of terrorists would obviously violate the principle of non-intervention in the domaine réservé or domestic
jurisdiction of the said state. Moreover, international terrorism is one of the gravest challenges for the international legal order, because it is a threat to the foundations and basic assumptions of the “Westphalian System.” The threat posed by international terrorist groups which are acting independently of a nation state can under the Westphalian System only be mitigated by action directed at the states, which are harbouring them and or providing them with training facilities.

After the attacks on the twin towers and despite the rather established legal system, the US announced a different kind of war against a different enemy and the UN Security Council in the preamble to its Resolution 1368 stated the right of self-defence in response to terrorist attacks for the first time. Similarly NATO invoked Article 5 of its treaty for the first time, which regards an attack on one member as an attack to all members. 

I. Definition of Asymmetric Threats

Contemporary armed conflicts are usually between parties that are diametrically different and can be classified as “asymmetric.” The classic notion of the symmetric war is a war between states, although the differences among states as the legal subjects can be enormous as well. The term “asymmetry” has to be seen in accordance with the subjects of International Law. In asymmetric conflicts nonstate actors are fighting with state actors. For the research subject of this paper, another difficulty is enshrined in the notion “terrorist.” The various proposals of the international community to find a widely accepted definition have not been successful so far, even after the events of 9/11. The problem is usually summarized in the famous phrase: “my freedom fighter is your terrorist.” For the purposes of this paper, a terrorist group will be understood as a group of private individuals that intentionally acts violently against another state.

II. Self-Defence under the UN Charter

Article 51 is the UN Charter’s provision concerning self-defence. It requires that an armed attack occurs. The term “armed attack” is the key notion for the applicability of Article 51 in a given situation. Only if the term is defined in an unambiguous manner is it possible to successfully oppose attempts by States to justify any use of force committed by them as self-defence. There is general agreement that the attack has to be of a certain gravity. As an indicator the General Assembly’s Definition of Aggression can be used, as the International Court of Justice stated in 1974.

---

7 NATO press release 124 (2001): “The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all”.
9 E. g. imagine a military conflict between the US and St. Kitts and Nevis.
10 See www.un.org/terrorism for further information. Also the General Assembly’s “Global Counter-Terrorism Strategy” is not defining the term. Also Quénévet, The World after September 11: Has it really changed?, 16 EJIL (2005), 561 et seq.
11 Simma-Randelzhofer, UN Charter, A Commentary, Art. 51, mn. 15.
its Nicaragua judgment. Concerning the gravity of the measures, it has long been disputed if the means or the effects of a certain act are decisive. For instance, the 9/11 terrorist used carpet knives for the hijacking of the airplanes. A carpet knife cannot be regarded as a military means, but the effects of the hijacking equalled to a military attack. From this point of view it is nowadays widely and rightly argued that the effects of the means used are decisive and not the means themselves. Hence, the 9/11 attacks have to be seen as an armed attack in the meaning of Article 51 UNCh.

A. Aggressor

The rather open issue is the question of the “aggressor.” The wording of the UN Charter does not provide an answer because it leaves the issue open. In a recent judgment, the ICJ adhered to the view that the right of self-defence is conditional on an attack being attributable, either directly or indirectly, to a state. Some judges of the World Court, among them its President, Rosalyn Higgins, criticised this interpretation, pointing out that the word “state” is missing in Article 51. In the light of a systematic analysis of the Charter which also pays regard to its object and purpose, the criticism seems not to be fully conclusive. The object of the Charter is based on international relations of States (Article 2(4)) and shall secure international peace. Only States can become members of the organisation and only States are addressed by its rights and obligations. In a classic self-defence action, the purpose is to repel the aggression that emanated from the state aggressor. Acts of terrorism committed by private groups or organizations cannot as such be regarded as armed attacks within the meaning of Article 51 UNCh. As a result, some affiliation or nexus between the actions of private individuals and a state is necessary.

Yet, notwithstanding the above finding, some private groups of armed terrorists dispose of enormous budgets and pose a severe threat to the peace of some countries. This leads to a dilemma. On the one hand, it cannot be accepted that states must simply endure private attacks, without having the right to defend themselves by using armed forces against the home bases of the terrorist aggressors and their

---

13 ICJ, Military Activities in and Against Nicaragua, Merits (Nic. v. U.S.), judgment of 27 June 1986, ICJ Rep. 1986, p. 14, para. 195. The ICJ stated that Art. 3 paragraph (g) of the Definition of Aggression reflects customary international law. The Court saw “no reason to deny that the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, in its scale and effects, would have been classified as an armed attack […] had it been carried out by regular armed forces.”


16 Art. 2 (4) UN charter reads: “All members (of the United Nations) shall refrain in their international relations from the threat or use of force against the territorial integrity […] of any state […]”

17 Cassese, Terrorism is also disrupting some Crucial Categories of International Law, EJIL 12 (2001), 993, 997.

18 Simma-Randelzhofer, UN-Commentary, 2nd ed. 2002, Art. 51 UNCh, nn. 34.
accomplices. On the other hand, state sovereignty is one of the basic pillars of the international legal order and should not lightly be violated.\footnote{19}

\section*{B. ILC Articles on State Responsibility}

How can the dilemma be solved? First, the rules of attribution of private conduct to states should be used. The rules of attribution are laid down in the International Law Commission (ILC) Articles on State Responsibility.\footnote{20} Some scholars have argued that the rules on attribution in the framework of the law of state responsibility have no bearing on the law of self-defence.\footnote{21}

This is hardly conclusive because it fails to ascertain the legal nature of the rules on state responsibility, which are secondary rules that establish the general requirement for states to be held responsible, and do not address the issue of substantive law.\footnote{22} The ILC Articles, which are largely a codification of pre-existing rules of international customary law, are very restrictive in attributing private conduct to a state. As a general rule, only the acts of organs acting in their official capacity are attributable.\footnote{23} The scope of this rule concerning private conduct has been defined by two important provisions of the ILC Articles 8\footnote{24} and 11.\footnote{25}

The International Court of Justice has been conferred with the question of the adequate standard of state control over the acts of private individuals in a number of cases. The Court established in its Nicaragua judgment of 1986 the concept of “effective control” over individuals.\footnote{26} Later, in the wake of the events during the break-up of the former Yugoslavia, the concept was regarded as too strict by legal scholars.\footnote{27} This ended in the famous re-routing of the concept by the Appeals Chamber of the ICTY in its “Tadic”-decision.\footnote{28} There, the ICTY established the looser concept of “overall control,”\footnote{29} where the attribution of acts of private individuals is much easier than under the effective control test. Yet, the ICJ did not accept the ICTY’s line of reasoning\footnote{30} and still maintains the effective control-test. The Court observes mainly that the concept of “overall control” may be suitable for determining whether an armed conflict was international, but not for the question of

\begin{itemize}
    \item \footnote{19} Ruys/Verhoeven, \textit{Attacks by Private Actors and the Right of Self-Defence}, Journal of Conflict and Security Law, 2005, 289, at 310.
    \item \footnote{22} Ruys/Verhoeven, \textit{supra} note 19, at 300.
    \item \footnote{23} \textit{Id}.
    \item \footnote{24} Art. 8 ILC Articles reads: “The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”
    \item \footnote{25} Art. 11 ILC Articles reads: “Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”
    \item \footnote{26} Nicaragua, \textit{supra} note 13, para. 109-110.
    \item \footnote{28} ICTY, \textit{Prosecutor v. Dusko Tadic}, IT-94-1-A, judgment of 15 July 1999 (Appeals Chamber), para. 115-145.
    \item \footnote{29} \textit{Id} at para. 120-121.
\end{itemize}
state-responsibility (as a matter of general international law, the latter issue was not within the criminal jurisdiction of the ICTY, which extends only over persons). Lastly, and also in its milestone 2007 Genocide judgment, the ICJ held that for the attribution of private acts to a state, private actors must act in complete dependence on the State, of which they are ultimately merely the instrument. The equation of private conduct to state conduct must be exceptional, the proof of a particularly great degree of state control is necessary. Under these limitations, the International Court of Justice accepts the legality and applicability of Articles 8 and 11 of the Rules for the attribution of private conduct to a state according to Article 51 of the UN Charter.

C. Attribution of Private Conduct

According to Article 8 Articles, the conduct of a person or a group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. Art 11 deals with conduct which is not attributable to a State under the preceding articles. Such an act shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own. As can be seen from the wording, both provisions are still relying on the attribution of an act to a state and, as a result, to the basic principle of state sovereignty. In both cases the acts of private individuals have to be adopted by the respective state as its own act.

In light of the recent developments the strict standard of attribution has been criticised. Articles 8 and 11 of the ILC establish an extremely high threshold for the attribution of private acts, which seem as being far too rigid for being a practical tool for a state to protect itself against a private attack, especially in times of international terrorism. The criticism rests on mainly two issues. Firstly, it will be highly unlike that a state would acknowledge an armed private attack and adopt it as its own and thus make itself the object of a counterattack. Secondly, although in some cases the control of a state over the acts of private individuals can be established, in most cases this will be impossible because states are usually more involved in indirect support, which would not pass the threshold.

Also some judges of the International Court of Justice in their separate opinions are criticising the majority’s restrictive approach concerning the attribution of private acts. For their argument, these judges are usually relying on recent developments in international law since 9/11. Judge Simma in his separate opinion in the Congo/Uganda-judgment relies expressly on the Security Council Resolutions 1368 (2001) and 1373 (2001) for proving his point that large-scale attacks by non-state actors can qualify as “armed attacks” within the meaning of Article 51. Judge Kooijmans is additionally stressing that if armed attacks are carried out by irregular

---

31 Id. para. 403-407.  
32 Id. para. 392.  
33 Id. para. 393.  
34 Ruys/Verhoeven, supra note 19, p. 313.  
36 Congo v. Uganda, supra note 13, Separate Opinion Simma, paras. 10-12.  
37 Sep. op. Simma, supra note 35, para. 11.
bands from the territory with almost complete absence of government authority, they are still armed attacks even if they cannot be attributed to the territorial state. 38 In these cases it should be unreasonable, according to the opinion of Judge Kooijmans, to deny the attacked state the right to self-defence merely because there is no attacker state and the Charter does so require. 39

These views are not fully convincing. If the terrorist organization can now be lawfully targeted, it follows that force may be used against the state from which the organization is acting. This violation of the sovereignty of that state is legally justified by its aiding and abetting terrorism and, stemming from this, aiding and abetting international terrorism is equated with an armed attack for the purpose of legitimizing the use of force in self-defence. 40 This is a result which should not be taken lightly. Secondly, the exact range of target states can hardly be determined. For instance, it is assumed that the Al Qaida network sprawls across 60 countries. In such a case, it would not be feasible that all 60 states could be the target of armed action against the terrorists. 41 The proposed de-legitimisation of self-defence, as Kooijmans at least hinting at in his opinion 42 is opening the door to an international order which is not based on the rule of law but on the rule of might and it would inevitably lead to a challenge for the Westphalian system. A conclusion which should – especially in light of the possible devastating results for the world order and the international legal system – not be accepted by the international community. 43 The rules of self-defence shall only be applicable in closely defined circumstances, otherwise the use of force would become even more widespread than today. This proposition is also supported by the history of the right of self-defence, even Nazi-Germany used it as a pretext before it attacked and occupied Poland in 1939. Hence, the better arguments are made in favour of the rather restrictive view of the majority of the ICJ and its narrow construction of the aggressor in terms of state responsibility. Whether the requirements are met in a given case this must be asserted on a case-by-case basis, but usually the harbouring state will not acknowledge the acts of the terrorist organization as its own.

D. Duty to Prevent Significant Harm

In these situations the legal rule of a duty to prevent significant harm to other states comes into play. A state is under a duty to prevent attacks on other countries and to use legal and proportionate means to obtain the necessary information, the so-called due diligence rule. 44 If a state obtained the relevant information on a plotted

40 Cassese, Terrorism is also Disrupting Some crucial Legal Categories of International Law, EJIL, 2001, 993, 997.
41 Cassese, ibid.
42 “[…] and the Charter does so require.”
43 Besides this issue, Kooijmans correctly stresses the issue of the „inherent right of self-defence“ as it is enshrined in customary international law and the possibility of creating a new legal concept for these acts, like state of necessity (proposed by Schachter, The Use of Force against Terrorists in another country, IsraelYbHR 19 [1989], p. 225 ff) or “extra-territorial law enforcement” (proposed by Dinstein, War, Aggression and Self-Defence, 3rd ed., p. 216). Yet, both legal concepts are not part of the corpus of customary international law.
attack or is knowingly harbouring a terrorist cell and fails to act, this amounts to an omission of the respective state to act and is legally regarded as an act. In these circumstances aiding and abetting terrorists is equated with an armed attack.\textsuperscript{45}

Rather problematic is that this rule applies factually only in states which have a working government and can live up to the requirements. The situation is extremely different in failed states, like Somalia, which do not have an effective government or in states which control only a part of their territory, as the Taliban did in Afghanistan.\textsuperscript{46} Strictly speaking, these governments cannot violate the due diligence-rule because of their lack of ability to control the territory. Unfortunately, terrorist groups are mainly using such a kind of country as history shows. International Law as it is today does not provide an answer to this lacunae and it has to be accepted that due to the absence of any kind of effective governmental authority failed states cannot violate the duty to prevent.

\textbf{E. Proportionality and Necessity}

The Charter’s right to self-defence is not unlimited. Self-defence is only permitted until the Security Council has taken the necessary measures. To this end measures taken in self-defence have to be reported to the Security Council. Much more important is the principle of proportionality. Although the Charter does not explicitly recognise it as an applicable principle, it is almost commonly assumed that this is the case because the right of self-defence under customary international law demands the proportionality of the measure taken\textsuperscript{47} and in this regard Article 51 is identical to the customary rule.\textsuperscript{48} Proportionality means that the means and extent of the defence must not be disproportionate to the gravity of the attack; in particular the means employed for the defensive measure have to be strictly necessary for the attack.\textsuperscript{49}

Whether the war on terror has always been exercised in a proportionate manner leaves some room for discussion, but it cannot be resolved here. Some writers have argued that the principle of necessity is a part of the provision as well, yet it is commonly assumed that anticipatory self-defence is permitted, but only under very limited circumstances.\textsuperscript{50}

\textbf{F. Overview}

Article 51 of the UN Charter is aimed at protecting the international peace and envisions that only states can be the aggressor. Acts of private individuals are only relevant if they can be attributed to a state under the strict rules of Articles 8 and 11 of the ILC Rules on State Responsibility. Moreover, states are under a due diligence duty to prevent attacks on other states, thus the acts of private actors or the aiding and

\textsuperscript{45} Also Cassese, Terrorism is also Disrupting Some crucial Legal Categories of International Law, EJIL, 2001, 993, 997.
\textsuperscript{46} The tribal areas in Pakistan would also fall in this category.
\textsuperscript{48} Simma-Randelzhofer, UN-Commentary, 2\textsuperscript{nd} ed. 2002, Art. 51 UNCh, mn. 37.
\textsuperscript{49} Id.
\textsuperscript{50} Lowe, International Law, 2007, p. 275 ff. At this point it is important to take note of the discussion on preventive and pre-emptive self-defence, which is not a part of this essay. For further information, see Niaz Shah, Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism, (2007) 12 J. Conflict & Security L. 95, p. 111-112.
abetting of terrorists can become imputed to the State in such a situation. Finally, the due diligence rule is not applicable for failed states or states which are not controlling their full territory.

III. Inherent Right

Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State.\textsuperscript{51} Until recently, it was assumed that the right as expressed in Article 51 and the inherent right have identical requirements concerning the armed attack, the aggressor, and the proportionality of the measure, as can be seen by the ICJ’s opinion in the Wall Advisory.\textsuperscript{52} The inherent right is part of the corpus of customary international law as it is enshrined in Article 38 (1)(b) of the ICJ Statute. Customary International law is composed of two requirements, an almost coherent\textsuperscript{53} international practice which has to be accepted as law. Among academics after 9/11 the issue arose whether the unwritten, customary law on self-defence is still identical with that expressed in Article 51.\textsuperscript{54} A change of customary law would necessarily mean a breach or modification of the customary law which was in existence at the time of the change. In the post-9/11 context the litmus test is whether the attacks on the territory of Afghanistan could be justified under the customary rule of self-defence. As has been concluded here neither Article 51 nor customary international law cover attacks of non-state actors.

New customary law emerges if a new state practice, which is the result of a changed \textit{opinio juris}, can be inferred from the action of the states.\textsuperscript{55} There was widespread support after 9/11 for the actions of the US and its allies against the Al-Qaeda “havens” in Afghanistan. Some scholars considered this as being a paradigm-shift in customary international law.\textsuperscript{56} Yet, for the acceptance of new customary rules a certain period of time is generally required\textsuperscript{57} and only in exceptional, very limited circumstances the creation of instant customary law has been accepted by the ICJ.\textsuperscript{58} Instant customary law demands an overwhelming \textit{opinio juris} which substitutes for the missing time needed for developing a coherent practice. In the international legal debates this issue is hotly argued. The Security Council resolutions after 9/11 referred to the right of self-defence, but only in their non-operative part.\textsuperscript{59} This has to be seen as a political statement of the Security Council whose legal value is extremely limited. Moreover, there was almost unanimous support for the attack on the Al-Qaeda bases

\begin{itemize}
  \item[\textsuperscript{51}] \textit{Wall Advisory}, supra note 14, para. 139; \textit{Nicaragua}, supra note 13, para. 193.
  \item[\textsuperscript{52}] \textit{Wall Advisory}, supra note 14, para. 139.
  \item[\textsuperscript{53}] See Malanczuk, Akehurst's Modern Introduction To International Law (7th Ed. 1997) p. 45-46.
  \item[\textsuperscript{55}] \textit{D'Amato}, Concept of Custom in International Law (1971), p. 88 purporting that new customary int'l law can be formed rapidly; for a critical analysis of customary int'l law, see also \textit{Kelly}, The Twilight of Customary International Law, (2000) 40 VA. J. Int'l L. 449, 484-97.
  \item[\textsuperscript{58}] That only a short period of time elapsed does not necessarily hinder the creation of custom, ICJ \textit{North Sea Continental Shelf}, (Germany v. Netherlands), ICJ Rep. 1969, p. 3, para. 74
  \item[\textsuperscript{59}] See Security Council Resolutions 1368 (2001) and 1373 (2001)
\end{itemize}
by the international community, which could be regarded as an overwhelming *opinio juris*, and a clear indicator for the changing of the law. Even NATO invoked its Article 5 of the NATO treaty.

On the other hand, the international community has refrained from active support of a new definition of the inherent right of self-defence. Besides the NATO members, the vast majority of states was not issuing statements in favour of the changing notion of the right of self-defence; a rather convincing sign in this respect are the mentioned Security Council resolutions, which referred to the right only in its preambles and did not reiterate the issue in the subsequent numerous resolutions concerning the “war on terror.” The states are very well aware of the “practical outcome” of the paradigm-shift: less security, and more potential conflicts. Hence, such a fundamental shift of the international legal order cannot be proven by single statements of a limited number of governments in the aftermath of a considerable terrorist attack, which shocked large parts of the world.

It is here argued that for the change of fundamental norms of international law, like the prohibition of the use of force and the right to self-defence, a unanimous and strong expression of the *opinio juris* is necessary, which cannot be inferred from the statements made after 9/11. In this regard the inherent right to self-defence has not been altered after the attacks on the twin towers and a new rule of customary law did not emerge. The written and the customary rule of self-defence still have identical legal requirements.

IV. Extra-Territorial Law Enforcement

Due to the stated difficulties under international law to react to terrorist attacks with the use of force, Dinstein created the new legal term “extra-territorial law enforcement.” This has to be examined within the background of the ongoing terrorist attacks on Israeli soil. According to this view, an armed attack is an armed attack even if it is carried by irregular bands from a territory with almost complete absence of governmental authority and cannot be attributed to the territorial state. If the territorial state is either unable or unwilling to prevent repetition of the attack, there is, according to Dinstein, no other way to enforce international law.

Dinstein’s opinion is supported by some judges of the ICJ in their dissenting opinions to the *Congo/Uganda*-case. This legal idea has the advantage that it is not laden with the history and the classic interpretations of the term “self-defence.” Additionally, the described problems for defining “self-defence” in a way that it also addresses attacks by non-state actors make extremely necessary the use of a new term.

---

60 This could be inferred from ICJ, *Congo v. Uganda*, supra note 14, Separate Opinion Kooijmans, para. 28.
61 This right is by some scholars even regarded as being a jus cogens-rule, see Schott, Chapter VII As Exception: Security Council Action And The Regulative Ideal Of Emergency, (2007), 6 Nw. U. J. Int’l Hum. Rts. 24, p. 92.
63 “Just as Utopia is entitled to exercise self-defence against an armed attack by Arcadia, it is equally empowered to defend itself against armed bands or terrorists operating from within Arcadian territory.”; see Dinstein, supra, p. 216.
64 Dinstein, supra note 62, p. 217.
65 Kooijmans, Simma, *supra* note 35, who do not make a clear distinction between the inherent right of self-defence and the notion of extra-territorial law enforcement.
Aside from the political necessity to find a convincing solution for the problem, the notion of extra-territorial law enforcement has to be an accepted legal principle. Public international law knows three sources of law, international treaties, international custom, and general principles of law.\textsuperscript{66} The first and the last sources are not met because there are neither treaties nor general principles of the national legal orders which entail such a right. Thus, only international custom could be applicable. At this point, the same problems emerge as for the re-definition of the inherent right to self-defence. There is, simply put, no consistent widespread practice and acceptance of such a principle, thus the requirements for customary international law explicated in Article 38(1)(b) of the ICJ statute are not met. Even the international response to the Israel–Palestine problem and Israel’s reactions to terrorist attacks is far less than equivocal and the criticism is not limited to the Arab world.

V. Proposal for a New Approach

As has been shown, public international law as it currently stands does not provide a convincing answer to the pressing problem of self-defence against non-state aggressors. In such a dilemma a lenient approach to the attacked state’s response seems to be most apt. The state relying on the use of force has to respect strictly the requirements of the law of self-defence, especially the proportionality of the counter-measure, because it is violating one of the fundamental pillars of the international legal order, the principle of state sovereignty. The attacked state would be required not to hamper the actions and to acquiesce to the military attack.

The proposed legal approach would only be feasible in extreme situations, where the very existence of the victim state of the terrorist attacks is at stake and the used military means do not endanger the existence of the state harbouring the terrorist group. At the heart of such a legal construction is the principle of proportionality, which has to be applied strictly. Otherwise the devastating result for the international legal order and the international community would be unbearable. A right as it is here proposed does have a severe impact on international order and international peace and must be used with extreme caution.

Moreover, in a more positive light, such a right would stress the object and purpose of the resolution adopted at the UN General Assembly’s 2005 World Summit.\textsuperscript{67} In para. 85 the UN Member States expressly “recognize that States must ensure that any measures taken to combat terrorism comply with their obligations under international law.” The following paragraph specifies a corresponding obligation on states by reiterating “the call upon all States to refrain from organizing […] encouraging, providing training for or otherwise supporting terrorist activities and to take appropriate measures to ensure that their territories are not used for such activities.”

VI. Conclusion

The paper has shown that a lacuna appears in the international legal system. Two conflicting rights have to be balanced. A state’s right to self-defence against an armed attack and to protect its own people must be weighed against the legal principle

\textsuperscript{66} See e. g. Jennings/Watts, Oppenheim’s international Law, 9\textsuperscript{th} ed. 1992, vol. 1, p. 24.
\textsuperscript{67} GA Res. A/Res/60/1, 24 October 2005.
of state sovereignty, which is one of the cornerstones of the international legal order. Due to its overriding importance, changes to the existing system should not be accepted lightly and the fulfilment of the requirements of a new customary rule must be strictly assessed. Proof for an emerging rule could not be found, although this has been argued by a number of legal scholars. It is the author’s view in this respect that a certain leniency in applying the law self-defence would do best. In case of terrorist attacks which threaten the existence of a state such a state should be granted the right to exercise use of force against the terrorists, but the rule of proportionality and the rule of evidence, that the terrorist group at stake committed the attacks, has to be applied in an extremely strict sense. Otherwise, the conflict with the principle of state sovereignty would be too great and too intense. It is argued that military force as a matter of last resort and under limited circumstances can also be used against terrorists on the territory of another state. This rule of emergency should be confined to extreme situations and could contribute to the international peace, which is also a cornerstone of the UN Charter.
INTERROGATION USING FUNCTIONAL MRI AND COGNITIVE ENGRAMS

Donald H. Marks*
Cooper Green Mercy Hospital, Birmingham, AL
Wallace-Kettering Neuroscience Institute, Kettering, OH

Based on Address to the Terrorism & Justice Conference:
The Balance For Civil Liberties Conference
University Of Central Missouri, February 18, 2008

Investigators have attempted for centuries to determine the truthfulness and accuracy of statements obtained during interrogation (Ford 2006). Methodologies include standard interrogation, with and without use of medication or coercion, polygraph, and brain fingerprinting using brain evoked response potentials (ERP). None of these technologies have yielded optimal results, for various reasons, and are not entirely suitable for measuring deception. The current state of terrorism and the pressures put upon counter-terrorism agencies for reliable interrogative methodologies have fueled interest in brain imaging for both interrogation and for mining of knowledge.

An association between the ERP and lying on a standard test such as the Guilty Knowledge Test (GKT) suggested that deception may be associated with changes in other measures of brain activity such as regional blood flow (RBF) (Langleben 2002; Mochizuki 2001). Changes in RBF can be measured as Blood Oxygen Level Dependent (BOLD) signals using functional magnetic resonance imaging (fMRI). Such changes have been shown to be measurements of regional brain activity (Ogawa 1990). These areas of brain activation on fMRI have been correlated with active memory encoding (Wegner 1999).

A number of researchers (Slotnick et al., Langlaben et al., Lee et al., Kozel et al.) have sought to apply fMRI to distinguish between truthful and deceptive responses during interrogation. In general, test subjects have been presented with artificial situations during which they were given the opportunity to tell the truth or give a false response to questions, while undergoing fMRI. The design of questioning was different between research groups. These separate research groups were able to detect truthful or deceptive responses, based upon analysis of activation maps showing where in the brain there was increased neural activity, usually in specific areas and not in others. The areas of activation corresponding to truth or deception differed among groups of researchers, making a universal framework for analysis of interrogation with fMRI difficult to develop.

* Direct correspondence to DHMarks@Yahoo.com
© 2008 by author, published here by permission
The Journal of the Institute of Justice & International Studies Vol. 8

Acknowledgements: I am very grateful to St. Vincent’s Hospital in Birmingham, Alabama for the generous use of their 3T MRI imaging time, Cooper Green Mercy Hospital for use of their clinical facilities and IRB, and WKNI for analysis of the functional imaging data.
We have evaluated fMRI to validate prior work of other investigators, and to develop a paradigm to address inter-investigator variability (Marks 2006). Our methods employed activation area analysis, both for truth and deception, combined with analysis of activation map patterns for object recognition. These combination analytical methods have the potential to yield a more robust schema for use of fMRI as an interrogation technique.

In past work (Marks 2007a), we have introduced the concept of the cognitive engrams - the multi-dimensional representation of activation areas in the brain. Our work demonstrating face-specific activation patterns across individuals has subsequently been independently validated and repeated by other groups (Kriegeskorte 2007; Kay 2008). Cognitive engrams symbolically represent specific thought process, and we have grouped truthful and deceptive responses, and also the recognition of specific faces and objects, into cognitive engrams. Certainly when an individual thinks of a truthful or a deceptive response, or recognizes a face or an object, that concept transforms into the more generalized concept of truthfulness or deception, or recognition of a specific person. This overall recognition is not simply fragmented into hundreds of isolated activation points, but should be treated as a whole, as a widely distributed cognitive engram.

In data presented elsewhere (Marks 2006), five normal individuals underwent fMRI. During imaging sessions, the volunteers were interrogated on whether they recognized the two test visual stimuli, and instructed to either tell the truth of to give a false response. All 5 persons did in fact recognize both visual stimuli before undergoing MRI, and their thoughts/intentions at that time were truthful. Activation points were identified for each individual tested, and those activation points present in at least four of five test subjects viewing either test photo were termed consensus points for truth. The coordinates for these fMRI activation areas (Table 1, Marks 2006) for truth and deception were identified for each individual tested, and those activation points present in at least four of five test subjects viewing either test photo were termed consensus points. The coordinates for these fMRI activation areas representing a False/ deceptive response are listed elsewhere (Marks 2006) are graphically displayed. The Truthful response data when viewing photos of both test visual stimuli were combined, and are presented in Figure 1, as 3-D scatter point graphs. Similarly, the False / deceptive response data for both test visual stimuli were combined, and are presented in Figure 2, as 3-D scatter point graphs.

![Combined Stimuli 1 and 2 Truth](image1)

![Combined False/ Deception](image2)

Figure 1.  
Figure 2.

Legend for Figures 1, 2. Activation points that were in common for visual test stimuli #1 and #2 for a truthful response (Fig. 1), or for a false/deceptive response (Fig. 2). Shown are 3-D scatter point graphs.
Discussion

We have previously shown that specific activation patterns occur in the brain of individuals while viewing specific pictures, and while contemplating giving a truthful or a deceptive response during interrogation. The consensus activation points across test subjects viewing specific test stimuli represent symbolically cognitive engrams, which may represent or correlate to the actual concept of visual face test stimulus as a thought. We have found that the cognitive engram pattern for visual recognition is a separate construct from the activation map for questioning on recognition of a visual face stimulus, which involves facial recognition in conjunction with the intention to tell the truth with regards to recognition of that individual. Thus, Figures 1 and 2 may represent the sum of a visual recognition for those visual face test stimuli along with the truthful response to whether they are recognized.

The cognitive engram patterns for visual face test stimuli appear to be distinct and non-overlapping, facilitating the determination of which photo a person was viewing (and thinking about) by examining the activation pattern in their brain via fMRI. This application of functional neuroimaging is a form of mind reading (Haynes 2007). By extrapolation, it could be possible to create a library of visual images and their corresponding cognitive engrams, to allow the interpretation of activation patterns without knowing in advance the stimulus.

The patterns for visual face test stimulus for truth vs. false/deceptive in our own data are unique and non-overlapping, confirming in our model that it is possible to distinguish a truthful from a deceitful response via functional MR imaging. That the activation patterns for different visual face test stimulus are not overlapping probably reflects the different components of a truthful response: visual recognition, emotional overlay, activation of or suppression of areas in the brain involved with a truthful response or a false/deceptive response, the later which may be at least in part the suppression (Wyland 2003) of a truthful response, and the design of the interrogation system itself. These and other factors (language, culture, medication use, disease state, age, etc.) must all be factored into any system which purports to apply fMRI to interrogation. This is especially important when the outcome of an interrogation can have serious consequences to the person undergoing interrogation.

The data (Marks 2006) for both visual face test stimulus #1 and #2 when looking for recognition, combined with imaging activation maps for a truthful response, were not overlapping or similar to that for a deceptive response. Our results support our approach to determining whether an activation map was indicative of a truthful or a deceptive response, by analyzing consensus activation maps.

In this three dimensional connectiveness, cognitive engrams may be in some ways analogous to the Object Form Topography (OFT) described by other researchers (Haxby 2001). However, cognitive engrams differ from OFT in a number of ways, not least of which is that cognitive engrams may be the actual symbolic representation of individual thought concepts (persons, places, things, intents), the concept of truth versus deception, and the recognition of specific faces of well-known men. Each cognitive engram can be assigned a unique identifier detailing the concept represented and the source of the data.

Interrogation for the determination of truth must sort out deceptive or inaccurate responses. Not all individuals attempting to respond truthfully may remember the details they are being questioned about, because of incomplete
remembrance of all details of an event, and the normal deterioration or fading of memory with time. There may also be confusion on what was being remembered or perceived to being remembered, resulting in so-called reality monitoring errors (Johnson 1993; Dodson 1993). Mistaken, or false, remembering also plays a role in the inaccuracies of interrogation (Gonsalves 2004). Functional neuroimaging has shown, not unexpectedly, that words well-remembered as opposed to words later forgotten show greater activity during the act of remembering (encoding) in those areas of the brain associated with active remembering (e.g. left inferior prefrontal cortex) (Reber 2002).

Previously (Marks 2006), I have discussed the design, limitations and differences between my work and that of Langleben, of Kozel, and of others. In the model of Langleben et al, increased activity in the anterior cingulate cortex (ACC), the superior frontal gyrus (SFG), and the left premotor, motor, and anterior parietal cortex was specifically associated with deceptive responses, indicating that cognitive differences between deception and truth have neural correlates detectable by fMRI. These findings were not consistent with our own findings. Although Langlaben et al (2002) found brain regions that were more active during Lie than Truth (his Figure 13), no brain regions were identified as being more active during Truth than Lie. This suggests that truth is the baseline cognitive state, but certainly limits the use of these findings to detecting deception as opposed to verifying the truthfulness of a response. Our own experiments, and those of other researchers, were able to distinguish a truthful from a deceptive response. As expected from Langlenben et al’s modification of the GKT, no activation of regions associated with positive skin conductance response, anxiety, or emotion (orbitofrontal cortex, lingual and fusiform gyrus, cerebellum, insula, and amygdala) were detected (Gur et al., 1987; Chua et al., 1999; Critchley et al., 2000). Further, none of the test subjects reported subjective feelings of anxiety during the GKT. Certainly, neuroimaging research scientists would be reluctant to label someone’s response during interrogation as deceptive (potentially resulting in punishment including death) based solely on activation of the ACC, SFG and other brain areas. It is in fact reasonable to expect that an innocent person who is also anxious, apprehensive, fearful, sleep-deprived and in possession of embarrassing information unrelated and irrelevant to the questioning at hand might also display non-specific activation of ACC, SFG, and other brain areas.

As was the case for the work of Langlaben et al, Kozel et al (2004) did not find their technique capable of detecting a truthful response, only for picking a signal indicating that deception was being employed, and they concluded that at that time, fMRI could not be used for that purpose. In a follow-up study, Kozel et al (2005) again used fMRI, this time in a mock crime paradigm, and the data analyzed with as a model-building group. This yielded a set of activation areas (identified as Kozel 2005 in Table 1 of Marks 2006) that could correctly differentiate a truthful from a deceptive response. This modeled data was then used to correctly identify truth/deception in an independent group of individuals, using the same mock crime paradigm. Interestingly, there are no uniform, consistent major anatomical overlap sets (by Talairach coordinates or Brodmann areas) for brain activation areas associated with truth and deception questioning when comparing the results from Kozel 2004 to Kozel 2005 (Table 1). Nor did there appear to be a common area of consensus activation noted when the data are plotted out in three dimensions (Figure 7,9, 13-15 of Marks 2006). Certainly part of the differences are due to the experimental models, the questions asked, or variations in subjects and in imaging techniques. However, without overlap
or common consensus areas between researchers or even consistently within one research group it would seem that no one set of data identified by any one author can reliably, definitively, or conclusively alone be used to discern truth / deception. This could indicate either that the exact model used for interrogation is crucial, or that there is a problem with internal consistency. Any real life application will require that neuroimaging models are robust enough to work across individuals, questioning techniques and imaging paradigms.

Limitations of Functional MRI for Distinguishing Truth from Deception

The experiments (Kozel; Langleben and others) used to generate data for mock interrogation were prepared from research protocols that were, by their very nature, designed to maximize positive results. Experienced liars, criminals, and individuals taking mind-affecting pharmaceuticals (serotonin reuptake inhibitors, amphetamines, cocaine, etc.) were not included. The experimental models were not tested in real life circumstances, and their application to such conditions is not yet established. As mentioned above, persons undergoing interrogation can reasonably be expected to be anxious, apprehensive, fearful, sleep-deprived. Persons undergoing interrogation with fMRI may be in possession of embarrassing information which is unrelated and irrelevant to the questioning at hand, and these emotional responses might also cause non-specific activation of ACC, SFG and other brain areas. To date, limited investigations of these and other moods and emotions have been studied with fMRI (Marks 2007b) and their effects on interrogation are unknown.

All experiments for which truth / false cognitive engrams were constructed (Kozel, Langleben, Slotnick) used small numbers of normal (drug free, non-criminal) volunteers, involved highly structured and artificial systems, none of the systems were applied to actual criminal investigations, and there unfortunately appeared to be little correlation between the experimental results between research groups. Large numbers of replicate scans under highly controlled circumstances are always needed in fMRI research to accommodate for intersubject and interscan variability (McGonigle 2000).

Analyses of experimental data by Kozel (2004, 2005), Langleben (2005) and others typically use a minimum cutoff size for number of voxels needed to yield a useful cluster. Although removing spurious data, in an environment of much inter-subject variability, this practice also eliminates potential low level data that could indicate finer specificity and details that code memory and intent for a given person. Researchers have reported that very few neurons may need to be activated during recall of specific memories (Fried 1997; Quiroga 2005). We tended to keep for analysis as many of the activation points as possible, even if of low voxel size and not in clusters, if the voxels are consistently activated across individuals.

It would appear from our analysis that a greater likelihood for success to distinguish a truthful from a deceptive response during interrogation in a real life situation will take a multifactoral approach to studying brain activation with fMRI. Specifically, fMRI will need to be combined with determination of the presence of specific concepts (cognitive engrams of persons, places, intentions) materially related to the subject of investigation. A concordance (Marks 2006) between the cognitive engrams for truth / deception with the presence of specific cognitive engrams for the matter of inquiry (person, place, intent) may allow much improved determination of whether a response is truthful or deceptive. Further, at the beginning of each fMRI
run, a set of known truthful and known false/deceptive responses should be run to “calibrate” for each individual which sets of activation points are best.

Analysis of fMRI data for interrogation, as for many functional neuroimaging studies, use the concept of reverse inference or reverse attribution (Poldrack 2006). Specific thoughts are inferred to occur because specific brain activation patterns are observed, based upon the presentation of certain stimuli. The basic concept of reverse attribution of thoughts has undergone a great deal of review and criticism, and is not without significant limitations, as discussed above. Potential legal pitfalls to using neuroimaging data for interrogation have been reviewed by New et al (2008) and others.

fMRI studies use specific stimulation to obtain brain activation. How relevant the stimuli may be to the question at hand is crucial. Use of single concepts is also simplistic, and may give vague, unrelated, misleading or poorly representative data, and may be more harmful than helpful during interrogation.

fMRI imaging studies may have reveal unrelated or unintended data, which once revealed is no longer private. Recent neuroimaging studies have evaluated questions of intents, preferences, basic emotional states, aggressive or violent tendencies, suicidal thought (Marks 2008) and potentially political, commercial or theological concepts. This unrelated data may be extracted during interrogation, and available for correlation to individuals who are innocent. Perhaps large numbers of the population may be (unintentionally) screened in this way, leading to great abuse of the data.

Unsuspected neurologic disease may become evident from the anatomic scans that accompany functional scans to provide landmarks. Illnesses such as aneurysm, AV malformation, tumors, multiple sclerosis, degenerative brain diseases and others may be inadvertently discovered. Imaging centers will need to inform individuals undergoing interrogation of the presence of illness, and potentially be responsible for assuring adequate medical follow-up. Therapeutic medications (Marks 2007b) and illicit drugs have the potential to affect the mind, the outcome on fMRI studies, and for standard interrogation.

Conclusions

Future fMRI work will need to address normal subjects, persons who are skilled at deception (including criminals, terrorists, and persons who are trained at deception), persons on CNS-active medications (both prescription medications and illicit drugs), the effects of language and culture, and a number of other factors. We have begun to modify our experimental designs to take these factors into account, and we expect that fMRI will successfully be applied to interrogation with a high degree of confidence.

References

Dodson CS, Johnson MK. Rate of false source attributions depends on how questions are asked. Am J Psychol. 1993 Winter;106(4):541-57.


Marks DH. MR Imaging of Drug-Induced Suicidal Ideation: poster presentation at the 2008 annual meeting of the American Association of Suicidology, Boston, MA.


COMMUNITY-BASED PEACEBUILDING:
A CASE STUDY FROM NORTHERN IRELAND

Harry Mika*
Central Michigan University (United States)
Queens University Belfast (Northern Ireland)

ABSTRACT
Drawing upon a careful assessment of community efforts to reduce paramilitary punishment violence in Loyalist and Republican working class areas of Northern Ireland, this paper explores the impact of former combatants as agents of the peace process. Conventional terrorist, peacekeeping (DDR), and transitional justice discourses largely discount even the possibility of a competing model of justice ‘from below,’ an orientation that seeks to leverage ‘local’ stakes in reconciliation, regeneration, development and sustainable peace. Findings of a multiyear evaluation of community-based restorative justice innovation are reviewed, involving the active participation and leadership of ex-combatants and the cooperation of paramilitary formations.

People of all cultures have struggled to delimit the precarious borders of what it is to be human. Far from being a fixed category, “humanity” is a shifty concept whose metaphorical hierarchical movement places people somewhere between Gods and Monsters. Terrorism discourse makes frequent use of such dissolution of human/bestial categories. (Zulaika & Douglass, 1996, p. 182)

A scant decade ago, in their mythography of terror, Zulaika and Douglass expressed their deep reservations about the intellectual and moral values of the concept of terrorism. In these intervening years, one suspects that both little has changed, and much has changed, in their view. In the wake of 9/11, the certainty and hegemony of the terrorist discourse (and really, could we live without it, they ask?) has become self-evident and self-sufficient, its role as the medium through which the dialectic between domestic and foreign policies is played out now enjoys the full light of day, the industries of counterterrorism are at full tilt accompanied by lavish accommodation by the academy, and slavish subscription by a culture

---

1 The community projects discussed in this article were supported by The Atlantic Philanthropies (NI) during the period 1999-2005. The Atlantic Philanthropies also provided financial underwriting to the author for the evaluation of these initiatives, and for basic research on ex-combatant roles (2002), and a comparative model of ‘bottom up’ transitional justice (with colleagues Kieran McEvoy and Kirsten McConnachie, 2005-08). Further, The Atlantic Philanthropies provided significant support for two international conferences (2000; 2007), hosted in Belfast, which showcased the implementation and impact of the community-based projects in Republican and Loyalist areas. Central Michigan University provided the author with a Research Professorship (1997) and other strategically timed research leaves, and coupled with a Fulbright New Century Scholar award (2003), these indulgences permitted an intensive and long term engagement with innovative peacebuilding efforts in Northern Ireland. The totality of this support is gratefully acknowledged.

* Direct correspondence to author at mika1h@cmich.edu
© 2008 by author, published here by permission.
The Journal of the Institute of Justice & International Studies Vol. 8
paralyzed by fear, and civil liberties and rights appear to be in full retreat lest they inadvertently shield and even foment apocalyptic possibilities.

Wading into this fray, and proposing strategic roles for ex-combatants (former terrorists) in peacebuilding, is with certainty, awkward. In some quarters, it will be considered reckless, or even disrespectful, perhaps deeply so. But nonetheless, the case for the intellectual and moral value of such peacebuilding roles will be made here. Peacekeeping imperatives that mitigate against these possibilities, and peacebuilding orientations that require them, will be reviewed as the foreground to a case study of ex-combatant roles in community-based restorative justice initiatives in Northern Ireland.

**Peacekeeping Imperatives**

The increasing deployment of multilateral strategies and interventions to manage violent conflict is testimony to some fundamental shifts in both the context and assumptions made about peace in the modern world. For example, multilateralism itself reveals new associations and alliances that could only take place with the thawing of the Cold War environment. Such interventions represent increasingly comprehensive, military-styled campaigns that are better resourced and studied than earlier efforts. They are more comprehensive as well, approaching the peacemaking proposition with a complex, multi-layered set of strategies choreographed as a continuum in the transition to a “rule of law” framework. The consolidation of the peace is increasingly recognized as a long-term project of establishing a security environment and sustainable peace, and involving the coordination of efforts and strategies across a range of international, regional, and local groups with a stake in reconstruction.

The somewhat tortured learning curve that has accompanied multilateral interventions over recent decades has produced some deeper and more sophisticated understandings of the most confounding issues of peacemaking. Weapons (their distribution, trafficking, and properties of ownership and use) and recruitment/conscription of civilian populations into armies, militias, and paramilitary groups represent but two of a host of seeming intractable realities of conflict. The cultures of violence and the technologies to sustain them, obsolescence of the grist of the war machinery (largely its civilian combatants), the needs of victims of violence, and wrecked and unsteady infrastructure all threaten not only the earliest overtures for peace, but continue to plague post-accord peace processes as well.

The seemingly benign invocation of Boutros Boutros-Ghali’s to peacebuilding in the early 1990s has produced, on its heels, two significant peace industries that have taken on a life of their own, a combatant-centric approach referred to as ‘disarmament, demobilization, and reintegration’ (DDR), and a victim-centric approach referred to as transitional justice.

While DDR policies and practices proliferate in response to the challenges of short term, strategic peacekeeping campaigns, it is the primacy of creating the “new” state, democratic and resourced, that is penultimate and prerequisite to all other reconstructive aspirations. While there is evidence that some DDR priorities shift and become more responsive to realities on the ground (increasing reliance on a regional voice, singular and coherent, to promote a relevant vision of peace and coordination of its constitutive strategies and resourcing is now promoted, for example), some DDR policies and practices appear conspicuously entrenched and non-malleable, even
stridently so. Amongst these is demobilization, the *sine qua non* of responses to combatant groups. It is fair to ask, however, if this might overstate the case.

Peacekeeping strategies directed towards ex-combatants largely promote security and safety objectives, including quartering, transporting and resettling ex-combatants, as well as disarming, demobilizing, and policing vice and mercenary activities (or conversely, professionalizing indigenous combatants for policing and security/army roles). The peacekeeping rubric also captures a host of early instrumental and strategic efforts to negotiate cease-fire and peace accords – sure to include amnesty and prisoner release – and various other power brokering exercises with combatant groups and associations in the absence of a functional state.

Peacekeeping also has a more benign humanitarian face, though arguably this approach is just as strategically vital to security and safety objectives involving ex-combatants. Interventions by international relief and other NGOs in pursuit of broad reintegration themes (education, rehabilitation, skills and vocational training, and employment), and special and emerging concerns (reintegration of child soldiers, and disability, health (HIV/AIDS), trauma, and family issues) pertaining to ex-combatants are exemplars of the peacekeeping approach. The point is made and reiterated, from now a variety of quarters, that collectively these peacekeeping efforts directed towards ex-combatants consume so much time and so many resources and drain so much political capital that they are increasingly and publicly decried as excessive relative to other profound needs of peace processes.

Such efforts directed to ex-combatants, no matter how Herculean, lead inevitably to a singular and expected outcome, *demobilization*, absolute and complete. Peacekeeping seeks to obfuscate and ameliorate the combatant role: the ex-combatant should become invisible and indistinguishable, and non-state military formations obsolete, once formal peace and reconciliation processes commence.

**Peacebuilding and Transitional Justice ‘From Below’**

Transitional justice, a second major impulse and framework for advancing Butrous Butrous-Ghali’s call to peace-building, has become a prominent if not dominant peace discourse. Despite its current fashion, transitional justice to date has focused almost exclusively on ‘top-down’ and highly centralized mechanisms, processes, and activities, initiated by national governments, multilateral coalitions, or international agencies/NGOs. There is scant evidence that the needs or capacities of those in local communities shape or significantly affect these largely bureaucratic peace enterprises. Those ‘local’ individuals and groups, at the end of the day, have been most affected by violence. The authenticity of local community structures, and their contributions to peace are seldom acknowledged in transitional justice discourses, where various prescriptions for peace and reconciliation do not appear able to contend with the nuances of conflict and peacebuilding in local areas.

Transitional justice encompasses distinct tendencies towards centralization, including prescriptive policy and practice, highly legalistic approaches to justice, assumptions about the relevant change agents (experts and state agents), and relevant venues for change (the state and bureaucratic structures). Centralization also fits within a broader international state-building agenda (the democratic society), where changes in state institutions are considered an accurate and desirable measure of transitional progress. Surely this prioritizes the political role of transitional justice. It also raises the distinct possibility that those who will dictate the terms and conditions
of peace and development will be those most removed from the direct consequence and experience of the conflict and the direct consequence and experience of the peace.

An alternative approach to peacebuilding suggests that change has to come from below, from within communities, if it is to be authentic, sustainable, and durable. While it is possible that the more familiar arsenal of transitional justice mechanisms such as tribunals or truth commissions or criminal courts can promote change, it is only in their capacity to successfully engage local communities and the needs of individuals living in those communities that peace dividends, such as peaceful coexistence amongst diverse populations, are attainable. Recognition of the ‘local’ is also more responsive to the changing nature of conflict and victimization, where the theater of war has moved from battlefields and front lines to villages, towns, and cities, where the civilian casualty far exceeds professional military casualty. Additionally, local non-state military formations have grown in size, resourcing, and sophistication in many places. It is increasingly accepted that conflict itself emanates from a host of problems – poverty amongst them – which have distinctly local faces and impacts. Interlinked ideas of reconciliation, human rights, and social development all appear to intersect, in profound ways, with the local arena, and the sustainable local peace. In the end, the dilemma of competing frameworks boils down to an empirical issue: which orientation is most likely to build the sustainable peace?

In suggesting that the orientation for building peace must be local (from below), and that the framework for sustainability – its agenda and energy – must have the distinct imprint of those most directly affected by the conflict and peace, a role for former combatants is indicated. Conceiving the ex-combatant role within a community peacebuilding framework, where former combatants are not mere targets or objects of intervention (DDR), but function as agents of societal regeneration, becomes possible. However, political discourse, public sentiment, and multilateral intervention strategists lend precious little credence to any remote possibility of productive and integral roles of active and former non-state military group members in peacebuilding processes. In part, there are normative concerns, where ‘terror’ and its agents are taboo, illegitimate, illegal, unsuitable, and unqualified for peace-related roles. In part, there are more conceptual concerns, where all violence, without regard for its political nature or circumstance, is the same, and where all combatant organizations and formations are the same. In part, there are empirically inspired concerns, such a crime and violence amongst former combatants.

Of special note is the distress amongst individuals and groups who are themselves absolutely integral to finding and sustaining peace. This cannot be casually dismissed. What is to happen with former combatants raises concerns amongst governments in terms of managing fragile political processes and alliances. It raises concerns in the international community where there is fear of regional instability as combatants and/or arms and munitions move through porous national boundaries. It raises concerns amongst victims and victim organizations and their advocates, who are often ignored and neglected in favor of programs and resources and recognition of former combatants. It raises concerns in communities who may struggle with the twin legacies of local atrocities and victimization, and significant combatant recruitment. It raises concerns amongst human rights and justice activists in terms of fundamental issues of accountability and impunity. While the foundations and legitimacy of these and other concerns are not disputed here, the problem of the ex-combatant does not disappear on its own accord, nor can it be punished out of existence. Conflict is far too complicated for simply pointing a finger, and peace – a
lasting and sustainable peace – requires a far more sophisticated and nuanced understanding of what gives rise to conflict in the first instance. But there is little debate that the participation of ex-combatants in a peace process is a very bitter dose for many.

The basic premise of the foregoing that is so difficult for many to consider even plausible and so easy to summarily reject, is the notion that terrorists are transfigured into peace makers. Such a rejection relies upon what is seen as a logical inconsistency, where ex-combatants and their military organizations assume peacebuilding roles. An alternative proposal, however, suggests it is how justice is defined or found in different political contexts over time that varies, far more than the essential character of individuals and organizations. Such a position implies a more consistent outcome, where former combatants and military organizations in transition preserve basic values and commitments to family, area, and cause as they develop newer instrumental community justice roles under dramatically changed circumstances. Seismic changes in the politics and justice context give rise to fundamental re-thinking and the very relevance of the means for addressing those values and commitments. Perhaps the gun is changed for the ballot box, or the difficult conversation. There are, of course, alternative explanations. Some would claim that terrorists become agents of peace due to a personal epiphany, or due to the transformative effects of imprisonment and punishment, or to effect an indemnification for deeds of the past and redemption in the present, and the like. At the end of the day, these are empirical issues that are not explored in this paper.

Of course, former combatants have themselves played an instrumental role in changing the external circumstances to give rise to a societal transition, and many have made significant sacrifices to do so. And they might choose, quite logically and without great fanfare, to participate as agents of that transition. Quite apart from the debate on the logic of a peacebuilding role for ex-combatants, there is the issue of their fundamental attributes (leadership, credibility and legitimacy in local areas, and skill sets) relative to the needs of destabilized and poorly capacitated and resourced communities. This case study of community-based restorative justice initiatives in Northern Ireland describes, in part, 50 former combatants with strategic organizing, administrative, management, training, and mediator roles in these projects. Against all odds and in the face of considerable opposition, these individuals have significantly reduced or eradicated the use of punishment violence in Loyalist and Republican working class areas. They have helped to develop nonviolent responses to local trouble, they have increased local tolerance for young people, they have helped to capacitate areas of low infrastructure, and they have managed the local peace at critical moments and at critical community interfaces. It is a long list of everything that defines community peacebuilding in Northern Ireland and elsewhere.
Community-Based Restorative Justice in Northern Ireland

The community-based initiatives in Loyalist and Republican areas of Northern Ireland that are the grist of this discussion adopted the moniker “restorative justice” only when program planning was well underway. The serendipity of this choice, made independently in each community, suggests it was more of a conceptual contrivance early on (a ‘flavor’ of the month’) than a strategic decision. In the ensuing years, however, basic tenets and values of restorative justice would not only guide the implementation and performance of the projects, but these initiatives would in turn come to define and refine core ideas about restorative justice practice and possibilities in transitional settings.

For the purpose of introducing this concept, restorative justice is both a framework and a vision of a just and peaceful society. Where conflict, crime and anti-social behavior create harms to people and relationships, restorative justice seeks to maximize the involvement of all stakeholders – offenders, victims, families, support networks, community representatives, and justice professionals – in the collective tasks of responding to the needs of victims, holding offenders to account, and creating the conditions in the local community for reducing and preventing future harms. Restorative approaches are strictly voluntary and pursue multiple justice aims and goals, such as victim service and support, restoration and healing, offender accountability, rehabilitation and re-integration, community safety, crime prevention and general community responsibility, community development and regeneration, and welfare and peace. To these ends, restorative justice makes use of facilitative and dialogic techniques, including negotiation, mediation, and counsel. Finally, restorative justice reflects diverse religious and tribal traditions found throughout the world. Its international profile and currency reflects a broad range of applications, from crime and delinquency, to societal transformation and reconciliation. Its models of delivery are varied as well, including church ministries, organic community initiatives, and statutory programs. Strategic partnerships involving state and community are often the most challenging type of restorative justice framework, requiring at a minimum, complementary division of justice labors, a high degree of cooperation, collaboration and respect, adequate resourcing, and shared control and responsibility. The definition of restorative justice has certainly evolved over time and has taken on nuanced meanings and interpretations given the political circumstances at hand. Northern Ireland is not exceptional in this regard.

Overview of Paramilitary Punishment

In the multi-party negotiations that led to the Belfast Accord of 1998, there were frank discussions about the persistence of community violence in areas of Northern Ireland, and the likely corrosive effects such violence might have on the success of a peace deal. One feature of the conflict in Northern Ireland, since the late

---

2 The data and selective text of this and the following section are reproduced from a larger compilation of findings and discussion presented in the public evaluation report, Community-based restorative justice in Northern Ireland, issued by Queens University Belfast in December 2006. There is an additional body of published and forthcoming academic research germane to the Northern Ireland case study contributed by the author, and jointly with Kieran McEvoy and other collaborators, which significantly expands on many of the substantive themes and details only touched upon in this broad survey of the community projects.
had been the use of beatings, shootings, and exclusions by paramilitary organizations as a response to local crime and anti-social behavior. While the concerns at the bargaining table were well-founded (and indeed, official statistics point to some 1,800 paramilitary-styled shootings and assaults between 1998 and 2005, after the Belfast Accord), there was political inertia regarding what should be done to reduce or eliminate such community violence. In the end, there would be no official mobilization or response to punishment violence activities in Loyalist and Republican areas.

Explanations for the persistence of paramilitary punishment violence were varied amongst community stakeholders. Some felt that due to the perceived absence of legitimate policing, communities had no option other than to turn to local paramilitaries to perform policing functions and to administer a punishment tariff to control crime and anti-social behavior. Others tied government tolerance of paramilitary violence to its desire not to upset or complicate the peace process, or exclude groups who had previously pledged to forego violence. Some felt that statutory bodies were indifferent to victims of paramilitary violence, as many lived in working class areas. Still others suggested that paramilitary policing and administration of punishment was nothing more than extending paramilitary control over local areas and communities.

At the end of the day, local Republican and Loyalist communities were left to their own devices, on the one hand victimized by paramilitary punishment violence, and on the other hand, dependent upon paramilitary violence given the perceived lack of non-violent options for responding to crime and anti-social behavior of youth, in particular.

Community-Based Violence Intervention

Against this backdrop, a private philanthropy funded some initial research on local community attitudes and support for alternative responses to crime and violence. In turn, by 1999 four community projects were privately funded (one Loyalist and three Republican) and began engaging local areas in the implementation of alternatives to paramilitary violence. Early efforts, during the initial funding period of 1999-2002, were generalist in nature. While some of the recorded casework unquestionably offered an alternative to punishment (that is, some young people in the new programs would have been beaten, shot, or their families excluded from areas were it not for the successful intervention of the new initiatives), most program activity involved interventions in a broad range of community conflict.

Early evidence gathered from the four flagship programs provided critical information for future programming. For example, it was clear that in any service area, it was a relatively small number of individuals who caused a disproportionately large amount of local crime and anti-social behavior. It was a relatively small number of individuals who received a disproportionately large amount of paramilitary punishments and threats. It was a relatively small number of individuals who were responsible for recruiting even younger individuals to prey upon the most vulnerable members of the community (the very young, and the old). It was also found that the local restorative justice projects had quickly gained credibility in their service areas, resulting in immediate and high levels of case referrals. The reputation of staff (significant numbers of which had past paramilitary affiliations) enhanced program credibility and legitimacy. Such early evidence strongly suggested that careful
targeting of community restorative justice intervention (and relatively small caseloads) would yield unexpectedly high results in the efforts to reduce crime, antisocial behavior, and punishment violence.

A second and final round of private funding (2003-05) involved eight sites, four in Loyalist areas of Belfast, three in Republican areas of Belfast, and a single Republican project for Derry. With respect to alternatives to paramilitary punishment violence and threat, the programs were charged with reducing, if not eliminating, paramilitary punishment, and facilitating where possible the reintegration of individuals who had previously been forcibly removed from areas by local paramilitary groups.

---

Figure 1: Northern Ireland Alternatives Project Model

A model of Loyalist practice is presented in Figure 1 (Northern Ireland Alternatives) and Republican practice is represented in Figure 2 (Community Restorative Justice). While each model shares basic restorative justice values and facilitative methods, it is useful to distinguish between their respective approaches to their casework. For the projects of Northern Ireland Alternatives (NIA), referrals of individuals facing imminent punishment violence were verified through direct dialogue with the paramilitary group, which in this case would be representatives of the Ulster Volunteer Force or the Red Hand Commando. Once an agreement was
reached with the young person and his/her family regarding participation, the punishment threat would be lifted by the paramilitary group, and a project caseworker would begin to closely monitor the young person, and assist them in formulating a client contract. The contract is the centerpiece of NIA’s approach, requiring that the young client propose engagement with the victim(s), affected community, and the self to make amends, and lay a foundation for changes that will minimize future criminal behavior. Over a period of several months, the young person would work to satisfy the terms of the client contract, before being discharged from the program. Relevant inputs from community and statutory institutions (probation, schools, and the like), victims, the client’s family, and resident groups and associations would be the norm.

For the projects of Community Restorative Justice Ireland (CRJI), referrals of individuals at imminent risk of paramilitary punishment resulted in an initial meeting with representatives of the Provisional Irish Republican Army to verify the threat, and subsequent meetings with the victim(s), and the client and family. Cooperation of the client results in the punishment threat being lifted. A facilitated agreement between
the parties to resolve the conflict would be formalized and monitored, and would involve the inputs of victims, the client family and assorted community and statutory organizations who the projects broker to assist the client. Personal development, support programs, and community citizenship are promoted to minimize future offending behavior in the community.

Both NIA and CRJI promulgated and published comprehensive sets of best practice standards to govern their work, ranging from inclusivity, non-violence, confidentiality, child protection, voluntary participation, accountability and transparency, and human rights.

**Profile of Direct Outcomes**

The community-based restorative justice projects were carefully evaluated over a period of eight years, including analysis of 892 cases, and serial interviews with 295 stakeholders (community leaders, representatives of community, voluntary and statutory organizations, volunteer mediators and project workers, members of management committees, local youth workers, clients, victims and program staff). A multi-dimensional evaluator role, extending to technical assistance and support for program design and implementation, public education, and facilitative skills training, also enhanced the ongoing assessment and correctives used to maximize program impact.

Among the limitations and clarifications for the data, there are two particularly critical considerations. The first of these is the observation that the collective workloads of NIA and CRJI dwarf their direct involvement in providing alternatives to paramilitary punishment threat and violence. For example, during the period of 2003-05, Community Restorative Justice Ireland reported that it handled 4849 community cases (not related to punishment activity) through a network of 310 volunteers. During the same period, Northern Ireland Alternatives reported that it had formal contact with 2139 young people and 1719 engagements with victims, supported through a network of 268 community volunteers. Hence the activity related directly to providing alternatives to paramilitary punishment violence was only 4% and 3% respectively of the CRJI and NIA workloads. A second consideration is that for each of the 498 verified cases, where a young person was spared punishment violence through the direct intervention of the community-based restorative justice programs, between 7 and 10 other potential incidents and concerns, with the potential for a paramilitary punishment threat, were quickly resolved, without an incident becoming formalized as a ‘case.’ Hence for the 498 verified cases, between 3486-4980 other issues were resolved informally. Actual recorded and verified cases, then, significantly understates the amount of paramilitary activity that came to the attention of the projects. Arguably, this informal intervention and resolution contributed to the overall reduced levels of violence and threat observed by 2005.

A selective profile of the second phase (2003-05) of the community projects, involving 327 total verified cases from CRJI and NIA, finds that 29% of these cases involved a punishment threat, 24% an exclusion threat, 10% a combined punishment and exclusion threat, and 26% ‘at risk’ of imminent punishment and/or exclusion. About 12% of cases involved requests from previously excluded individuals to return to home communities. More than 60% of all referrals were made to the projects by paramilitary organizations directly, with the remainder coming from the client or their family (18%), and community (15%) and statutory (5%) organizations. Project staff
classified 56% of clients as having an extensive (serious and chronic) offence background, 29% with a more limited offence background, and only 15% with no known offense background. About 35% of all clients had previously come into contact with the statutory justice system, some 25% had previous social services intervention, and half of all clients had contact with neither. Clients had considerable past experience with paramilitary punishment, 59% of whom had received previous warnings/threats, 6% who had been physically punished by paramilitaries, 10% who had been both warned/threatened and punished, and 4% who had been excluded. Clients were overwhelmingly male (82%), and approximately 60% of all clients were ages 14-19.

The interventions by Community Restorative Justice Ireland and Northern Ireland Alternatives blended a number of different activities, including facilitated meetings and negotiations, community program activities (participation in group recreational settings, for example), community therapeutic activities, and brokering client needs to statutory organizations (housing, probation, social services, schools, and the like). Most cases (93%) involved more than one type of activity, more than two-thirds required three activities, and about a third required four activities. Specifically, about one-third of cases involved statutory organizations.

Negotiated resolution of cases often involved apologies and agreements to desist, victim restitution, community service, and agreements to participate in a range of community, therapeutic and personal development programs. About 90% of all cases resulted in fully satisfied client agreements. For cases that involved a referral to outside organizations, fully 86% had the desired outcome. By case close, most cases (87%) required no modification: fewer than 6% of closed cases had to be re-opened due to additional difficulties. Most cases were closed/resolved within six months (69%), with 20% lasting up to 1 year, and 11% exceeding 1 year. Follow-up monitoring at 6 months after case close reveals that for 73% of the cases there had been no additional problems, for 13% there was a record of some difficulties but insufficient to re-open those cases, 2% of cases re-opened with significant problems, and for the remaining 12% follow-up was not possible (mainly, clients had moved out of an area). At 12 months, 75% of cases had experienced no additional problems, for 9% there was some record of difficulties but not sufficient to re-open the case, 1% of cases were re-opened with significant difficulties, and for the remaining 15% no follow-up was possible.

The metrics involved in gauging the impact of these case interventions are complicated principally because while a number of paramilitary groups practice punishment violence, only three groups (two Loyalist and one Republican) were directly involved with the community-based projects. Official data on punishment related activity, however, cannot discriminate among paramilitary group responsibility. That being said, it is estimated that over the entire period of 2003-05, CRJI projects stopped some 82% of potential paramilitary punishments in its service catchments, while NIA stopped 71%. By 2005, both initiatives were preventing over 90% of potential punishments, unquestionably a significant drop in the beatings and shooting that continued even in contiguous areas beyond the reach of the community projects, where other paramilitary groups stayed active in local policing and punishment. Upon further analysis and inquiry, with paramilitary groups and local police, it seems very likely that punishment activity in the four service catchments of CRJI projects, directly attributable to the Provisional Irish Republican Army, had dropped to zero at some point in early 2005. Similarly, punishment violence directly
attributable to the Ulster Volunteer Force and Red Hand Commando fell to zero in three of four service catchments of the four NIA projects by late 2005. In addition, the data reveal that 71 exclusions were prevented, and 46 re-integrations were accomplished during the 2003-05 period.

Profile of Indirect Impacts

The total of 498 individuals from 1999-2005, mostly young people, spared from certain punishment violence, stands on its own as a significant accomplishment. The additional observation that punishment activities had all but ended for select paramilitary groups in the service areas of the community-based restorative justice projects only gilds this prize. But it is only a portion of the impact of the community initiatives. A summary overview of serial interviews conducted with many key stakeholders from 1999-2005 helps to round out this discussion.

Community and local political leaders provided perhaps the widest lens in assessing the impact of the community-based restorative justice projects within their jurisdictions. They acknowledged the importance of the non-violent option that the projects had helped to advocate and fashion. They noted the importance of direct community involvement and responsibility for local problems. Decreasing the role of paramilitary punishment and intolerance for youth, and providing a serious intervention for youth crime and anti-social behavior were vital developments, in their view. But the community-based projects were also involved in broader community efforts to develop local infrastructure and ‘build’ community. Their participation and leadership in various community campaigns (ranging from ecological efforts to youth drinking) was noted. They were quick to enter into partnerships and collaborations to amplify their impact in addressing a host of community problems, including local feuds, group conflict, and ethnic discrimination. The community-based projects had become, in a very short time, essential community assets.

Community and voluntary organizations, including youth workers, were anxious to highlight their experiences of working with the community-based restorative justice projects. Their perspectives, generally, were very much influenced by the contexts within which they worked, namely significant community needs, poor community resourcing and limited infrastructure, and the reluctance of some statutory organizations (due to lack of capacity or preference) to engage with working class areas. These community and voluntary organizations had come to know the restorative justice projects intimately, and their assessment was uniform. The community projects were competent, predictable, and trusted, they followed high standards of practice, made appropriate referrals to other organizations, and asked for assistance and support for their own casework as needed. The local restorative justice projects also helped to build local capacity, through both their extensive training in local areas generally, and within community organizations specifically. There was no concern regarding service overlap or duplication in these local areas, but rather, certainty that the restorative justice projects filled a significant void and addressed critical community needs.

Victims emphasized respect and fairness as they described their varied experiences with the community-based restorative justice projects. Project staff, they pointed out, were patient, listened carefully, were persistent, and offered comfort and safety to victims. Some projects formed victim support groups, formalized befriending services (peer support), and assisted victims with a variety of safety and
crime prevention concerns. Many victims welcomed the opportunity to engage directly with the resolution of their problems, some meeting with offenders, while others stayed in close contact with staff who were working with an errant young person.

Offenders conceded that expectations were high amongst program staff. ‘Accountability’ was difficult, and the direct involvement of their families was often itself a source of significant pressure and shame. But offenders agreed that staff made the critical difference because the offenders were listened to, were taken seriously, and were respected. Indeed, there is impressive anecdotal evidence that some offenders, even the most troubled of offenders, formed significant relationships with program staff that persisted well beyond the period of time they were formally engaged with a restorative justice project.

The program staff and volunteers, including members of local management committees (boards of directors), spoke to the sense of urgency for their work, and their frustration. Their experiences had not been what they might have initially envisioned. For example, there was significant and festering conflict in their communities. Local resident demanded instant and often violent interventions. Local intolerance, particularly for youth, was rampant. Any particular case would always prove to be more complicated and complex than its presenting details. These considerable challenges paled in comparison to the pride staff and volunteers reported from their work and the contributions they were attempting in local communities. Many saw their involvements with community-based restorative justice as part of a larger and longer project of developing their local areas.

The most complex relationships of the local projects involved statutory workers and organizations, and through the period of the evaluation, these became two distinct conversations. Statutory workers on the ground, who routinely engaged with the community-based restorative justice projects, compared to those statutory workers in senior administrative positions, often had profoundly different perceptions and approaches to the local projects. Statutory workers on the ground routinely highlighted the attributes of the local projects with respect to justice intervention. They were very pragmatic in doing so, emphasizing in their assessments what eased or enhanced their own efforts in the local community. They comment frequently about how impressed they were with the organizational skills of NIA and CRJI, and their standards of practice. They acknowledged as well the impressive levels of local consultation and ownership each group enjoyed in their respective communities. They looked forward to even higher levels of partnership and collaboration in the future, and were never short of ideas for promoting a closer working relationship. Such views contrasted sharply with the perceptions and positions of senior officials within statutory organisations. Usually quite reserved in their direct judgment of the community-based initiatives, these officials had to contend with objections in the political realm related to ongoing debates on policing reform, and the prospects of government support for the community-based projects. Where statutory workers on the ground aspired to closer working relationships with the community-based projects, senior administrators issued pointed directives that impeded and discouraged such developments. Senior statutory officials cautioned that it was representatives of political parties and government civil servants who orchestrated the resistance to working relationships between community groups in working class Republican and Loyalist areas, and formal criminal justice structures.
A special consultation was held with key representatives of political parties, and executives of statutory organizations and prominent NGOs regarding the community-based restorative justice projects of NIA and CRJI. The principal concerns (early 2005) revolved around the (lack of) progress on resolving the policing issue in the Republican community, and the eventual working guidelines that might formalize the relationship of the community-based initiatives and statutory criminal justice structures. However, relative consensus existed around four propositions. First, there had been no formal police or government responses to the challenges of paramilitary punishment violence and exclusion in local areas, despite acknowledgement by the parties to the Belfast Accord that such violence might negatively affect the peace process. Second, the development of the community-based restorative justice projects, including the private philanthropic initiative to resource them, represented an ambitious and risky intervention that took place in a political vacuum. Third, paramilitary punishment violence appeared to have abated in areas where the community projects existed. Fourth, considerable thought had been given at all levels to the necessity of working partnerships between statutory organizations, governments, and community-led initiatives to reduce crime, violence and anti-social behavior. Such partnerships must include resources for community efforts.

Finally, across the entire range of interviewees, an agenda of critical concerns took shape. Interviewees were concerned that both NIA and CRJI were victims of their own successes, often overwhelmed with the work expected of them in their local areas. Perhaps they had become too dependent on volunteers, and may be in need of more professional and paid staff. Additional rapport with local community groups, including more collaborations and partnerships, would be desirable. The community mindset, it was emphasized, is fickle, and efforts to demonstrate effective options to violence must be continually renewed, refreshed, and ongoing. NIA and CRJI would need to maintain a high visibility in the community. There were concerns that there had been a long standing statutory policing vacuum in Loyalist and Republican areas that was changing very slowly. With historic changes to paramilitary groups (specifically, the eventual demobilizations of the three groups germane to the community-based restorative justice projects) a community policing vacuum existed as well. While reductions in paramilitary influence was universally viewed as a positive development, there were now concerns that community-based restorative justice groups, embroiled in political controversy and facing an uncertain (financial) future, would be unable to sustain their work in local areas. Significant limitations in the futures of NIA and CRJI were thought to be their paramilitary links, perceptions of the roles of ex-combatants and ex-prisoners, continued political criticism of community-based justice intervention, inadequate levels of program staffing and resourcing, and expansive (and expending) service areas. Persistent unmet community needs remain, within the remit of NIA and CRJI, particularly additional programming for victims of crime and anti-social behavior, 24 hour crisis management of conflict, and more prevention and aftercare work with offenders and youth at risk.
Strategic Conclusions

The record of performance of the NIA and CRJI initiatives in community-based restorative justice compares favorably with restorative justice-styled programming in any other venue, and the sheer quantity, scope and severity of cases appear well beyond the norm. It is critical to note that the bulk of restorative justice practice in Northern Ireland takes place in working class communities, much of it linked historically to informal justice traditions. It is in these communities that one finds a very significant repository of indigenous expertise in restorative justice in Northern Ireland, not necessarily amongst justice professionals who might occupy marginal roles in an area, but amongst diverse community volunteers who reside there, and who often have the most to gain or lose with the availability of non-violent options. Models of program development, implementation, and legitimacy, and indeed even emergent ideas about restorative justice in transitional settings generally, exhibit the distinct imprint of their gestation and elaboration amongst the community initiatives in Northern Ireland. These local projects have set the bar very high, certainly expanding a notion of restorative justice as largely affective processes and outcomes related to harm and accountability between two or a few individuals, to more comprehensive considerations of community peacebuilding, community justice, and community regeneration.

A host of characteristics are shared by the community-based projects in Loyalist and Republican areas that surely affect program performance. These initiatives operate in areas and housing estates that amongst the most deprived, not only in Northern Ireland, but in Europe as a whole. Local resources and infrastructure often cannot respond to the needs of program clients that directly affect their offending behavior, and perhaps least of all, to the needs of victims. The projects share difficulties in sustaining an active core of community volunteers to perform difficult and draining work. High levels of referral and case activity, low funding levels and uncertainties about program survival, a persistent local appetite for violence, and unreasonably high levels of local expectation for program involvement and success are but a handful of the types of issues that are likely to haunt the performance and promise of the community-based projects for some time to come.

There exists a relative consensus amongst all stakeholders that what is desperately needed in all working class areas of Northern Ireland is cooperation and collaboration between government, statutory organizations, and properly resourced community counterparts. That, of course, will take time, particularly in a highly politicized transitional environment where ideas about justice, and ideas about community, are hotly contested. Other factors will continue to confound progress as well. Crime and anti-social behavior rates are high and continue to spike in some areas. Assistance and aid to victims is very limited, as are supports and pathways for offenders to become productive members of their communities. Quick and rough justice remains the preference of some, and remaining paramilitary groups and individuals from demobilized paramilitary groups will continue to be pressured to remain engaged in such work on the local level. There is evidence in some areas of vigilantism, and a growing fear in others of a return to a ‘hard man’ culture, where individuals act with impunity, often in the name of the community and increasingly with little regard from any potential paramilitary interference.

A particular challenge has been forging the formal relationship between community-based restorative justice projects and criminal justice agencies through a
set of agreed protocols. This somewhat tortured ‘process’ had been ongoing since early discussions in 2000, resulting in a formal public consultation in 2005. Inspections and accreditations followed, and by 2008 public funds via grants from statutory organizations were reaching the community-based groups under the umbrellas of CRJI and NIA. The agreed protocols are a complex architecture that appears more responsive to a particular political climate than to the pragmatic needs of communities, or community-based projects, or statutory justice professions seeking to partner and assist communities in finding justice. Noting again the broad consensus in Northern Ireland about the efficacy of collaborating, while the terms and conditions of collaboration are contested, there is fundamental agreement in theory that there are suitable roles for statutory and community based justice, and that working class areas are in need of both. The acid test is likely to be the outcome of the engagement over the longer term, whether one type of justice simply morphs into the other, producing in the end a justice that is less than palatable to community and state. What is likely to engender respect and credibility the most is where the integrity of various types of justice responses are preserved during the course of collaboration, where core values derived from the community-based approaches and those derived from statutory-based approaches are safeguarded, and the values common to both become a catalyst for serving local areas.

Under difficult circumstances, the community-based restorative justice initiatives attempt to make headway, by building and strengthening local institutions, encouraging the local exercise of human rights, providing community safety, confronting the legacies of violence, and encouraging civic participation. On many fronts, these are significant contributions to the ongoing peace process and community peacebuilding in Northern Ireland, by engaging ex-combatants in peaceful community activism, creating non-violent options for responding to conflict and crime in local areas, and for reducing community violence. The community-based initiatives have influenced paramilitary groups and have contributed to the personal transformation of former combatants, and there is convincing evidence that the development of these projects paralleled significant changes in paramilitary practices within service catchments. For example, paramilitary groups who were involved with the community initiatives appeared to rely less on violence and threat over time, and even rival and dissident paramilitary groups increased their levels of cooperation with local projects over time to limit violence, threat, and exclusion.

In hindsight, what the community-based restorative justice projects did not become is worthy of reflection. Despite dire early warnings, there is no credible evidence that the projects ever became a ‘cover’ for paramilitary violence and paramilitary control of communities. Evidence does exist that the projects had a role in dismantling the paramilitary justice prerogative in service areas. There is no credible evidence that the community-based projects became an ‘alternative justice system.’ Instead, there is a long record of NIA and CRJI engaging in dialogue and negotiations of the terms and conditions of collaboration with statutory justice organizations. There is no credible evidence that the community-based projects take advantage of helpless, frightened, and cowering communities. It is clear from the evidence that a repository of bloodlust existed in local communities, but that over time, those communities increasingly turned to NIA and CRJI for assistance, and away from paramilitary groups. It appears that the right people – among them, ex-combatants and ex-prisoners – were involved in the community initiatives, serving in the front line against violence in their own communities. The criticisms leveled
against them have been slanderous and happily unencumbered by evidence. Perhaps most significantly, the work of Community Restorative Justice Ireland and Northern Ireland Alternatives directly influenced demobilization of the Provisional Irish Republican Army (2005) and the Ulster Volunteer Force and Red Hand Commando (2007). In both cases, the armed groups identified the presence of these nonviolent community-based restorative justice initiatives as pivotal in efforts to promote and implement needed organizational transition and change.

There is one final issue of context and meaning. These small, non-profit community organizations received what can only be described as an inordinate amount of attention, requiring a significant expenditure of political capital during the first decade of the Belfast Accord. They were topics and targets of Criminal Justice Review, the Justice Oversight Commissioner, the Independent Monitoring Commission, two rounds of consultations on protocols, the Northern Ireland Affairs Committee, extensive media coverage and generalized hysteria – it all begs for an explanation. One possibility is that this unprecedented attention symbolizes something larger than a fear of some aberrant form of restorative justice, or the paramilitary links, or even the prominent role of former combatants and ex-prisoners. Perhaps, in the end, it is a fear of the community role in the justice equation. In a transitional period, as both the state and communities attempt to regenerate themselves, justice seems a likely candidate for debate. It is arguably a fundamental democratic right to choose appropriate responses to conflict, between statutory services, and/or community services. It is arguably contrary to democratic principles for the state, or a church, or a voluntary organization, or a community-based organization to hold a monopoly over how conflict is addressed in the community. Communities have themselves responsibilities to deal with the difficult issues of conflict in their midst, and when they abdicate those responsibilities for too long, their capacities and abilities decline, and with it, civic responsibility declines as well. Taking on and taking back the responsibilities of democratic citizenship means, in part, expanding viable options for community involvement and responses.

The community is contested, in Northern Ireland and elsewhere. In transitional settings, where community-led peacebuilding may well outflank state and multilateral efforts (despite its relative obscurity), a grand opportunity presents itself. Credible community-based organizations may have an opportunity to serve as key brokers for statutory organizations intent upon enriching their community resumes and discharging statutory obligations to local areas. That remains a very seductive possibility in Northern Ireland.

References


IMPACT OF THE WAR ON TERROR 
ON HUMAN RIGHTS TERRORISM AND JUSTICE

Jumana Musa
Rights Working Group

Address to the Terrorism & Justice Conference: 
The Balance For Civil Liberties Conference 
University Of Central Missouri, February 18, 2008

I find the title of this conference—Terrorism and Justice, the Balance for Civil Liberties—to be interesting, because it speaks to what I want to speak, which is the idea that there necessarily has to be a balance. I work for a human rights organization and from our perspective, obviously there is no balancing involved. Human rights are human rights, and they exist for whatever situation is confronted. It is not a matter of what must be traded off to get security. Our position is that security is actually achieved through respecting human rights and the rule of law.

The terms of United States counter-terrorism policy should be examined in the use of the label, the so-called “War on Terror.” This war is much broader than any “war,” any formal armed conflict, as it was understood in the past. It is more of a policy statement like the “War on Drugs” except that it does in fact attempt to invoke laws of war. These counter-terrorism policies have affected the rights of vulnerable populations, such as refugees and asylum seekers. They have also transformed the very nature of the idea of what constitutes human rights. They once were restrictions on nation-states, in terms of how states could or could not treat people, whether they were civilians or criminals. The concept of human rights under these policies has been transformed to something more akin to special privileges that people should be accorded if they behave properly.

The basis for the idea that it is a war on terror and the effort to invoke a law of war framework is not because the U.S. has been bound by or is excited about applying all the laws of war. But the war on terror label has been a tool to expand executive power and to actually circumvent the laws of war and human rights law in a number of ways. The U.S. takes the position that when the laws of war apply, human rights law does not apply. International law does not recognize it that way; these bodies of law are very complementary. Certainly, there are some areas when in an armed conflict the laws of war will supersede human rights law. The laws of war provide the rules for who is allowed to be killed and who is not allowed to be killed. But, just because it is a wartime situation, this does not mean human rights disappear. But, the way U.S. counter-terrorism policy has evolved has led to a substitution of a loosely constituted law of war framework to replace the rules from the human rights framework.
One of the first things that we have heard in the context of this war on terror is that a new thinking for a new type of war was needed. The terrorist threat was something different than anyone had ever encountered before. Anyone who has studied world history knows that the U.S. is by far not the first country to encounter terrorism or international terrorism. A lot of countries have dealt with domestic terrorism. When people speak to the issues of the U.K. cases, the Israeli cases, and other countries, democracies, and western countries, there are countries that have actually dealt with terrorism before. Though the U.S. is not unique to efforts at counter-terrorism measures, we are especially taken with the idea that we need to use new thinking and new tactics to confront this new threat that we believe nobody had ever before encountered. The irony for us at Amnesty International is that all of this new thinking hit upon the issues that we have worked on since our inception. This new thinking has involved the use of torture, although it is called something else. It has involved indefinite arbitrary detention. It has involved disappearances. It has involved unfair trials. Throughout its history, these are the tools Amnesty International has seen people justify for use in fighting terrorism and domestic insurgencies. The label of a new thinking for a new war does not really hold when the policies are seen for what they are.

I want to examine the impact of some of these policies on human rights and on global communities. First I want to discuss the policy of what is called “extraordinary renditions.” From our perspective, a rendition is an extralegal transfer of a person from the custody of state A into the custody of state B, resulting in a risk to human rights. They are at risk of torture and other human rights abuses. As a general policy, Amnesty International opposes all informal transfers because it basically eliminates the ability of people to make a claim of fear of torture or fear of persecution when being transferred to another country. The fear is particularly heightened in these cases where the rendition or transfer is set to send someone to the custody of another country where they will be held for questioning and most likely tortured.

Now, the justification for this as we have heard from the U.S. has been on two major bases, both of which we find insufficient. One is that Article 3 of the Convention Against Torture, which prohibits the transfer of any person into the custody of another country where they face a substantial risk of torture, does not apply extraterritorially. That is if the person were held outside the territory of the U.S. and even if transferred by the U.S., Article 3 by its terms would not apply. However, the U.S. has said that it will apply Article 3 as a matter of policy. We at Amnesty International are not particularly comforted by the fact that the U.S. says that though it is not obligated it will apply it as a matter of policy because we have also been told that people would be treated humanely as a matter of policy and we have seen what that means with this administration. It has meant the photos from Abu-Graib, it has meant water boarding, it has meant a lot of severe forms of torture that were redefined as humane. Further, the international community does not recognize Article 3 of the Convention Against Torture, which the U.S. has signed and ratified, as only sort of a within-the-territorial jurisdiction prohibition. It is a prohibition on anybody who is in the country’s exclusive custody or control. The idea that a government can hold somebody, not in its own territory, and thereby have complete control over what happens to them, including transferring them to a country where they may be tortured or summarily executed, does not hold in terms of international law.
The second basis that the U.S. uses, to justify these transfers, is the idea of a diplomatic assurance. A diplomatic assurance is not something that is based in the Treaty of the Convention Against Torture. It is not something that is statutorily based in U.S. law. It is in fact regulatory. Which is, once a treaty is in place, the regulation is promulgated to enable the request of diplomatic assurance that a person returned to a country will not be tortured. This justification falls apart for two reasons. First, if the U.S. is asking a country to not torture a person, there is probably already a fear of torture or otherwise no one would be asking. The second reason is, that there are no sufficient safeguards and, in the context of the War on Terror framework of these extraordinary renditions, these are extremely informal verbal promises, sometimes intelligence community to intelligence community making an off-the-cuff promise. On this basis the U.S. will ship someone off to Syria or Egypt or countries that the U.S. and its own State Department Country Reports says every year are torturing people.

The idea that these individuals are very dangerous people has grown beyond the context of extraordinary rendition, and this justifies harsh treatment of the kind inflicted by television’s Jack Bauer is now seen in the context of refugee and asylum seekers legitimately coming to the U.S. or other countries. These people are coming because they face the fear of persecution in their home country based on the grounds described in the Refugee Convention or they have a legitimate fear of torture if returned. In many cases, they are put under the label of people trying to sneak into the country to commit terrorist acts. Everybody has become suspect to some extent. So the legitimate refugee or asylum seeker, who is apprehended crossing the border, may be placed in a detention center. Here a person has escaped from one trauma only to be placed into another trauma.

This mentality of the fear of very dangerous people also has manifested itself in the removal of individual protection though generalized memoranda of understanding. The protection found in the Convention Against Torture is an individual protection. Thus, this can be satisfied by a generalized assurance that torture is unlikely. It is an individual issue, where that individual is supposed to be able to make a claim for the protection framed in terms of the individual’s specific circumstances. Thus, the individual should be able to base the fear of torture due to membership in a particular group or a particular religion, or due to involvement in labor organizing, for example. However, the memoranda of understanding used to satisfy the requirement of diplomatic assurances are just a general understanding, with which the UK and other countries have made with countries like Jordan or Libya, or Algeria, that create only general agreements, that if people are sent to these countries they will not be tortured. This does not rise to the level of meeting obligations to protect human rights. The basis of the justifications for these extralegal transfers is that these are very bad people and special rights should not be given to these very bad people. However, international law does not recognize the difference between very good people and very bad people on the prohibition on torture. Torture of anyone is not permitted regardless of what they are accused of doing. What we have seen is this sort of cancerous spread in terms of how terrorism suspects get treated, to how refugees and asylum seekers get treated.

The U.S. has taken this law of war framework said it exists everywhere. The traditional view is that armed conflict exists between two nations. There can be a non-international armed conflict, but that is generally at least geographically located. The U.S. has taken the position that this war on terror exists every place on earth, all
As long as somebody may somehow be, however tenuously affiliated with or supporting someone affiliated with Al-Qaeda, or a group like them, they will be subject to a special body of law that applies to special circumstances. This body of law essentially applies to everybody, everywhere, in the place of human rights law. This view leads to the position where not only can the government engage in extraordinary renditions, but also in disappearances and enforced disappearances. An enforced disappearance means that the person is killed. I once was told by the State Department that the U.S. does not engage in disappearances, since the U.S. is not murdering people. Disappearances occur where individuals who are taken into custody and nobody knows where they are. They do not have access to lawyers, to independent monitoring bodies, to their family, to any form of communication. They are essentially disappeared. Obviously the country who has them in custody knows where they are, but nobody else.

Disappearances are illegal under international law. There is not any equivocation for this. In fact, the Committee Against Torture, which reviews compliance with the Convention Against Torture has said that disappearance is a per se violation of the treaty. This means there need not be any actual pulling out fingernails or otherwise torture of the person; but just disappearing them into custody is a violation of the treaty. The President and his Administration officials have said it is perfectly legal to have secret prisons where people are disappeared. Amnesty International has not seen the legal analysis or justification for this. But it is an assertion just like there is an assertion that there is a war that exists everywhere that somehow alleviates their human rights obligation.

But there is an even larger problem here. It is not just that the U.S. has disappeared a discrete number of people, who are claimed to be really bad anyway, but people have been disappeared who clearly were not that bad because they have reappeared and are walking around free and were never formally charged with any crime. In fact, three of them are in Yemen, where one of our researchers found these three men in prison and Yemen could not figure out what to do. The U.S. government kept telling the Yemeni government there would be “files forwarded” for “prosecution.” But this never happened. So the Yemeni officials concluded that must have been some kind of visa violation or irregularity in their passport, and imposed a judgment for that. The three men were given time served for the time they spent in a secret U.S. prison and released. So again, all the explanations do not seem to hold up.

It is not as if the U.S. is the only country in the world that has engaged in disappearances. A major concern arises once the U.S. starts engaging in these types of things, then for countries that engage in disappearances are those countries on the fringe, who do not have the level of attention and influence that the U.S. has. If a notorious human rights abusing country disappears somebody, no one is surprised, and this country is not held up as an example of what is allowed, what is legal and what can be done. It is looked at as a pariah nation in violation of the law. When the U.S. engages in this behavior, there is an implicit endorsement of it. This has led to the other piece of the war on terror, which is a “you are either with us or against us” mentality that has forged relationships with countries that are notorious human rights abusers. But we are told these countries are important because they are allies in the war on terror. Pakistan is a great example of this. After September 11th there was a huge increase in aid to Pakistan and work with Pakistan in all kinds of joint ventures. This was done in a way that had not happened before and without any kind of conditions on funding, or conditions on any sort of human rights violations. Thus,
literally up until the day that Benazir Bhutto was assassinated the assistance was provided without condition. The Pakistani Supreme Court had been suspended and the government was locking up all the lawyers and beating them up in the streets in the guise of fighting terrorism. Only after Benazir Bhutto’s assassination, has even a now small portion of U.S. funding to Pakistan been conditioned. Pakistan however, is engaged in a great number of disappearances. Pakistan has been very complicit in the idea of U.S. renditions. They take people into their custody, hand them to the U.S. who may send them to other countries, bring them back to Afghanistan, and send them to Guantanamo. So not only is the U.S. implicitly endorsing these practices, but also explicitly endorsing them by working hand-in-hand with countries who both have a history of using the practices and are now engaging in the practice with the U.S..

The U.S. has cited as partners, countries such as Uzbekistan, Jordan, and Egypt. These are countries that the U.S. has had a long history of weighing in their human rights records. They are now utilizing the fact they have a poor human rights record and using that as legitimizing tool in a so-called war.

Another impact that we have seen before several times is this idea of indefinite and arbitrary detention. For this the law of war framework becomes very important. Because in the context of human rights law, somebody cannot be just picked up and then be put in prison and be held until the government believes the person cannot ever engage in a crime again. Human rights law does not support that. U.S. law does not support that. But under a law of war theory a country is not required to release captured soldiers onto the battlefield the next day and allow them to start fighting all over again. The captured soldiers may be kept until the country gains the advantage or someone else gains the advantage and the war can be ended. That is the idea underlying detaining people under the laws of war. It is not a criminal detention. It is not for prosecution. It does not mean that people cannot be charged with war crimes, but only if they engage in specific prohibited activities. But for the broad detentions that happen resulting in prisoners of war, the purpose is to allow one side to gain the advantage over the other.

This principle in the law of war has been transformed with this war on terror, to mean at least to the U.S. government, that the government can pick up anyone, anywhere who is considered affiliated with terrorists. Maybe as part of an international armed conflict in Afghanistan, but also maybe outside the port in Bosnia, or maybe in Gambia, or wherever the government may find them, take them into custody and then hold them until the end of the so-called war on terror. There are many names for it, but this war may not end for generations or ever. This is a bastardization of the idea of what the laws of war are and how they are to be applied. With this authority of the administration it has pronounced terrorist suspects to be unlawful enemy combatants. Before this particular conflict this term mean nothing. The term had no status in international law. It is not something that was recognized in terms of prohibited behavior under the law of war. Within an armed conflict there are soldiers, prisoners of war, saboteurs, or civilians, but no unlawful enemy combatants. If this term is to be applied to what is not an international armed conflict (which means a conflict between two parties to the Geneva Conventions), but to a non-international armed conflict (which includes an internal conflict) where non-state actors who are not recognized as lawful combatants then to put a combatant label on these actors becomes more problematic because status issues are compounded in the laws of war. In the creation of this status, the U.S. is asserting the right to hold people essentially for the rest of their lives, without charge, and without being let into court.
But what if there is a desire to try these people? The U.S. has justified what it has done claiming that these are very bad people that they need to be held in secret prisons, or subjected to enhanced interrogation techniques, which most of us know as torture, and then need to be detained. How does the U.S. try these people? Certainly not in U.S. courts. These courts would not recognize the lawfulness of the detention, or the lawfulness of the techniques used to get their information. So military commissions are created.

Military commissions were created initially through executive order. However, the Supreme Court ruled that there was a separation of powers problem for the Executive to create its own system of justice apart from anything Congress authorized him to do. Subsequently Congress returned and authorized the President to establish military commissions in the 2006 Military Commissions Act (MCA). The issue with these trials is not that what protections have been granted. It is frequently heard that these people are getting more rights and more process than anyone ever has in a war. They get to have defense attorneys. Just recently it was being argued that it is not like what it was back in 1865, when these people could have been summarily executed. Apparently, that is an improvement in U.S. law, that we are not summarily executing people as if this is the baseline that we are working from.

Frequently, however, what is not heard is discussion of the rights these people do not have and the rights that would have been recognized by any other sort of legitimate system of justice. First, because of the unique nature of these commissions, they are not bound by any precedent. What that means is anyone facing these commissions cannot look to any other body of law and invoke that as how their cases should be decided. They cannot look to a case that happened in the U.S., in international courts, or in any judicial system. These commissions stand on their own and whatever the commission judge decides is what the judge decides and it may not bind the next judge.

Further, these commissions are not bound by the Constitution. In Guantanamo, where these commissions are happening the U.S. asserts that even though it has absolute control over the entire military base and the population there, the U.S. Constitution has no application. Interestingly enough the Endangered Species Act does apply, a member of one of these endangered species in Guantanamo is very protected. This member of an endangered species is not allowed to get hit by a car or get eaten. But a human being in prison in Guantanamo has no rights under the Constitution. Thus, the government could allege that a fifteen year-old is a child soldier, prosecute this person and seek the death penalty since there is no age limit on this in the MCA, and the Constitution does not apply. The Constitutional cases do not apply. Thus, the government has recently argued that a suspect could be five, fifteen, or thirty-five. The suspect could be prosecuted in the same system regardless of age and may be executed. This was not really a very proud argument for the U.S. Government that day.

Additionally there is no Equal Protection clause with the Military Commissions Act, which is explicitly discriminatory, in making these commissions and their lower standards applicable only for foreign nationals. Those lower standards are not for U.S. citizens. There is no Confrontation Clause, which means the defendant does not have the right to confront adverse evidence, or adverse witnesses. The defendant may be faced with a statement from an anonymous witness or a piece of paper describing a confession somebody made during an interrogation in Afghanistan, which implicates the defendant. Under the MCA there is no ability to
figure out who made that statement, under what conditions it was made, or even if it was a decent translation. There is no prohibition on using evidence that was derived from torture or other violations. That is there is no prohibition on using the “Fruit of the Poisonous Tree,” which prohibits using evidence in a court because it was obtained through unlawful means. Because the Constitution does not apply, according to the U.S. government, and there is no such limitation in international law then that is in fact not a problem. The approach of the government on this will allow it to avoid a central controversy, that being the issue of torture and treatment in custody. Yet, this has been one of the most damaging controversies in the context of the U.S. war on terror.

For a long time, it has been very well recognized that torture is absolutely prohibited. It did not mean countries did not engage in it. It did not mean it never happened. Clearly it did, that is why Amnesty International is still in business and why I have a job, because torture happens in a lot of places. What the prohibition did mean was that it was not acceptable to even talk about torture. It was not something for which there was any equivocation. Every government that had experimented with it, that had a legal system that looked at it, has essentially backed away and proclaimed that torture is impermissible. The U.K. had said this. Israel had said this. There was sometimes a gap between policy and practice. However, there was no conversion in seeing the utility in the practice and then denying there was any torture because of the needs of a war on terror and its the extreme circumstances.

The government has insisted that the CIA has this very specialized interrogation program and it cannot be limited in what it can do. But what the government is not telling us is that the CIA on September 11, 2001, in fact did not have a single interrogator. It did not have an experienced body of interrogators. The military had experienced interrogators. The FBI had experienced interrogators. The military and FBI will tell us that these enhanced techniques are not needed. Techniques that involve things like water boarding, which people call simulated drowning. I had one torture survivor tell me, “I do not know why they call it that. It is drowning. They just do not let you die.” For a long time people including the U.S. actually called it water torture.

These practices involve things like standing for lengthy periods of time or stress positions. These involve things that can sound very benign, but actually result in torture. Superficially, it does not sound so bad. Former Defense Secretary Donald Rumsfeld signed a memo on interrogation practices wondering why there is a limit to standing for only four hours, when he stood at this desk eight to ten hours a day, as if this were no big deal. Doctors would have explained to Mr. Rumsfeld that long time standing, that is eighteen to twenty-four hours of continuous standing, can result in an accumulation of fluid in the tissues of the legs, the ankles, and the feet of the prisoner, causing them to swell to twice their normal circumference. The edema may rise up in the legs. The skin becomes tense and extremely painful. Large blisters develop which break and exude watery serum. The heart rate increases and fainting may occur. Eventually there is renal shutdown and urine production ceases. All of this may occur just from standing. When several techniques are combined—water torture, forced standing, stress positions, sleep deprivation, hypothermia—for anyone who has ever worked with torture survivors or worked on tortures understands this to be torture. The U.S. has sought to redefine these techniques as constituting only enhanced interrogation that are needed to protect security.
Originally, the people who were taken to Guantanamo were said to be the worst of the worst, the most vicious killers on earth, and then about a year and a half ago when the government finally admitted it had secret prisons, which at that point were a very poorly kept secret, it brought those who the government said in fact were “really the worst of the worst.” These so-called high value detainees were brought out of these secret prisons into Guantanamo. These people, such as Khalid Sheikh Mohammed, Ramzi bin al-Shibh, are those who are said to have been involved in plotting the attacks on September 11.

As a human rights organization, Amnesty International stands on accountability. We have said since the beginning, anybody involved in those kinds of crimes against humanity should be prosecuted. However, the issue is now the desire of the U.S. to prosecute the perpetrators in these military commissions, even though it has been confirmed by the government that at least one of the suspects has been water-boarded, and they have been held in secret prisons, and they have been subjected to enhanced interrogation techniques, which most of us understand to be torture. The government has now gone back and re-interviewed these defendants with what it has called “clean techniques,” and has brought in the people who actually do interrogations the legitimate way. The FBI was brought back in to use its reporting methods to get the same information that already had been obtained under dubious methods, as if someone could somehow be un-tortured. Now the government has charged these six men. The government wants to try them in Guantanamo in these unfair trials and possibly execute them.

This is where it has all come full circle. In terms of the U.S. having once been a country whose justice system was emulated around the world, now going around emulating the kinds of justice systems around the world that it used to condemn. When one examines the damage that all these counter-terrorism policies have done to human rights, it is troubling to realize who has endorsed them. Early on, the U.S. President issued his executive order effectively claiming the authority to detain people and try them in any way necessary because of the war on terrorism. President Hosni Mubarak, who has been the president of Egypt for many years, which has been in a state of emergency for many years, has had many people disappeared into prisons, tortured, and frequently convicted in front of military courts, sometimes in the middle of the night when there is no defense attorney. This president found an implicit endorsement being effectively made by the U.S. President of these Egyptian anti-terrorism measures. So now what has happened is that the U.S. has gone from a leader in terms of creating human rights law and using its power in terms of influencing other countries’ human rights records, to a leader in allowing countries who have always engaged in these techniques to justify their own bad behavior.
COUNTER-TERRORISM AND CIVIL LIBERTIES:
THE UNITED KINGDOM EXPERIENCE, 1968-2008

Jessie Blackbourn*
Queens University, Belfast

ABSTRACT
In the wake of the terrorist attacks on New York and Washington on September 11th 2001 much attention and academic literature has focused on the lessons that the USA could learn from the UK’s experience of fighting terrorism in Northern Ireland. This article will address the UK’s response to terrorism throughout the late twentieth and early twenty-first century to assess the validity of these claims, concentrating on the pertinent issue of civil liberties and their suppression at the hands of counter-terrorism policy.

Since September 11th 2001, the issues of terrorism and counter-terrorism legislation have pervaded academia and the media to a degree only previously witnessed in short time-periods following particular and specific terrorist atrocities. The scale of the interest in terrorism and counter-terrorism legislation has grown with each additional terrorist attack in the twenty-first century and with the escalation of the invasion of Afghanistan and the war in Iraq. Much of the academic debate has centered around the domestic and foreign policy decisions of United States President George Bush, and their effect on the civil liberties and human rights of United States (US) citizens, and the impact of policies on national security both at home and of US soldiers in conflicts abroad (Guelke, 2006; Kolko, 2006; Burbach and Tarbell, 2004; Talbot and Chanda, 2001). The academic study of terrorism has, however, come under scrutiny since September 11th; studies of terrorism that appear apologetic to terrorist groups, such as attempts to understand the root causes of terrorism have partially lost currency (Newman, 2006, pp. 332-333; Miller, 2007, p. 332; Bjørgo, 2005, p. 1), and have been mostly replaced by debates centering on the dichotomy between the state’s legitimate counter-terrorism and the illegitimate act of terrorism. This article will question the perceived legitimate nature of the state’s response to terrorism to understand whether the state undermines its own legitimacy by its counter-terrorism policy. This article will use the United Kingdom’s (UK) experience in Northern Ireland during the Troubles and post-9/11 as a case study to interpret broader questions of whether the restriction of civil liberties through the state’s counter-terrorism legislation perpetuates cycles of terrorism, or if the threat from terrorism in the twenty-first century is so great as to necessitate the potentially unlimited subjugation of civil liberties by the state.

* Direct correspondence to jblackbourn01@qub.ac.uk
© 2008 by the author, published here by permission.
The Journal of the Institute of Justice & International Studies Vol. 8

1 The perceived failure of the war on terrorism and new stringent counter-terrorism laws that only appear to be perpetuating cycles of violence have led some authors to reconsider traditional approaches to the study of terrorism, such as the root causes approach in an attempt to better understand how government action or inaction can affect terrorism.
The academic literature on this topic considers the present situation in the US in the context of the UK’s experience of fighting terrorism in Northern Ireland (Guelke, 2007; O’Connor and Rumann, 2002-2003; Rolston, 2002; Thomas, 2002-2003). This article does not aim to replicate the debates on the lessons that the UK may (or may not) have learned from forty years of conflict in Northern Ireland, but instead hopes to draw attention to contemporary debates about counter-terrorism legislation and its impact on civil liberties, while comparing the UK’s experience of countering terrorism in Northern Ireland to its experience of countering international terrorism in the twenty-first century, ultimately, the value of this case study is that it reveals the state’s linear response to two very different terrorist threats over a period of forty years.

The aim of this article is not only to observe the UK’s response to terrorism and its use of legislation to counter-terrorism over two different periods and contexts, but also to connect this to, and open up contemporary debates regarding the formerly taboo subject of torture and inhuman and degrading treatment. Specifically then this article aims to address the following three questions: 1) Does the threat from any form of terrorism require the subjugation of civil liberties, or does the restriction of civil liberties perpetuate cycles of terrorism? 2) How did British counter-terrorism policy undermine civil liberties in Northern Ireland during the Troubles? 3) What lessons did the UK learn from the Northern Ireland experience and use against the new threat from international terrorism post-September 11th?

The first question will provide a theoretical framework within which the following two questions can be examined. This is important, as a clear framework for understanding counter-terrorism can help alleviate the problems encountered when attempting to define terrorism. Definitions of terrorism are notoriously plentiful, and often of little academic use, either being so broad as to encompass most forms of political dissent under their banner, or so narrow as to apply to a singular act of terrorism or terrorist group. In 1977 Walter Laqueur wrote:

Any definition of political terrorism venturing beyond noting the systematic use of murder, injury and destruction or the threats of such acts towards achieving political ends is bound to lead to endless controversies… It can be predicted with confidence that the disputes about a comprehensive, detailed definition of terrorism will continue for a long time, that they will not result in a consensus and that they will make no notable contribution to the study of terrorism. (Laqueur, 1977, p. 79)

What can conclusively be argued, however, is the important legalistic distinction between the terms terrorism and counter-terrorism. Terrorism within the context of the law is a concept that is defined by the state; the state does not, therefore, include its counter-terrorism efforts, whatever form they take or however close to terrorism they appear, in the definition of terrorism. The contradiction between the potential similarity of terrorism and counter-terrorism methods can be understood by recognizing that defining terrorism involves the exercise of power (Sederberg, 1989, p.3) with the legitimate, democratically mandated Weberian state holding the power to define terrorism as the illegitimate use of violence, and its counter-terrorism methods as the legitimate use of force. Conor Gearty (2003) argues that this terminology of illegal violence and legal force leads to the idea that, “What the terrorist does is
always wrong, what the ‘counterterrorist’ has to do to defeat the terrorist is therefore invariably, necessarily right” (p. 380).

The first section will question this tautological nature of defining terrorism, before examining how the UK’s counter-terrorism policy since 1968. The second section of this article will use a critical analysis of government legislation to examine two key themes in British counter-terrorism policy in Northern Ireland during the Troubles: detention without charge and torture. Although these were not the only aspects of British counter-terrorism policy during this period, they are the most pertinent to the third section of this article: how the UK responds to the current threat from international terrorism, and whether the lessons from Northern Ireland are applicable in this context.

Does the Threat From Any Form of Terrorism Require The Subjugation of Civil Liberties, Or Does the Restriction of Civil Liberties Perpetuate Cycles of Terrorism?

The first part of this article, dealing with broadly theoretical aspects of the relationship between terrorism, counter-terrorism legislation and civil liberties will address this question as a debate between two approaches to the study of terrorism: the lesser or necessary evils doctrine and the crisis response approach. The first part of the question, examining whether the threat from terrorism requires the subjugation of civil liberties will be addressed in the context of the lesser evils doctrine, while the second part of the question assessing whether the restriction of civil liberties perpetuates cycles of violence will be examined using a crisis response model. An attempt will be made to conclude decisively the outcome of the debate before moving on to the second part of the article in which the UK’s experience of counter-terrorism will be discussed.

Hastily enacted, often stringently draconian counter-terrorism legislation is as much an established response to a terrorist act by the government as is shock from the public and excessive media coverage. The recent history of the conflict in Northern Ireland, as well as the post-9/11 response offers many examples of this point. During the conflict in Northern Ireland, following an intensified bombing campaign of mainland Britain in the early 1970s, the UK government enacted the Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary Provisions) Act 1974, and in the aftermath of the Omagh bomb in August 1998 the government passed the Criminal Justice (Terrorism and Conspiracy) Act 1998. In the twenty-first century this pattern was repeated with the Anti Terrorism Crime and Security Act 2001 following the September 11th terrorist attacks, and the Terrorism Act 2006 in the wake of the London bombings on July 7th 2005. The UK was not the only country to enact legislation following 9/11: the US enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (USA PATRIOT Act), Canada the Anti Terrorism Act 2001, and Australia the Anti Terrorism Act 2004. The common theme in these acts is the extension of law enforcement powers to the detriment of civil liberties, so it is important to question whether these laws helped prevent or provoke acts of terrorism.

The tautological nature of defining terrorism, as discussed in the introduction, helps us to understand two contradictory approaches to the study of terrorism: the lesser evils approach which asserts that the government must take any counter-terrorism steps necessary, such as the restriction of civil liberties, to prevent terrorist
catastrophes; and the crisis response method which argues that terrorism and counter-terrorism are caught in a perpetual cycle of either terrorist crisis followed by government response, or government crisis resulting in a terrorist response. For the purposes of this article, the second approach of government counter-terrorism policy as the crisis and terrorism as the response will be used to demonstrate an alternative to the lesser evils theory. In this crisis response approach, the restriction of civil liberties by the government is the crisis to which terrorism responds.

These two approaches will now be used to discuss contemporary debates in counter-terrorism policy and their effect on civil liberties. The two great debates of the modern era since the advent of the war on terror have centered on the treatment of terrorist suspects, notably, the increase in the length of pre-trial detention and the use of torture or extraordinary rendition of terrorist suspects, prisoners of war, and enemy combatants.

Conor Gearty (2007) explains the lesser or necessary evils argument as follows:

> In its clearest and most coherent form, this approach asserts that the danger facing our democracies and our culture of human rights is so great, so evil that we are entitled, indeed morally obliged, to fight back. In defending ourselves in this way it may well be that we ourselves have to commit evil acts, to commit harms that run counter to our fundamental principles, but that these actions are nevertheless justified, both as necessary (to save ourselves) and as less evil than what our opponents do (both because we try to ensure our actions are less bad and because we still believe in accountability and legality while our opponents do not). (p. 351)

The torture debate has recently been brought to the fore of contemporary politics by the arguments of Alan Dershowitz (2002, pp. 131-163; 2004, pp. 257-280) advocating the need for a torture warrant. Dershowitz repudiates the idea of torture as a necessary evil, instead claiming that it is inevitable in certain situations (the ticking bomb), and that since its inevitability is undeniable, the use of torture should therefore, at the very least, be regulated by the government, which is accountable to the people. Dershowitz (2004) claims that:

> “[The torture warrant’s] Goal was, and remains, to reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use. I saw it not as a compromise with civil liberties but rather as an effort to maximize civil liberties in the face of a realistic likelihood that torture would, in fact take place below the radar screen of accountability.” (p. 259)

Dershowitz has, understandably, faced some academic criticism for his defence of the practice of torture. Ronald Sundstrom (2006, p. 442) argues that Dershowitz’s legitimization of the torture debate exacerbates a sense of US exceptionalism from internationally agreed civil rights norms as advocated by the United Nations, Amnesty International and the International Committee of the Red Cross and that the US engages in double standards in legitimizing its own use of torture, while maintaining the façade of criticizing those who use torture against US citizens (Sundstrom, 2006, pp. 441-442). The main problem with Dershowitz’s argument is not that it legitimates
the use of torture, but that it legitimates the use of torture in one specific situation, the case of the ticking bomb (Dershowitz, 2004, pp. 257-272). This debate is somewhat limited to the academic arena as the scenario rarely emerges outside of a Hollywood plot.

The history of counter-terrorism is littered with examples of the use of legislation designed for one specific situation, broadened into general use and accepted as part of everyday criminal law,\(^2\) known as the slippery slopes effect (Flyghed, 2002; Haubrich, 2003; Waddington, 2005; Haubrich, 2006). Terrorism or the threat from mass terrorism in the twenty-first century has been considered so evil as to relegate torture to a lesser degree of evil. From the utilitarian perspective the prevention of thousands of deaths supersedes the rights of one individual terrorist suspect who is tortured for information, whether that individual is a terrorist and holds pertinent information or not. The pervasion of acts of terrorism in the modern media, such as the real time footage of the attacks on the World Trade Centre and the subsequent collapse of the twin towers has created a greater sense of fear of a terrorist attack than the actual risk of dying from terrorism; therefore there is an imbalance between the perceived risk from terrorism and the actual risk from terrorism. In light of this saturation into daily life of the threat of terrorism, it can be easily understood how the torture debate has gained currency, and how the extraordinary time periods for which suspected terrorists have been detained have become somewhat acceptable.

Torture and indefinite detention without trial may be considered necessary evils in the fight against terrorism, but they also help perpetuate cycles of terrorist violence, which feeds into the crisis response method of studying terrorism that will now be used to address the second part of the question. The crisis response method advocates that government action, either initial policy which feeds the root causes of terrorism argument,\(^3\) or counter-terrorism legislation following a terrorist attack, creates a crisis to which terrorism provides a response. This provides a paradox for governments to deal with; in tackling the effects of terrorism by creating laws that will help find terrorists and prevent acts of terrorism, the government risks further alienating members of the communities from which terrorists originate, thereby

\(^2\) For example the right to a fair trial was restricted in Northern Ireland in 1988 with an amendment to the law which affected a suspected terrorist’s right not to incriminate himself, manifested in a right to silence. Article 6.2 of the European Convention on Human Rights states that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”, (Council of Europe, 1950). The 1988 law allowed for a judge in a Diplock court to infer the guilt of a defendant from their silence in certain situations; this law was then extended to England and Wales, demonstrating how legislation enacted for a particular crisis becomes part of the everyday criminal law and is used beyond the original scope of its purpose.

\(^3\) In Northern Ireland in the late 1960s the Northern Ireland Civil Rights Association organized to tackle the minority community’s concerns of discriminatory practices by the government in the allocation of public housing and employment, the repeal of the Special Powers Act, change in the electoral franchise and the redrawing of gerrymandered electoral boundaries. Instead of having their concerns redressed through the political system the government and security forces banned marches, which led to a breakdown in law and order in Northern Ireland and resulted in the resurgence of an otherwise depleted and weakened IRA in defence of catholic areas. In this case, the root cause of government discrimination against the minority community led to initially peaceful protests which in turn resulted in the overuse of the police and army, a resurgence of the IRA and restrictive counter-terrorism policies aimed to disable that organization. Many of the civil rights movement’s requests were met, but the long term effects of the conflict far outweighed any benefit gained from the restrictive policies that were introduced. This cyclical escalation of crisis and response stemmed from the initial failure of the government to deal with the root causes of discrimination, and aptly demonstrates how terrorism can be the response to the government’s crisis.
unintentionally helping to increase the number of people who join terrorist organizations. The use of torture as well as other restrictions on civil liberties can easily be located within this crisis response framework. The use of torture provides terrorist groups with a self-fulfilling prophecy; by restricting civil liberties and targeting sections of society (following 9/11 the US government requested voluntary interviews from thousands of men of middle eastern origin) the government further demonstrates that it acts in the way that the terrorists claim they are fighting against. The crisis response method stresses the inherent failures in government counter-terrorism policy as propagating, rather than preventing terrorism. Diego Gambetta (2004) points out that the perils that the terrorists pose to lives and liberties lie as much in the Western governments' response as in the damage they can directly cause.

This article proposes that states should be held accountable for their actions and therefore not be able to use a lesser evils argument that issues a blank cheque on which to write restrictive counter-terrorism policy. The aim is to see how, or if policy has changed over time with the different threats of terrorism and whether it is applicable to compare pre-9/11 counter-terrorism policies with their post-9/11 counterparts.

The UK’s experience of counter-terrorism policy must be examined in the context of its commitments to human rights and civil liberties established through legislation and international conventions. The UK signed and ratified the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms within six months of the convention being opened to signatories in November 1950. The UK has been obligated to adhere to an international code of human rights norms throughout the conflict in Northern Ireland. Rights affirmed by the European Convention on Human Rights include a commitment by signatories to the: right to life; prohibition of torture or inhuman or degrading treatment; prohibition of slavery and forced labour; right to liberty and security; right to a fair trial; prohibition on punishment without law; right to respect for private and family life; freedom of thought, freedom of conscience and religion; freedom of expression; freedom of assembly and association; right to marry; and prohibition of discrimination. For the purposes of this article it is important to note the commitment to the prohibition of torture or inhuman or degrading treatment and the right to a fair trial. In 1998 the UK parliament also passed the Human Rights Act 1998 which came into force in October 2000, and incorporated the European Convention on Human Rights into domestically enforceable UK law. The Human Rights Act 1998 required that all UK legislation must be consistent with those rights enshrined, which includes all post-9/11 legislation in the UK. This allowed the House of Lords, in its position as the highest court of appeal in the judiciary (rather than as its position as part of the legislature) to hear cases on terrorism legislation that did not conform to the UK’s commitments under the European Convention on Human Rights. This most notably occurred in the contentious areas of detention without trial and torture. The ruling, A. v. Secretary of State for the Home Department (House of Lords, 2004), led to the repeal of the Part 4 provisions (indefinite detention of non-national terrorist suspects) in the Anti-Terrorism, Crime and Security Act 2001, and led to the December 2005 Lords judgment that the government could not use evidence obtained in foreign countries by

---

4 The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms is more commonly and will hereafter be referred to as the European Convention on Human Rights.
torture in cases brought before the Special Immigration Appeals Commission (House of Lords, 2005).

**How Did British Counter-Terrorism Policy Undermine Civil Liberties in Northern Ireland?**

This section will explore two key themes of British counter-terrorism policy during Northern Ireland’s Troubles, detention without trial and torture. Whilst counter-terrorism was not limited simply to internment and torture, these two aspects of British policy are pertinent to current debates on terrorism and civil liberties.

In 1971 the British government used provisions in the *Civil Authorities (Special Powers) Act 1922* to introduce the policy of internment to Northern Ireland. This allowed members of the police to indefinitely detain terrorist suspects without any requirement of future justice through the normal criminal procedure of arrest, charge, and trial. The policy of internment, used extensively during the early years of the conflict and not removed from the statute until 1998, severely restricted the right to liberty and security as enshrined in Article 5 of the *European Convention on Human Rights* which states that:

> “Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.” (Council of Europe, 1950)

In order to continue the policy of internment the British government was required to derogate from the *European Convention on Human Rights*, placing the UK in a state of public emergency that has continued since the early 1970s. The fact that this continuous state of public emergency existed has allowed the state the latitude to enact draconian legislation to deal with both the current and any subsequent crisis.

The initial policy of internment, followed later by increases in the length of pre-charge detention in Northern Ireland in the *Prevention of Terrorism (Temporary Provisions) Act 1974*, gave the state broad scope to increase its powers in other areas under the guise of necessary legislation required for the exigencies of the moment. The policy of internment also neatly demonstrates the paradox of government counter-terrorism action proving to be counter-productive. Michael O’Connor and Celia Rumann (2002-2003, p. 1662) quote an interview with Jim McVeigh in 1998 who claimed that government counter-terrorism measures were “the best recruiting tools the IRA ever had.” It is well documented that following internment there was a substantial increase in the number of Catholics in Northern Ireland who joined the IRA (Guelke, 2006. p. 206; Tonge, 2006, pp. 44-45, 66; Morrow, 1996, p. 20; Buckland, 1981, p. 162). In *The IRA and Armed Struggle* Rogelio Alonso interviewed

---

5 Article 1.c states that; “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure proscribed by law: … the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.” (Council of Europe, 1950).
many IRA members in order to understand the ideological motivations behind IRA members’ decisions to join the organization:

There is no doubt that the direct experience of violence provided a crucial motivation for certain activists, who stress that a factor in their decision to join the IRA was the disproportionate stance of the British army from the early 1970s onwards, including the introduction of draconian measures such as internment without trial of those suspected of belonging to proscribed organizations. For example, Brenda Murphy decided to join the IRA when she was only sixteen years old following the dramatic events of 9 August 1971, when internment without trial was introduced and hundreds of people were arrested by the security forces, the majority of whom were totally innocent. (Alonso, 2003, p. 30. See also English, 2004, p. 123).

The policy of internment particularly affected members of the minority Catholic community\(^6\), which meant that it was as discriminatory as it was restrictive. If the indefinite detention of many innocent citizens of Northern Ireland was not sufficient to raise questions about counter-terrorism policy, then the accusations of torture by those interned at the hands of the security services offers the opportunity to study the historical dimensions of the torture debate in terms of counter-terrorism policy.

In 1978 the Republic of Ireland brought a case against the UK to the European Court of Human Rights alleging that the UK had engaged in the torture of suspected IRA terrorists interned during the conflict through its use of five techniques of sensory deprivation: wall standing, hooding, continuous noise, deprivation of food, and deprivation of sleep. The Court found that the UK had not in fact used torture but had instead engaged in inhuman and degrading treatment. Ellen Cohn argues that:

The court thus posited a novel distinction, distinguishing inhuman and degrading treatment from torture. While such a distinction may be disposed of as merely “semantic,” it is suggested that in so distinguishing, the term “torture” is reserved for particularly shocking techniques such as those employed by the Chilean regime, and is not to be applied to the less repulsive techniques used in Northern Ireland. Britain could be subjected to sanctions by the court and could, at the same time, politically save face by not being condemned for the use of torture. (Cohn, 1979, p. 184)

Thus, in this case in 1978 the European Court of Human Rights adjudicated on the nature of torture, and found that some forms of treatment (inhuman and degrading) are less bad than others (torture), which helped perpetuate the idea that otherwise democratic western countries do not torture, while non-western, non-democratic state sponsors of terrorism do engage in torture.

---

\(^6\) J. Tonge states that “From 1971 to 1975, 2,060 republicans were detained compared to only 109 loyalists,” (Tonge, 2006, p. 66).
What Lessons Did the UK Learn From Northern Ireland and Translate to the New Post-9/11 Threat?

The two themes of detention and torture continued in the post-9/11 era. Following the attacks on September 11th 2001 the UK passed the *Anti-Terrorism Crime and Security Act 2001* which designated wide sweeping and restrictive powers for British law enforcement agencies. Most restrictive and contentious of these powers was the ability of the Secretary of State for the Home Department to indefinitely detain non-national suspected terrorists without trial if there was no recourse to deportation. This particular clause in the law is reminiscent of the internment provisions allowed in 1971, yet internment proved to be a disastrous policy for the government of that day, first because it brought international disapproval of its policy in Northern Ireland, and secondly because it actually increased support and membership for the terrorist groups it intended to quash. The policy was therefore both ineffective and widely criticized for its unnecessarily restrictive nature. Yet, thirty years later a different government passed a piece of legislation, which, though only affecting non-nationals, replicated the policy of internment. It is then necessary to ask whether the government should have learned from the disastrous policy of internment and sought a different solution to the problem of the detention of suspected terrorists. This question was particularly pertinent in July 2005 following the first suicide bombings in the UK as three of the four suicide bombers were born in the UK, and the fourth held British citizenship. These four would not therefore have been detained under the 2001 Act’s provisions. The problem of the indefinite detention of suspected terrorist non-nationals was resolved following a House of Lords Judgment that the Act contravened the *European Convention on Human Rights* on the grounds that it breached both Article 5, the “Right to Liberty and Security,” and Article 14, “Prohibition of Discrimination” (Tonkins, 2005, pp. 259-266). The Part 4 provisions of the *Anti Terrorism Crime and Security Act 2001* were replaced by the *Prevention of Terrorism Act 2005* which sought to redress the discriminatory nature of the earlier Act by introducing control orders which were applicable to UK citizens suspected of terrorism as well as non-national terrorist suspects, and addressed the question of the derogation from the *European Convention on Human Rights* by establishing a system of derogating and non-derogating control orders. The Lords, in its capacity here as a court of appeal managed to exert its influence on the government’s counter-terrorism legislation.

The Lords, in its position as the second chamber of parliament, may again be able to exert some steadying influence when Prime Minister Gordon Brown’s current *Counter Terrorism Bill*, which aims to increase the period of pre-charge detention to 42 days, is voted on in its chamber. In 2005, the House of Commons rejected then Prime Minister Tony Blair’s proposals to increase the pre-charge detention of terrorist suspects for up to 90 days following the July 7th London bombings, but on 10th June 2008 Brown’s 42 day period of pre-charge detention narrowly passed by nine votes in the Parliament. The debates on the current *Counter Terrorism Bill* in the Lords show some considerable opposition to the use of lengthy periods of pre-charge detention because of the effect on liberty. In her maiden speech to the Lords former Director General of MI5, now Baroness Manningham-Buller (HL Deb Vol 703 c647 8th July 2008) stated:
In deciding what I believe on these matters, I have weighed up the balance between the right to life – the most important civil liberty – the fact that there is no such thing as complete security and the importance of our hard-won civil liberties. Therefore, on a matter of principle, I cannot support the proposal in the Bill for pre-charge detention of 42 days.

Baroness Neville Jones (HL Deb Vol 703 c637 8th July 2008) was aware that the government’s actions might perpetuate rather than prevent terrorism:

At the heart of the debate is one central question: what type of society are we trying to create, protect and secure? After all, it is on the effects of our actions, not our intentions – however virtuous these may be – that we will be judged. Extending pre-charge detention seeks to guard against the terrorist threat by giving more power to the state. We take a different view from that of the Government. Security measures should not have as their sole focus a reduction in the threat, essential as this is. If security is to be sustainable over the long term, security measures must also facilitate and protect a united society based on shared liberal values and the mutual trust of a free, responsible citizenry.

The experience of terrorism and counter-terrorism legislation in the UK in the twenty-first century is therefore easily identifiable as an escalation of the crisis response theory, and indicative of the problems of slippery slopes.

Conclusion

It is difficult to draw too firm a general set of conclusions from a case study. Despite the similarities of the British government’s response to terrorism in Northern Ireland during the Troubles and international terrorism in the post-9/11 era, the nature of the threat and the motivation of the terrorist groups in question provide sufficient distinctions as to preclude an easy comparison.

Over forty years of the Troubles in Northern Ireland, the government failed in many ways to learn from its past counter-terrorism efforts; restrictive legislation from the 1970s that followed an increased terrorist campaign was replicated in 1998, four months after the Good Friday Agreement, with the enactment of the Criminal Justice (Terrorism and Conspiracy) Act 1998 as the response to the Omagh bomb perpetrated by dissident republicans. Despite the failures of the internment policy, and the fact that it had the opposite to anticipated effect (i.e. it increased membership to the IRA rather than weakening the organization) since 9/11 both former Prime Minister Tony Blair and current Prime Minister Gordon Brown have introduced legislation to increase the length of time that a suspected terrorist can be detained without or prior to charge. The restriction of civil liberties in Northern Ireland only served to increase disaffection amongst the community most likely to join a terrorist campaign against the government. The restriction of civil liberties in the UK following 9/11, along with the UK’s foreign policy in the war on terror and abuse of detainees in Southern Iraq have already started to demonstrate a clear trend of the alienation of certain marginalized sections of society and a tendency for those groups to then use the government’s policies as an excuse to carry out acts of terrorism. Mohammed Sidique Khan, who detonated one of the bombs on the London Underground on July 7th 2005,
stated his motivations for carrying out the suicide bombing mission: “your democratically elected governments continuously perpetuate atrocities against my people all over the world” (London Bomber n.d.).

The lesser evils argument rescinds all accountability from the government in its actions restricting civil liberties for the sake of national security, and so absolves the government of the use of torture, the indefinite detention without trial of its suspected terrorists, and the denial of some basic human rights to its citizens. The crisis response method, on the other hand, requires that states take responsibility for their actions and accept that, while terrorism is undoubtedly wrong, the government’s response to terrorism can help create and perpetuate cycles of violence and repression. The experience of the UK, both in Northern Ireland during the Troubles and in the post-9/11 era serves as an example of how state responses to terrorism and the restriction of civil liberties can not only be ineffective in countering terrorism, but can instead propagate the very terrorism it was intended to prevent. Asking why states fail to learn the lessons of the past or at least engage in a process of selective amnesia is important in understanding why they keep on making the same counter-terrorism mistakes. A failure to heed the effects of earlier incantations of counter-terrorism policy (for example internment in Northern Ireland in 1971 and lengthy pre-charge detention periods in the UK post-9/11) represent a negligence on the part of the government to understand the causes of conflicts and a misguided belief in a ‘one size fits all’ policy for countering terrorism. The continuing restriction of civil liberties in order to prevent and prosecute terrorism has already resulted in an alienated base of support from which terrorist groups draw strength and numbers. It is essential that governments recognize the failure of current ineffective counter-terrorism policy and invent new ways to tackle the problem of terrorism in the twenty-first century.

Although the use of torture is considered a necessary, if undesirable feature of counter-terrorism policy in the US, it should not, as Dershowitz suggests (2002: 158-159) be regulated and held accountable to the government, as the acceptance of and adherence to international norms prohibiting torture legitimate democracies in their fight against terrorism. Resorting to the same tactics as terrorism only offers the opportunity for terrorists to argue that they are indeed justified in using terrorism against the state, because the state is using terrorism against them; states must therefore hold themselves to a higher standard than they hold terrorist groups in order to maintain their legitimacy within the international community and to ensure the survival of liberal democracy.

References

Anti Terrorism Act 2001
Anti Terrorism Act 2004
Anti Terrorism Crime and Security Act 2001
Criminal Justice (Terrorism and Conspiracy) Act 1998


House of Lords (2005) *A and others v Secretary of State for the Home Department 2004*

House of Lords (2004) *A v Secretary of State for the Home Department 2004*

House of Lords Hansard

*Human Rights Act 1998*


Northern Ireland (Emergency Provisions) Act 1973


Prevention of Terrorism (Temporary Provisions) Act 1974


*Terrorism Act 2006*


USA PATRIOT Act 2001

POLITICAL PARTIES IN NEPAL: OPPORTUNITIES AND CHALLENGES

Keshav Bhattarai and Darlene Budd
University of Central Missouri*

ABSTRACT
This paper identifies and discusses the role that Nepalese political parties will play in creating a stable governing environment. Currently, it appears that a lack of political party cooperation and obstruction tactics will affect the success of the newly-formed Constituent Assembly. The Constituent Assembly was formed by the recent parliamentary elections in 2008 and has the challenge of managing the transition from a 240-year old monarchial system, writing a Constitution, and serving as an interim parliament. The new Federal Democratic Republic (FDR) emerged after peace talks ending with the participants agreeing to allow the Maoist guerilla party to participate in parliamentary elections and with the decision that King Gyanendra would be the last King of Nepal. This paper examines Nepal’s political parties in the aftermath of these sweeping changes and their role in the transition process. The paper analyzes the strategies and tactics of the political parties that reflect longstanding ideological and ethnic conflicts. Party dynamics and geopolitical realities will significantly impact the likelihood that: 1) the political parties can reach a consensus on issues dealing with ethnic politics in Nepal and lingering policy issues related to Indian involvement in Nepali politics, and; 2) whether political parties will work together to maintain peace in the country while addressing the challenges of a stagnant economy, international acceptance of a communist-dominated Constituent Assembly, and the security challenges of integrating the Maoist People’s Liberation Army into the Nepalese Army.

A Maoist Victory

On the morning of April 12, 2008, the possibility of a Maoist election victory was apparent. Statements by international election observers confirmed victory while parties and commentators adjusted to the unexpected turn of events. Maoist leader, Prachanda, magnanimously accepted victory and assured the business community and international aid donors that the Communist Party of Nepal – Maoists (CPN-M) was anxious and willing to work cooperatively with the four other parties of the newly-formed, a Maoist-led Constituent Assembly (eKantipur, 2008a). However, Prachanda’s reassurances to maintain peace occurred while Maoist-initiated violence continued in many parts of the country. After the election, opposition party leaders of the Nepali Congress (NC) party and the Communist Party of Nepal (Unified Marxist-Leninist) CPN-UML voiced disapproval of violence and hypocrisy and declared the election a fraud (Shrestha, 2008).

Rhetorical debates aside, the Communist Party of Nepal-Maoists (CPN-M) has the opportunity to establish law and order and begin work to fulfill the economic development promises the party made in 1996 when Prachanda initiated guerilla...
warfare activities against the national army. Barriers to law and order and economic development exist to be sure. The CPN-M (Maoists) must share power and make decisions together with four other parties – a significant change from a totalitarian system. A new and greater challenge ensuring that aid donors continue to support Nepal’s economy. Currently, 70% of the government’s budget is comprised of foreign aid and donations (Nepalnews, 2008a). The humanitarian motivations for many donors may fade leading to withholding aid and assistance and the consequent human suffering. The Maoist leaders must convince the international community that the party is truly committed to democratic norms and principles. Recent remarks by Prime Minister Pushpa Kamal ‘Prachanda’ Dahal questioning the relative merits of a traditional parliamentary democracy have understandably raised concerns among donor agencies. However, western democratic nations will have no choice but to work with the CPN-M if they wish to continue to support and aid Nepal’s transition to a more representative and democratic form of government.

In the first part of the paper, we discuss the period prior to and immediately following national elections to form a Constituent Assembly, replacing the 240-year Monarchy in Nepal. We review the election process, the individual parties that participated in the election, the issues of ethnic minority representation, and the geopolitical forces that have a significant influence on politics in Nepal. The second part of the paper addresses the challenges that the Maoist-led government faces including the integration of the Maoist Peoples Liberation Army into the existing national army and the issue of international recognition and acceptance of the newly formed government. Throughout the paper we assess the behavior of the various political parties in an attempt to determine whether the parties are a help or hindrance to the transition process. We conclude with a few remarks on the viability of the newly formed government in Nepal.

**Constituent Assembly Election**

It took herculean efforts on the part of Indian government officials and United Nations peacekeepers to negotiate a cease-fire and agree on an election and organizational structure agreement. Part of this agreement was to hold elections to form a Constituent Assembly responsible for writing a new constitution to guide the governance of Nepal. Nepal’s existing political parties resisted inclusion of the Maoist rebels in the election and rejected the Maoist demand that the King step down and the monarchy be abolished. Eventually the Maoists were allowed to participate in elections and their demand to eliminate the King was granted. Nepal would become a Federal Democratic Republic (FDR) and the party winning the most seats in the election would become the Prime Minister, head of the government of Nepal. A President would later be selected by the party or parties holding a majority of seats in the Constituent Assembly.

On April 10, 2008, fifty-five parties vying for representation in the 601-seat Constituent Assembly¹ participated in elections to form a Federal Democratic Republic (FDR), formally ending the 240 year-old monarchy. The parties agreed to a hybrid electoral system employing both proportional representation (PR) and single-member district (SM) (or first-past-the-post) election processes.

¹ Twenty-five parties won seats in the election.
The Constituent Assembly electoral process was an unfamiliar and confusing format to Nepali voters. Of the 601 seats in Nepal’s Constituent Assembly, 240 representatives were elected from 240 single-member districts (SM), while 335 representatives were elected nationwide using the proportional representation (PR) system. In a proportional representation (PR) election, voters cast their vote for a party (not an individual) and seats – in this case 335 – are allocated to parties based on the percentage of votes the party receives. The cabinet nominated the remaining 26 members (Dhakal, 2008). Thus, voters cast one vote for an individual running in the district in which they reside using the single-member (SM) system, and one for the party of their choice.

A total of 3,970 candidates – 367 women and 3,580 men – ran in district elections. A total of 5,701 candidates participated in the national election. Half of the candidates were women, while nearly 5,000 candidates were from indigenous or lower caste groups - 2,000 Madhesis, 600 Dalits, 2,000 Janajatis, and nearly 200 from traditionally underrepresented in Nepal (Dhakal, 2008).

There were 20,880 polling centers (serving districts ranging in size from 23 to 104,888 voters) in 9,829 different locations. Each center was staffed with between 5 and 13 individuals, totaling 234,000 polling staff (Dhakal, 2008). Due to the nature and significance of the election, over 80,000 domestic election observers representing 148 different organizations and 856 international observers including ex-President Jimmy Carter, were present. The Nepali Armed Police Force was deployed to provide security at each of the polling centers. However, the Nepali Army (NA) was noticeably not deployed for the election. The Maoists Young Communist League (YCL) was active and there were numerous reports of staff and voter intimidation. Despite these reports, voter turnout was not suppressed as voter turnout was only slightly lower in certain areas compared to past general election turnout results (Franklin, 2008). Ultimately, 17.6 million (8.89 million male and 8.73 female) registered voters cast their ballots to shape the destiny of Nepal (Dhakal, 2008). The result was Nepal’s most representative governing body with regard to gender, caste, ethnicity, religious, and regional diversity. One-third of the representatives elected were women, thereby making Nepal the region’s leader in female representation overnight.

The Constituent Assembly election results and seats won by various parties in the district elections are presented in Table 1.

---

2 General elections turnout rates were 65.15% in 1991, 61.86% in 1994, and 65.79% in 1999 (Election Commission of Nepal, 2008).
### Table 1

<table>
<thead>
<tr>
<th>Party</th>
<th>Number of Seats</th>
<th>Political Affiliation</th>
<th>Political Ideology</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communist Party of Nepal</td>
<td>220</td>
<td>Maoist, Revolutionary Internationalist Movement, CCOMPOSA</td>
<td>Communism, Marxism-Leninism-Maoism-Prachanda Path</td>
</tr>
<tr>
<td>Nepali Congress</td>
<td>110</td>
<td>Socialist International</td>
<td>Democratic Socialism, Social Democracy, Third Way</td>
</tr>
<tr>
<td>Communist Party of Nepal</td>
<td>103</td>
<td>Unified Marxist-Leninist (CPN-UML)</td>
<td>Communism, Marxism-Leninism</td>
</tr>
<tr>
<td>Madheshi Jana Adhikar Forum Nepal</td>
<td>52</td>
<td>MJF</td>
<td>A 3 party coalition demanding self determination rights and the formation of a Madhes autonomous region.</td>
</tr>
<tr>
<td>Tarai-Madhesh Loktantrik Party</td>
<td>20</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rashtriya Prajatantra Party</td>
<td>8</td>
<td>National Democratic Party, Asia Pacific Democrat Union</td>
<td>Conservatism, Royalism, Nationalism, Centre-right</td>
</tr>
<tr>
<td>Communist Party of Nepal</td>
<td>8</td>
<td>CPN-ML, Marxist-Leninist</td>
<td>Communism, Marxism-Leninism</td>
</tr>
<tr>
<td>Janamorcha Nepal</td>
<td>7</td>
<td>Founded in 2002 following the merger between the Communist Party of Nepal (Unity Centre) and the Communist Party of Nepal (Masal)</td>
<td>Communism</td>
</tr>
<tr>
<td>Communist Party of Nepal</td>
<td>5</td>
<td>United, Founded in 2007, following a split in the Communist Party of Nepal (United Marxist)</td>
<td>Communism</td>
</tr>
<tr>
<td>Rashtriya Prajatantra Party Nepal</td>
<td>4</td>
<td>Splinter group of the Rashtriya Prajatantra Party</td>
<td>Conservatism, Royalism</td>
</tr>
<tr>
<td>Rashtriya Janamorcha</td>
<td>4</td>
<td>RJM, emerged out of a split in the Janamorcha Nepal in 2006</td>
<td></td>
</tr>
<tr>
<td>Nepal Workers Peasants Party</td>
<td>4</td>
<td>NWPP</td>
<td>Communism</td>
</tr>
<tr>
<td>Rashtriya Janshakti Party</td>
<td>3</td>
<td>RJP, emerged out of a split in the Rashtriya Prajatantra Party</td>
<td></td>
</tr>
<tr>
<td>Sanghiya Loktantrik Rashtriya Manch</td>
<td>2</td>
<td>The party is comprised of 12 different janajati organizations.</td>
<td>Supports the formation of a Limbuwan autonomous region in North-Eastern Nepal.</td>
</tr>
<tr>
<td>Nepal Sadbhavana Party</td>
<td>2</td>
<td>Anandidevi, NSP, in June 2007, NSP merged into NSP(A)</td>
<td></td>
</tr>
<tr>
<td>Nepali Janata Dal</td>
<td>2</td>
<td>Established in 1995 as the United People's Party</td>
<td>Progressive, Nationalist, Socialist</td>
</tr>
<tr>
<td>Dalit Janajati Party</td>
<td>1</td>
<td>NRP, a continuant of the Federal Republic National Front.</td>
<td></td>
</tr>
</tbody>
</table>
Nepa Rastriya Party | 1 | Formed in order to preserve the identity and culture of the Newar community | Supported the Maoist-nominated candidate Ram Raja Prasad Singh in the 2008 presidential vote.


Chure Bhawar Rastriya Ekta Party, Nepal | 1 | The party was formed in 2007 to defend the interests people living in the hilly regions of the Madhes region. It has its own Peace Army. | The Party demands autonomy in the Chure Bhawar region and opposes demands for a ‘single Madhes region.

Nepal Loktantrik Samajbadi Dal | 1 | | |

Nepal Parivar Dal | 1 | | |

Independents | 2 | | |

Not yet determined | 26 | | |

While the election results were contested by opposition parties, the final results were accepted. However, the success of the elections masks the potentially negative consequences of the undemocratic tactics and acts of commission and omission that political parties have used before, during, and after the election.

**Manipulating Voters**

In general, all parties failed to fully educate voters about the election format and the new constituent assembly. A lack of knowledge and civic engagement does little to promote democratic ideals and behavior. A pre-election survey revealed that only a small percentage of citizens were familiar with Nepal’s newly-created electoral system using both the single-member district (SMD) and proportional representation (PR) methods to determine representation in the Constituent Assembly. Equally low levels of familiarity were associated with the purpose and goals of the Constituent Assembly (Sharma and Sen, 2008). While election officials briefed local party candidates and workers about the election code of conduct, election officials witnessed frequent violations committed by nearly all parties, in almost all parts of the country. Several instances of serious violence resulted in several deaths. No party was without fault.

**Communist Party of Nepal-Maoist (CPN-M)**

The Communist Party of Nepal – Maoist (CPN-M) reportedly obstructed royalist parties and responded strongly to the efforts of the United Marxist-Leninist (UML) and the Nepal Congress (NC) parties efforts to harass its campaign workers. The Maoist campaign strategy focused on securing strongholds in rural and mountainous areas and deploying the Youth Communist League (YCL) and additional activists to areas with uncommitted voters. Instances of YCL cadres stuffing ballot boxes were reported (Franklin, 2008). The CPN-M was better organized than the other parties and had superior communication. Party members
worked consistently to win over voters ignored by other parties and to communicate the party’s policies clearly. The CPN-M did not take any votes for granted and campaigned on a platform of change that helped boost support for the party.

**The Communist Party of Nepal – United Marxist Leninist (CPN-UML)**

The CPN-UML was formed in 1995 and is a relatively new political party. The CPN-UML describes itself as a social democratic party but it follows a communist-style organizational philosophy. Currently, the CPN-UML has limited appeal and lacks boldness to gain broader appeal. For example, many educated, urban voters who traditionally voted for the CPN-UML shifted their allegiance to the Maoists because they felt the CPN-UML was no longer a “real” communist party. This sentiment is due in part to the fact that the CPN-UML petitioned the King to select a CPN-UML candidate for the position of prime minister and then joined the coalition government. Potential voters feel that the CPN-UML has seriously neglected its natural supporters including urban workers, the unemployed, and the rural poor (Franklin, 2008). Failed attempts to increase support among left-leaning citizens suggests the demise of the CPN-UML. One Maoist leader predicted that there will two major political parties in Nepal: The Nepali Congress (NC) will represent the bourgeois and wealthy people, and the Maoists will represent progressive and poor people. According to the Maoist leader, the CPN-UML represents neither group (Bhattarai, 2008).

**The Nepali Congress**

Once the dominant political party in Nepali politics, the Congress (NC) party won a disappointingly low number (110) of seats (35 from SMD elections, 70 from PR elections, and 5 cabinet nominations). Many long-time supporters blame the party’s lackluster performance on the party’s willingness to cooperate with the Maoists, unclear policy positions due to previous divisions within the party, and an on-going feud among party workers despite a recent reconciliation between the previously divided factions. Such ambiguity creates the impression that the party stands for little other than its traditional commitment to multi-party politics. Many NC supporters advocate a return to the party’s support of multiparty democracy headed by a constitutional monarchy as postulated by the founding leader of the party, B. P. Koirala (Guha, 2001). This platform attracts business leaders, the Congress party’s historical base of support.

In addition to not clearly communicating the party’s position on key issues, the Congress party made a tactical error during the election campaign. The leaders of the party viewed the Communist Party of Nepal – United Marxist Leninists (CPN-UML) as their main rival in the election and in certain districts encouraged Congress supporters to vote for the Communist Party of Nepal – Maoists (CPN-M) if they wanted a “real” leftist party. This strategic voting tactic backfired and may have further weakened the NC.

**Madhesi Janadhikar Forum (MJF)**

The major parties discussed above must also contend with the recent rise in the popularity and the number of ethnic- and minority-based parties. The largest of
these parties is the Madhesi Janadhikar Forum (MJF) winning 52 of the 601 seats in the Constituent Assembly. The term *madhesi* is synonymous with the term *tarai* and is used to refer to the fertile, southern region of Nepal stretching from east to west, where nearly half of Nepal’s population resides. The Madhesi Janadhikar Forum was originally a political advocacy movement demanding improved representation and rights as well as ethnic self-determination and the creation of a Madhes autonomous region (Yhome, 2007) The Tarai Madhes Democratic Party (TMDP) and the Sadbhavana Party also received support capturing 20 and 9 seats respectively in the Constituent Assembly. The formation of Madhesi-based parties has served to encourage historically, underrepresented ethnic and regional groups to form and actively pursue their agendas.

Increased popularity and visibility of the parties sends the unambiguous message to the other parties that they can no longer expect support from minority groups in the region without listening and responding to individual group demands (Crisis Group Report, 2008). There parties are stronger with the formation of the United Madhes Front (UDMF), a coalition comprised of three parties—the Madhesi Janadhikar Forum (52 seats), the Tarai-Madhesh Democratic Party (20 seats), and the Sadbhavana Party (9 seats).

**Balancing Party Politics with National Interest**

Based on their actions, political parties do not seem to believe that fulfilling the will of the people and working toward creating a federal democratic republic requires that they work together to build institutions. If party leaders can focus on national issues to a greater extent and their own political power to a lesser extent, Nepal’s future and the future of party politics will be much brighter and healthier. Nepal is at a critical transition period. If the transition process is not handled promptly, the current political system and economy could deteriorate quickly if not completely fall apart (Bom, 2008b). As the party with the largest number of seats in the Constituent Assembly, the Maoists must take the lead to help create a sense of responsibility among the parties to draft a new constitution that will guide governance and provide representation to the many different regional ethnic groups that make up the country of Nepal.

**Geography and Ethnic Politics**

Ethnic-based parties increase awareness of marginalized groups and increase the chances that the need to improve their living conditions will be on the agenda. However, these numerous ethnic-based political parties are also increasing historically charged ethnic tensions. In-fighting among ethnic parties—these parties have widely varying platforms—contributes to increased discontent. Conflict among parties and their constituents will likely produce little in terms of measurable improvements.

The issues underlying under-representation of groups from the Tara region elicit substantial debate and disagreement among political parties and the population in general. Nepal has three distinct geographic regions: the Himalayan mountain range of the north, the rolling hills of the mid-range region of the country known as Pahad, and the fertile, plains of the Terai in the south. Anthropologically, the people
of these three regions of Nepal are the indigenous groups, Kirats, Magars, and Tharus, respectively (Bom, 2008c). Historically, the indigenous communities of the southern, Tarai region were enslaved by their fellow land-owning Nepalese from the middle and northern regions of the country (Bom, 2008a).

Although Nepal abolished slavery in 1921, the Kamaiya (debt-bondage) system in 2005, and the Haliya (indentured labor) system in 2008, the indigenous groups of the Tarai cannot be considered politically liberated (NepalNews, 2008). Numerically, the region has historically been underrepresented in government, the army and other state institutions due mainly to the fact that those in power in Kathmandu tend to be of the Brahman caste with regional origins in the northern hill ranges of Nepal. The division between the regions has increased since the early 1960s when the Panchayat government began actively promoting the culture and traditions of the northern hill regions, which are quite distinct from those of the southern region (Hoftun, 1999).

The majority of the people living in the southern Terai region are ethnic Mahesh, speak Hindi, and are often described as culturally similar to the Indians living in the adjacent Indian states of Bihar and Uttar Pradesh (Sharma, G. 2008). The desire to have Hindi recognized as a national language the same way Hindi is recognized in India was a cause taken up in the 1950s by Gyajendra Narayan Singh, leader of the Nepal Sadbhavana Party. Recognition of the Hindi language and the demand for greater political autonomy not only creates concern about future demands to secede, but has also led to suspicion that some Indian government members were backing the Sadbhavana Party (Hoftun, 1999).

Nepal-India Relations

While the current government in India publicly denounced the Maoist peoples’ revolution and worked to close the border to weapons and Maoist rebels, there were rumors of Indian officials voicing disappointment that the secessionist-parties did not perform well. These rumors are surprising since India initiated the peace process (Adhikari, 2008). New Delhi’s willingness to engage the Communist Party of Nepal – Maoists (CPN-M) since mid-2005 and encourage Nepal’s mainstream political parties to allow the Maoists to participate in elections may have a significant impact on Indian domestic politics. In Chhattisgarh State, India’s Maoists are on the offensive and have for the first time announced the establishment of a parallel “revolutionary government,” a move similar to the Maoists’ tactics in Nepal (Basak, 2008a). India’s Maoists also appear to be following the CPN-M lead in adding an urban focus to their formerly rural-based movement, with one senior leader reportedly saying that “if we fail to build our movement in the cities, the revolution will remain a dream” (Basak, 2008b). Concerns that such Maoist rhetoric and actions may lead to unrest or violence in either or both countries, require serious consideration to prevent instability and possible violence.

Additionally, Indian government officials are currently facing (CPN-M) Maoist demands to renegotiate the 1950 Treaty of Peace and Friendship signed by India and Nepal, which many Nepalese have long considered biased towards India especially with regard to Mahakali River water rights (Thapa, 2008). Many in India also worry about the Maoist victory in Nepal for yet another reason – China. One Indian columnist wrote that “Delhi must be the first, last and ever-willing neighbor to
help Nepal and to keep China out under any and every circumstance. India having an overly Sino-friendly Pakistan as a neighbor is bad enough” (Kamath, 2008).

**Nepal-China Relations**

China has historically been less voluble and visible in its dealings with Nepal but is no less desirous of continued peace and stability among minority ethnic groups in Nepal than India. Long suspicious of the Communist Party of Nepal-Maoists (CPN-M) – and embarrassed by the use of the “Maoist” tag – China however adjusted its policy following the April 2006 (CPN-M) people’s movement by increasing the number of troops stationed on the China-Nepal border. China claims to adhere to a policy of non-interference in the internal affairs of other countries, and respects the choice made by the Nepalese people regarding its political system and development path. The Chinese government seems ready to promote bilateral relations and cooperation with all political parties, including the Communist Party of Nepal-Maoists (Zheng, 2008). In return, the CPN-M, as well as the major Nepali political parties, have adopted a pro-Beijing stance with regard to Tibetan protests in Kathmandu, regularly complying with Beijing’s requests to arrest and return Tibetan refugees. Mr. Pushpal Kamal Dahal (Prachanda) the leader of the CPN-M attended the closing ceremony of the Beijing Olympic games in September 2008 and expressed his interest in visiting Mao’s home village for “inspiration” (China News, 2008). This diplomatic visit to China breaks a long tradition of newly elected Nepali prime ministers visiting India first. Perhaps as a result, China has expressed interest in increasing its direct investment in Nepal’s private sector.

**International Acceptance and Security Issues**

In addition to geopolitical relationships and ethnic domestic politics, the Maoist-led government faces yet another challenge. The Maoists must work to promote a stable working environment for all involved parties in order to improve Nepal’s economic situation. International acceptance of Nepal’s newly formed Maoist government will be difficult for many democratic nations. Governments and international organizations will be watching closely to see not only how the Maoist party governs, but how the parties interact with one another. If government infighting takes precedent over sound economic-development and institution-building decisions on behalf of the Nepali people, international monetary aid, technical assistance, and foreign investment will likely decrease or disappear. Nepal’s economy is far too fragile to handle increased instability. Although the CPN-M has tried to convince the international community of its commitments to forming a representative government—including, for example, statements made by Prime Minister Dahal to President George W. Bush about his party’s commitment to democracy while at the 63rd General Assembly of the United Nations—many donors are not sure if the CPN-M will stand by its promises (Nepalnews, 2008c).

A 2008 UN report indicates that Nepal has performed poorly among the world’s 50 least developed countries (LDCs). Compared to other Asian LDCs that have enjoyed relatively high rates of growth in recent years, Nepal remains an exception. Nepal’s average GDP growth rate for the last three years was 2.8%, well below the 7.6% average of other Asian LDCs. While other Asian LDCs have made
progress transitioning their economies from a dependence on commodity exports to developing manufacturing and service sectors, a lack of political stability is one of main factors preventing Nepal from moving in the same direction (Nepalnews, 2008a). Continued international support is imperative in the coming months and years.

**The United States**

The U.S. has maintained its strong support for political pluralism while gradually building contacts with the Maoists. It welcomed both the elections and Nepal’s decision to form a federal democratic republic (US State Department, 2008). Ex-President Jimmy Carter stated that “it’s been somewhat embarrassing to me and frustrating to see the United States refuse among all the other nations in the world, including the United Nations, to deal with the Maoists, when they did make major steps away from combat and away from subversion into an attempt at least to play an equal role in a political society” (BBC, 2008). U.S. Ambassador Nancy Powell held the first meeting with the Maoist leadership on 1 May 2008. Deputy Assistant Secretary of State for South and Central Asian Affairs Dr. Evan A. Feigenbaum visited Nepal on 24-26 May, met with Prachanda and reportedly had a productive discussion. Prachanda requested continued U.S. economic assistance to support Maoist efforts to introduce a “new model of development” (eKantipur, 2008b). Future meetings are planned and positive outcomes expected.

**The United Nations**

United Nations peacekeeping forces have played a key role in maintaining stability and helping to ensure free and fair elections. While UN officials and workers prepare to wind down operations, some observers argue a UN presence is still needed and are working on extending the current exit timeline. The post-election transition has been contentious and prolonged for three reasons: the interim constitution was ambiguous in many of its transitional provisions, and was based on the assumption of a seven-party consensus. Additionally, the pre-election calculations by the parties (other than the CPN-M) were based on a Maoist defeat, and as a result, the parties were initially not prepared to follow the rules they had put in place when assuming they would still be in charge. Most critical is the monitoring of arms and armies. There is no easy solution on the issue of integrating the Peoples’ Liberation Army with the Nepalese Army. It is reported that many Maoist leaders privately agree that continued UN presence is necessary, with several publicly stating the same opinion (Bhattarai, 2008).

**Challenges of CPN-M: Selling “Maoist Democracy”**

As Communist Party of Nepal – Maoist (CPN-M) leaders assume their positions at the head of Nepal’s newly formed transitional government; they face numerous internal and external pressures. They will have to manage a coalition of parties, handle rising expectations, and address serious problems (not least, rising food and fuel prices) that would challenge the strongest of governments.
The Maoists are also well aware of the fact that they need to deal with the international community as a whole – both as political power centers and/or donors – and skeptical potential allies such as the business community and media. Maoist leaders’ immediate reactions to their victory were overwhelmingly conciliatory and accommodating (*The Kathmandu Post*, 2008a). After the election victory, party leader, Mr. Dahal, expressed his desire to work together with not only the seven parties that form the Constituent Assembly, but also any new parties formed through this election as well as existing parties not represented in the Constituent Assembly. He also stated that “all we [Maoists] want is for outsiders to give us a fair chance. Let them criticize us if we make mistakes but the time for prejudice is over. We want to deliver real change and hope our international friends will work with us.” (Mikesell and Des Chene, 2008).

**Maoist Policy: Rhetoric versus Reality**

While the Maoists have made the politically correct statements that foreign officials and the business community want to hear, questions remain as to whether the Maoists are sincere or whether they will use the rhetoric of violent struggle they used to win members and votes. Some argue that Nepal’s Maoists may have changed their strategy and tactics but not their goals. On the eve of the elections, Mr. Dahal stated that “we have not completed the democratic revolution; we are in the process of the completion of the democratic revolution” (Mikesell and Des Chene, 2008). The Maoists emphasize that their current situation is the result of bullet and ballot, not a rejection of the former. Baburam Bhattarai, a Maoist activist stated “we have not left the armed struggle. We wouldn’t be here without the armed struggle – if we did not have an army. It’s a fusion of bullet and ballot” (Gupta, 2008). This rhetoric coincides with the fundamental tenet of Marxism stating that no radical restructuring of the system is possible without eliminating the existing state.

A democratic-reversal could also occur when the Maoists begin to work within an existing bureaucracy that is inherently conservative and unrepresentative. The Maoists may find themselves trapped between their ambitious manifesto pledges on one side and demands for political compromise and bureaucratic stalemate on the other. Some observers fear that if the Maoists get too frustrated, they will go back to the streets and engage in violence. Speaking on June 1, 2008, Prachanda warned that obstruction in government formation could lead the Maoists to launch new agitation. Others raised the prospect of an “October Revolution.” Asked if another movement or struggle is likely, a Maoist leader explained that the question is about handing power to the people, not the CPN-M (Srivastava, 2008).

**New Government Challenges**

Assuming the Maoists do not officially take to the streets, a significant challenge within the Communist Party of Nepal – Maoists (CPN-M) is the fact that many CPN-M cadres continue to engage in illegal and violent activities. It is yet to be seen how the Maoist leaders will satisfy overly ambitious cadres to whom many promises were made. To date no actions have been taken by the Maoist leadership to punish those involved in illegal activities, including killings and torture of many
innocent people stating that these are isolated cases. Some argue that the CPN-M will lose support from its base if the illegal activities (e.g., torture, murder, and looting) are prosecuted. Winning the trust of the general populace and the international community will require consistent implementation of the rule of law and an end to the parallel policing functions of the Maoist, Youth Communist League (YCL).

**The Peoples Liberation Army**

In addition to local power struggles among Nepali police and the Youth Communist League, another major challenge is integrating the People’s Liberation Army into the existing Nepalese Army (Bom, 2008b). The Maoist position is that the PLA should be integrated into the Nepali Army, which falls under state control (Gorkhapatra, 2008). The fact that the Nepali Army has never been subjected to political control in the past is a significant challenge. None of the major political party leaders have broached the topic of defense and security out of concern of infringing on the military’s power structure. Recent remarks by the Army Chief General Rookmangud Katawal ruling out the possibility of inducting anyone into Nepal Army from outside without meeting its recruitment standards as well as counter remarks made by the PLA Chief Nanda Kumar Pasang that the army should follow the rules made by the politically elected representatives (Dhakal & Sharma, 2008) raises serious concerns.

Further complicating the issue is an agreement secured by the United Madhesi Front (UDMF) in the February 2008 to guarantee the induction of Madhesis into the Nepali Army. Most Madhesi leaders are firmly opposed to integrating former Peoples’ Liberation Army fighters into the Nepali Army and are determined to wait until the agreement to allow Madhesis to enlist in the national army is implemented before discussing PLA integration. The Nepali Army is resistant to both the plan to allow Madhesis into the army and to integrate the PLA into the national army.

Despite their apparent hostility, the Communist Party of Nepal-Maoists (CPN-M) and the Nepali Army have held talks at different levels. When the Nepali Army and the Peoples’ Liberation Army have been forced to work together, they have cooperated and worked effectively (Pradhan, 2008). The fact that the Communist Party of Nepal-Maoists received almost 200 votes from soldiers in the Nepali Army headquarters suggests that former battlefield opponents are not necessarily enemies for life (Sitaula, 2008).

**The Role of the Losing Parties**

As for the constitutional process that the election was meant to initiate, little if any progress has been made. While the Maoist manifesto does include detailed constitutional proposals, no party has paid much attention to making the Constituent Assembly a functioning governing body. The Maoists have developed several controversial plans to shape the federal organizational structure and the National Congress and United Marxist-Leninist parties have agreed in concept without any effort to develop alternative proposals (Franklin, 2008).

In the aftermath of the electoral losses, the attitude of the losing major parties has shifted from acceptance to that of denial. These parties seem to anticipate that
power will return to its usual locus--a few individuals who will make all major decisions based in private, back-room deals. For these interests, the rapid return to politics as usual may be reassuring and is certainly better than armed warfare.

**Can the Parties Reform and Recover?**

There is plenty of potential for the major parties to rejuvenate themselves, reconnect with voters and do well in the next election, if they are willing to heed the message for change. A substantial number of people did not cast their vote for the Communist Party of Nepal-Maoists (CPN-M) and would presumably be interested in other parties. Nepal’s voters have long demonstrated a desire for change; however, some argue that Nepal’s dominant two-party system prompted an anti-incumbent sentiment among voters who would prefer incremental change to the radical transformation offered by the Maoists.

Rejuvenated mainstream parties would benefit the country immensely – both to play a critical but constructive role in the constitutional process and to offer real competition and choice at the next election. Even the Maoists have said repeatedly that truly competitive politics is essential to avoid economic stagnation and political corruption – two key prerequisites to attracting foreign direct investment.

**Conclusion**

Recent events provide encouraging evidence of political progress and continued peace in Nepal. To begin bringing the CPN-M into the legitimate political system, based on ballots and not bullets, is positive. A successful election and the creation of a Constituent Assembly to create a constitution that will guide the government through its transition from a 240-year monarchical system to a federal democratic republic bodes well for increased representation of groups historically discriminated against in Nepal. It is to date, the most inclusive body ever elected with members from upper and lower castes, ethnic groups, and regional communities, as well one-third female members. If the leaders from all of the parties can agree to work together and put the interests of the country and its people ahead of their own interests, the chances of economic success increase exponentially. The Maoists must take the lead in promoting an open, give-and-take environment to decide policy for the country. To be sure the political, social, and economic challenges are significant and any misstep could result in political instability or even violence.

**References**


TERRORISM AND MEDIA IN KOREA

Yeok-il Cho, University of Central Missouri*
Franklin Wilson, Indiana State University

ABSTRACT
This study explores thirty total cases from Korean Terrorism Information Integration Center (KTIIC), in which Korean nationals were victimized outside Korea by foreigners from 1997 to 2007. The current study reports that the terrorist events reported by the KTIIC are more likely to draw Korean newspaper attention when they (1) take place in Iraq, (2) use crueler modes of action, and (3) are related to Korean national interests, specially supporting the American Administration policy on the war-on-terrorism which the Korean government has supported since its inception.

Terrorism has taken place since the beginning of world history, but it began to be known to more people in recent decades because of the ever increasing development of newer and faster mass media outlets through which information regarding terrorism can be disseminated to the masses1 (Biernatzki, 2002; Laquer, 1976; Nacos, 2002; Nacos, 2003; Nacos, 2007; Picard, 1993; Weimann & Brosius, 1991; Weimann & Winn, 1994; Wilkinson, 1997). It is no surprise that there have been scholars who emphasized the close or symbiotic link between terrorism and media. Weimann and Brosius (1991) said that the media “willingly or unwillingly” help terrorists to complete their wishes (p. 333). According to Nacos (2002), the media assist terrorists by “exploring and explaining the grievances of those who died for their causes” (p. 15). Biernatzki (2002) acknowledged that terrorism recently became a critical topic for research mainly because it interacts with the media, while Laqueur (1976) contended that the media and the terrorist are each others’ best friends. Most eloquently, Nacos (2003) described the nature of their relationship:

Terrorists and the media are more like partners in a marriage of convenience in that terrorists need all the news coverage they can get and the media need dramatic, shocking, sensational, tragic events to sustain and bolster their ratings or circulation (p. 52).

When New York and Washington, D.C. were attacked by terrorists on September 11th, 2001, the American mass media provided more articles and words on the incident than any other previous terrorist incident (Chermak & Gruenewald, 2006; Hess & Kalb, 2003; Kern, Just, & Norris, 2003; Nacos, 2002; Nacos, 2003).

As such, this study starts from a very simple research question: Under what circumstances does a terrorist event receive more coverage than other events? In order

* Direct correspondence to cho@ucmo.edu
© 2008 by the authors, published here by permission
The Journal of the Institute of Justice & International Studies Vol. 8

1 There have been a host of definitions regarding terrorism. For example, the Federal Code of Regulations defines it as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of social or political objectives” (See, 28 CFR, Section 0.85).
to answer this question, the present study examines the portrayals of approximately thirty terrorist acts targeting Korean nationals in three Korean newspapers. This study, in addition, will explain whether terrorist incidents are covered by the newspapers and analyze attributes of terrorist events affecting the amount of newspaper coverage. Furthermore, the current study will explore implications on the nature of the link between terrorism and media in Korea.

There have been numerous studies published on incidents in which Americans were targeted by terrorists, particularly focusing on the nature of the relationship between terrorism and media (Atwater, 1987; Kelly & Mitchell, 1981; Picard, 1993; Weimann & Brosius, 1991; Weimann & Winn, 1994; Wilkinson, 1997). Especially since the 9/11 terrorist attack, there has been a dramatic spike in the number of research articles on this issue (Biernatzki, 2002; Chermak & Gruenewald, 2006; Jiwani, 2005; Kern, Just, & Norris, 2003; Nacos, 2002; Nacos, 2003; Nacos, 2007). No research of this nature, however, has been conducted on Korean terrorism or victims. Therefore, the present study fills this gap by documenting terrorist incidents to which Korean nationals fall victim.

Literature Review

Some people learn about terrorist incidents through word of mouth, or hearsay. However, the mass media, to a large extent, has contributed to the people’s understanding of terrorist accidents. As such, a large body of previous research has laid a meaningful foundation for explaining the impact that types of terrorism have on media coverage (Atwater, 1987; Chermak & Gruenewald, 2006; Kelly & Mitchell, 1981; Kern, Just, & Norris, 2003; Paletz, Ayanian, & Fozzard, 1982; Picard, 1993; Weimann & Brosius, 1991; Weimann & Winn, 1994). For example, Picard (1993) indicated a common characteristic found in both American and Korean media that certain incidents are allotted more coverage because they are politically or socially important. The author provided a Korean example, which attested to the fact that it had more extensive coverage because of its social and political importance in South Korea, which regards North Korea as an enemy:

In 1987, when Korean Airlines Flight 858 crashed near the Thai-Burma border, it was covered both in the United States and Korea as a “normal” air crash, although officials alleged – without offering evidence – that the crash was the work of North Korean agents… After the arrests took place, coverage changed dramatically, and the press gave significant coverage to the terrorism issue. In Korea the terrorism aspect dominated the South Korean news. Coverage was so extensive that it pushed other news, including the upcoming Korean presidential election, off the front pages of newspapers for three days (p. 92).

Weimann and Brosius (1991) analyzed (1) the Rand Corporation dataset on terrorist activity from 1968 to 1980, (2) the coverage in nine newspapers from America, Canada, England, France, Germany, Israel, Egypt, and Pakistan, and (3) three major American broadcast networks (ABC, CBS, and NBC). They made three observations. First, “the level of victimization (amount of fatalities and injuries), the type of action, the identity of the perpetrators, and an attributable responsibility” are the most important factors affecting the media coverage. Second, “the process of news
“selection” is so complicated and complex that there should be a “two-step process of selection,” which are selection and prominence. Finally, “the perpetrators’ identity and attributable responsibility” are two major indicators in media’s selection of terrorist events while “number of fatalities and injuries” is the most important determinant factor for “the prominence of coverage” (p. 349). This study is significant because it dichotomized the news selection process and found decisive variables of terrorist incidents for each process.

Weimann and Winn (1994) used the same three sources used by Weimann and Brosius (1991), but expanded the scope of the date by six more years. This study is meaningful due to the fact it explored the extent to which the prominence decision by media personnel is affected by the location of terrorist action, mode of terrorist action, nationality and occupation of target, number of fatalities and injuries, and claimed responsibility for each behavior. Weimann and Winn (1994) reported that incidents with the following criteria received the most coverage: (1) Middle East as a location of terrorist action, (2) hijacking as a mode of terrorist action, (3) existence of terrorist organization claiming responsibility for incidents, and (4) presence of one or more fatalities or injuries as a seriousness of the case. This study is consistent with Weimann and Brosius (1991) in that it emphasized the importance of the extent of injuries and fatalities among other factors to predict the coverage prominence:

Doing physical harm is a potent predictor. The presence of injuries doubles the prospects for attention in print and more than doubles the prospects in the case of television. When no one dies, the probability of print coverage is only 22%. But this jumps to 48% when at least one person is murdered. The presence of one or more fatalities is one of the very highest predictors for both types of media (Weimann & Winn, 1994, p. 128).

Chermak and Gruenewald (2006) collected and analyzed both a list of terrorist behavior from both the FBI’s Terrorism in the United States annual report and the Memorial Institute for the Prevention of Terrorism (MIPT) Knowledge Base in conjunction with the New York Times articles from 1980 to 2001. They found that hijacking was the most predominant form of terrorism presented in the news. The authors, in addition, reported that the presence of a fatality was a potent predictor. While this result is consistent with earlier studies (Weimann & Brosius, 1991; Weimann & Winn, 1994), the three studies did not take into consideration whether there is any difference between cases of one fatality and those with multiple fatalities. Although Paulsen (2003) did not focus on the relationship between terrorism and media, but on that between homicide and media, he differentiated between single and multiple victims in terms of whether the homicide events were covered by the Houston Chronicle. However, this study also did not explain whether there is any discrepancy among cases of two as opposed to three or more victims in the newspaper coverage.

Kern, Just, and Norris (2003) searched for every story about terrorism from 1969 to 2002 in major U.S. broadcast networks (ABC, CBS, NBC, and CNN) and the New York Times. Kern and colleagues found out that the American mass media is more likely to cover the terrorist incident when Americans are victimized rather than when people of other nationalities are the victims (Kelly & Mitchell, 1981; Picard, 1993). Further, more recently Nacos (2005) and Jiwani (2005) explored the link between gender and terrorism. In Nacos’ examination of the description of female
terrorists in the mass media, she noted the presence of gender bias, in that female terrorists are regarded as less violent than male terrorists. Her argument was that gender reality must be reflected in the prevention measures of terrorism and counterterrorism policies. On the other hand, Jiwan (2005) examined two Canadian newspapers (Gazette and Globe and Mail) after the 9/11 attack in America. She insisted that Canadian media reiterated the patterned view of “all Muslim women as victims of barbaric Islamic practices and savage Muslim men” (p.17). In sum, previous research reported that the amount of media coverage has varied based on such factors as political or social importance of cases, region or country where terrorist incidents occurred, target, terrorist’s gender, tactics used by terrorists, and seriousness of terrorized victim. These prior studies led into the research question of the current study.

Methodology

The current study utilizes two main sources: (1) three major nation-wide Korean daily newspapers (Donga-ilbo, Seoul-shinmun, and Hankook-ilbo) and (2) a list of terrorist incidents. The list was procured from the Terrorism Information Integration Center, which presents a total of thirty terrorism cases in which Korean nationals were victimized outside Korea by foreign terrorists from 1997 to 2007. This study defines terrorism cases as the thirty cases reported by the Center. However, the summarized cases, provided by the Center, did not include sufficient information about the region, country, seriousness, target, and mode of terrorist activity. Therefore, keywords from the cases were used to discover the news coverage of the three newspapers in the Korea Integrated News Database System (KINDS). For instance, if the terrorist case took place in Iraq by means of kidnapping, keywords such as “Iraq” and “kidnapping” were used. The search was continued until identified articles provided information about geographic region, country, number of deaths, type of target, and mode of terrorist activity. Then, collected articles were used to know whether each case was addressed in the aforementioned newspapers and to count the number of words and articles each case received. The data collected for each case were entered into SPSS to generate descriptive statistics such as frequency, percentage, and mean.

Findings

Table 1 breaks down the basic frequencies and percentages of all 30 terrorist incidents by incident type. With respect to regions where terrorist action took place, the most frequently occurring region was Asia while Africa occupied the second place. No more than 2 cases occurred in Europe, North America, and South America respectively. On the other hand, with regard to the country of terrorist action, both Iraq and Nigeria were the most frequently occurring countries. Afghanistan, Sri Lanka,

---

2 The Terrorism Information Integration Center in Korea is a government agency attached to the Korean National Intelligence Service which is similar to the American CIA. Retrieved December 20, 2007, from http://www.tiic.go.kr/.

3 KINDS is a comprehensive online news database service which Korea Press Foundation has operated since 1990. It is the largest service, composed of 9 national dailies, economic dailies, English-version newspapers, news bulletins, 29 local dailies, TV main news, magazines, and foreign newspapers. (for online access, go to http://www.kinds.or.kr/).
Yemen, and Indonesia each had two incidents while America, Japan, Pakistan, Greece, Kenya, South Africa, Philippine, Columbia, Turkey, Russia, Myanmar, Gaza Strip, East Timor, and Somalia respectively had only one incident.

The number of dead victims was an indicator for measuring the seriousness of incidents. More than three quarters of the incidents involved no fatality. However, five out of thirty incidents involved one victim killed while two incidents had two dead victims. Mostly private citizens or business installations were targeted. Missionaries were rarely targeted, much less military installations or non-government organizations (NGO). Arguably it is surprising that Korean diplomatic installations and airlines were not targeted at all by terrorists. Kidnapping was the most frequently used mode of terrorist behavior. It was followed by bombing, shooting, and installation attacks. Two out of thirty cases used kidnapping and murdering simultaneously. It is noteworthy that hijacking was not used in any terrorist events.

Table 1 Frequency and percentage of terrorist incidences by incident type (N=30)

<table>
<thead>
<tr>
<th>Region</th>
<th>N</th>
<th>%</th>
<th>Target</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asia</td>
<td>19</td>
<td>63.3</td>
<td>Private citizen</td>
<td>15</td>
<td>50</td>
</tr>
<tr>
<td>Africa</td>
<td>7</td>
<td>23.3</td>
<td>Business installation</td>
<td>11</td>
<td>36.7</td>
</tr>
<tr>
<td>Europe</td>
<td>2</td>
<td>6.7</td>
<td>Missionary</td>
<td>2</td>
<td>6.7</td>
</tr>
<tr>
<td>North America</td>
<td>1</td>
<td>3.3</td>
<td>NGO</td>
<td>1</td>
<td>3.3</td>
</tr>
<tr>
<td>South America</td>
<td>1</td>
<td>3.3</td>
<td>Military installation</td>
<td>1</td>
<td>3.3</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Diplomatic installation</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Country</td>
<td></td>
<td></td>
<td>Airline</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Iraq</td>
<td>4</td>
<td>13.3</td>
<td>Kidnapping</td>
<td>12</td>
<td>40</td>
</tr>
<tr>
<td>Nigeria</td>
<td>4</td>
<td>13.3</td>
<td>bombing</td>
<td>7</td>
<td>23.3</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>2</td>
<td>6.7</td>
<td>Shooting</td>
<td>6</td>
<td>20</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>2</td>
<td>6.7</td>
<td>Installations attack</td>
<td>2</td>
<td>6.7</td>
</tr>
<tr>
<td>Yemen</td>
<td>2</td>
<td>6.7</td>
<td>Kidnapping &amp; murdering</td>
<td>2</td>
<td>6.7</td>
</tr>
<tr>
<td>Indonesia</td>
<td>2</td>
<td>6.7</td>
<td>Hijacking</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
<td>46.7</td>
<td>Other</td>
<td>1</td>
<td>3.3</td>
</tr>
<tr>
<td>Seriousness</td>
<td></td>
<td></td>
<td>No death</td>
<td>23</td>
<td>76.7</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1 death</td>
<td>5</td>
<td>16.7</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2 deaths</td>
<td>2</td>
<td>6.7</td>
</tr>
</tbody>
</table>

Table 2 represents a more in-depth analysis of the number of total articles, mean number of articles per case, number of total words, and mean number of words per case by the three newspapers. Among the cases with coverage, seventeen cases received no more than seven articles. Perhaps of more importance is the fact that seven cases out of the total thirty cases (23.3 percent) did not receive any article whatsoever. This finding is consistent with previous studies in that a large proportion of terrorist incidents go underreported or even unreported (Chermark & Gruenewald, 2006; Traugott & Brader, 2003; Weimann & Brosius, 1991; Wurth-Hough, 1983).
This result is a significant issue when one considers that most citizens learn about terrorist incidents through mass-mediated news in the modern world (Nacos, 2007).

**Table 2  Number of articles and words by three newspapers**

<table>
<thead>
<tr>
<th></th>
<th>Donga</th>
<th>Seoul</th>
<th>Hankook</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Articles</td>
<td>76</td>
<td>86</td>
<td>67</td>
<td>229</td>
</tr>
<tr>
<td>Mean # of articles per case</td>
<td>2.5</td>
<td>2.9</td>
<td>2.2</td>
<td>7.6</td>
</tr>
<tr>
<td>Words</td>
<td>72,536</td>
<td>75,707</td>
<td>62,997</td>
<td>211,240</td>
</tr>
<tr>
<td>Mean # of words per case</td>
<td>2,418</td>
<td>2,524</td>
<td>2,100</td>
<td>7,041</td>
</tr>
</tbody>
</table>

The top five cases in terms of the number of articles and words were selected from the sample and are depicted in Table 3. The purpose of this selection is to illustrate that only five cases represented the vast majority of total articles (over 73 percent) and over three quarters of total words in the Korean newspapers. The first was the Sunil Kim beheading case. Mr. Kim was working for Gana General Trading Company, a South Korean company under contract to the United States military. He was kidnapped by Islamic extremists in Iraq on June 24, 2003. The kidnappers insisted that Korean troops should withdraw from Iraq within 24 hours and that Korea’s plan to send more troops should be cancelled. Mr. Kim’s beheaded body was found in Fallujah, Iraq. Korean newspapers responded as similarly as their US counterparts did after the 9/11 attack by disseminating more coverage for the case than any other terrorist cases. This case received the highest number of articles and words in the newspapers.

**Table 3  Top five cases**

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Total articles</th>
<th>Total words</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sunil Kim beheading</td>
<td>2004</td>
<td>92</td>
<td>84,630</td>
</tr>
<tr>
<td>Saemmul Church abduction</td>
<td>2007</td>
<td>23</td>
<td>23,917</td>
</tr>
<tr>
<td>Tikrit shooting</td>
<td>2003</td>
<td>24</td>
<td>19,398</td>
</tr>
<tr>
<td>Somali piracy</td>
<td>2007</td>
<td>17</td>
<td>17,768</td>
</tr>
<tr>
<td>Jangho Yoon bombing</td>
<td>2007</td>
<td>12</td>
<td>13,235</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>168</td>
<td>158,948</td>
</tr>
</tbody>
</table>

Second was the Saemmul Church abduction case. Around two dozen South Korean missionaries were kidnapped and held hostage by members of the Taliban in July, 2007. This evangelistic group was composed of sixteen women and seven men. Two men were executed by the terrorists only because they carried bibles. However, two women were released on August 13th and the remaining 19 hostages on August 4th.

---

4 For more information, go to http://www.foxnews.com/story/0,2933,123343,00.html or http://www.cnn.com/2004/WORLD/meast/06/22/iraq.hostage/.

29th and August 30th. This case obtained the second largest number of articles and total words. The third top case was the Tikrit shooting. On November 30th, 2003, two South Koreans were killed and two others injured in Tikrit, Iraq, by the terrorist shooting which was thought to threaten the Korean government to postpone its plan to send more troops to Iraq.

Fourth was the Somali piracy case. Somali pirates abducted two South Korean-owned vessels with four Korean crew members on May 15, 2007 and released them on December 4, 2007. The hostage situation lasted around two hundred days. Finally, the least important among the top 5 cases was the Jangho Yoon bombing incident. Sergeant Yoon was Korean-born and American-educated. He worked for the Korean military as an English translator in Afghanistan. When he was waiting for local Afghani residents at the front gate of the military base, he was attacked by a Taliban suicide bomb on February 27, 2007.

It is very surprising that all the top 5 cases except the Somali piracy, to a large degree, are related to the American Administration policy on the war-on-terrorism which the Korean government has supported since its inception. This result is consistent with previous studies in that the incidents that are a threat to national interests are more likely to receive news coverage (Chermak & Gruenewald, 2006; Nacos, 2007).

Table 4 shows the total number of articles, mean number of articles per case, total number of words, and mean number of words per case according to an incident type. This table, also, addresses the research question of the current study: Under what circumstances does a terrorist event receive more coverage than other events? This table illustrates that newspaper coverage was affected by region or country where terrorist incidents took place, number of dead victims, mode of terrorist action, and target.

With respect to the region, Asia is more likely to have articles and words, Africa was ranked second, North America third, and Europe fourth. The incident in South America never received any coverage. With regard to the country, Iraq was the top country which received the most frequent number of articles and words. This means that when the incident takes place in Iraq, it is the most likely to receive newspaper articles and words. Afghanistan was second and Nigeria third. Finally, the case which occurred in America resulted in seven articles with 5,712 words even though it took place only one time.

The number of dead victims impacted the number of articles and words. More coverage was provided to the cases with a death than their counterparts. Table 4 shows that the cases involving a fatality received around ten times more mean number of articles and words than the cases without death. This result is consistent with prior studies (Chermak & Gruenewald, 2006; Weimann & Brosius, 1991; Weimann & Winn, 1994). There was, however, little dramatic difference, if at all, between the cases with one and two dead victims in terms of mean number of articles and words.

In terms of target of terrorist action, the cases with private citizens targeted were the most likely to draw attention from the three newspapers. It was followed by

---

6 For more information, go to http://news.bbc.co.uk/2/hi/middle_east/3250158.stm.
7 For more information, go to http://news.bbc.co.uk/2/hi/africa/7078012.stm.
business installation, missionary, military installation, and NGO. The cases with crueler methods were much more likely to receive articles and words than their counterparts. For instance, the cases involving kidnapping and murdering simultaneously received ten times the average number of articles and words compared to those with only kidnapping.

Table 4  Number of articles and words by incident type

<table>
<thead>
<tr>
<th>Region</th>
<th>Total articles</th>
<th>Mean # of articles/case</th>
<th>Total words</th>
<th>Mean # of words/case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asia</td>
<td>187</td>
<td>9.8</td>
<td>169,252</td>
<td>8,908</td>
</tr>
<tr>
<td>Africa</td>
<td>34</td>
<td>2.4</td>
<td>36,008</td>
<td>5,144</td>
</tr>
<tr>
<td>North America</td>
<td>7</td>
<td>7</td>
<td>5,712</td>
<td>5,712</td>
</tr>
<tr>
<td>Europe</td>
<td>1</td>
<td>0.5</td>
<td>264</td>
<td>132</td>
</tr>
<tr>
<td>South America</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Total articles</th>
<th>Mean # of articles/case</th>
<th>Total words</th>
<th>Mean # of words/case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iraq</td>
<td>121</td>
<td>30.3</td>
<td>109,172</td>
<td>27,293</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>35</td>
<td>17.5</td>
<td>37,152</td>
<td>18,576</td>
</tr>
<tr>
<td>Nigeria</td>
<td>11</td>
<td>2.8</td>
<td>15,624</td>
<td>3,906</td>
</tr>
<tr>
<td>US</td>
<td>7</td>
<td>7</td>
<td>5,712</td>
<td>5,712</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Seriousness</th>
<th>Total articles</th>
<th>Mean # of articles/case</th>
<th>Total words</th>
<th>Mean # of words/case</th>
</tr>
</thead>
<tbody>
<tr>
<td>No death</td>
<td>66</td>
<td>2.9</td>
<td>61,801</td>
<td>2,687</td>
</tr>
<tr>
<td>1 death</td>
<td>116</td>
<td>23.2</td>
<td>106,115</td>
<td>21,223</td>
</tr>
<tr>
<td>2 deaths</td>
<td>47</td>
<td>23.5</td>
<td>43,313</td>
<td>21,657</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Target</th>
<th>Total articles</th>
<th>Mean # of articles/case</th>
<th>Total words</th>
<th>Mean # of words/case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private citizen</td>
<td>120</td>
<td>8</td>
<td>108,285</td>
<td>7,219</td>
</tr>
<tr>
<td>Business installation</td>
<td>68</td>
<td>6.2</td>
<td>60,654</td>
<td>5,514</td>
</tr>
<tr>
<td>Missionary</td>
<td>26</td>
<td>13</td>
<td>26,118</td>
<td>13,059</td>
</tr>
<tr>
<td>Military installation</td>
<td>12</td>
<td>12</td>
<td>13,235</td>
<td>13,235</td>
</tr>
<tr>
<td>NGO</td>
<td>2</td>
<td>2</td>
<td>2,943</td>
<td>2,943</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mode</th>
<th>Total articles</th>
<th>Mean # of articles/case</th>
<th>Total words</th>
<th>Mean # of words/case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bombing</td>
<td>15</td>
<td>2.1</td>
<td>14,546</td>
<td>2,078</td>
</tr>
<tr>
<td>Kidnapping</td>
<td>55</td>
<td>4.6</td>
<td>53,856</td>
<td>4,488</td>
</tr>
<tr>
<td>Installations attack</td>
<td>4</td>
<td>2</td>
<td>3,486</td>
<td>1,743</td>
</tr>
<tr>
<td>Shooting</td>
<td>39</td>
<td>6.5</td>
<td>30,540</td>
<td>5,090</td>
</tr>
<tr>
<td>Kidnapping &amp; murdering</td>
<td>115</td>
<td>57.5</td>
<td>108,548</td>
<td>54,274</td>
</tr>
</tbody>
</table>
Conclusion

Previous research has indicated two agreed points. On the one hand, a certain terrorist incident is more likely to receive news coverage than other incidents. For example, first, four out of the top five most news generating cases were, to a large extent, related to the national interest and received around three quarters of articles and words. Second, the incidents that happened in Iraq were more likely to receive newspaper articles and words than their counterparts. Although the same number of cases happened in Iraq and Nigeria respectively, the cases in Iraq drew much more attention from the newspapers than those in Nigeria. Third, the cases with one dead victim received around a ten times greater mean number of articles and words than those without a fatality. Finally, cases with more brutal methods had a higher chance to draw attention from the editorial policy of newspapers than cases with less brutal methods. On the other hand, a large proportion of terrorist incidents go underreported or unreported. As an implication for this point, future studies should focus on why some cases are underreported or even unreported.

Additionally, the current study found out unique features in the Korean setting. First, all terrorist incidents connected to the national interest in this study had a lot to do with the war-on-terrorism. Second, Korean diplomatic installations and airplanes were not targeted by foreign terrorists; so, hijacking as mode of terrorist action was not used in the total 30 cases. Finally, there was little difference among the cases with one and two dead victims in terms of average number of articles and words they received. In sum, the terrorist events reported by the Korean Terrorism Information Integration Center are more likely to draw newspaper attention when they (1) take place in Iraq, (2) use crueler modes of action, and (3) are related to Korean national interests, specifically supporting the war-on-terrorism.

In conclusion, future studies should consider the limitations of this study. First, this study focused on only one country. In order to know more about the general relationship between media and terrorism, future studies need to include multiple countries. Second, this study dealt with only national newspapers. These terrorist incidents may also have been written about by local or provincial newspapers. So, later studies should target not only national newspapers but also local ones. Third, this study did not address why the events took place and the objectives surrounding them. Terrorist events have such wide effects on people and society that diverse approaches should be adopted in order to provide more extensive information that could account for the causes and purposes of terrorism (Ben-Yehuda, 2005). Fourth, in regards to methodology, the current study examined whether each case was written in the newspapers and its word counts in order to measure the prominence of coverage. However, the prominence of coverage can be explained more effectively by exploring where the article is located compared to other news stories even on the same page. So, a more sophisticated measure of coverage, such as location of article, should be used in the subsequent studies. Finally, a short acknowledgement about the operational definition of terrorist cases should be mentioned. This study defined terrorist cases as the thirty cases reported by Korean Terrorism Information Integration Center. The reported cases, however, included such incidents as piracy and war crimes against civilian contractors working with the military and religious missionaries in a war zone, which may not be considered as terrorist acts. Therefore, this study cannot avoid the criticism that the operational definition of terrorist cases is too broad. In addition, the
following question may arise: How are these Korean cases comparable to the 9/11 acts?

References


PROSECUTING DOMESTIC TERRORISTS IN THE
AMERICAN COURT SYSTEM:
A STUDY OF THREE CASES

Gregg W. Etter Sr.
University of Central Missouri

ABSTRACT
Throughout the history of the United States there are those that have attempted to achieve their political and personal ambitions by means of force. When these plots failed, the plotters were subject to trial in the American justice system. The American judicial system is somewhat unique in that these plotters were tried in civil rather than in military courts. In this study three court cases will be examined: United States v. Aaron Burr, United States v. John Brown and United States v. Timothy McVeigh to explore the evolution of the American judicial response to domestic terrorism over the history of the republic.

Although the law in the United States has its roots in English Common Law, Law in the United States must conform to the United States Constitution. It is through a constitutional prism that American courts view all legal actions in the United States. Thus when those that have attempted to achieve their political and personal ambitions by means of force plotted against the government and their plots failed they were put before the American civil justice system to face trial for their actions. This action is considered to be somewhat unique in jurisprudence. Prior to 1776, under English laws many who had committed such offenses were tried in either Admiralty or Military courts for their alleged offenses. The trials were often not public. The verdicts sealed for reasons of national security and even some executions were not subject to public view or knowledge.

In the early years of the republic, the courts, the judges, and the lawyers had all been trained in the principles of English common law and they were used to practicing law in that fashion. The ratification of the United States Constitution in 1789 gave a new framework for the legal system of the United States that guaranteed certain rights for individuals and limited the powers of the government in ways that were not fully understood by most at the signing of the document. The new legal system under the Supreme Court was about to undergo a test when the case of Aaron Burr v. The United States came to trial in 1807.

The Plotters: Aaron Burr (1756-1836)

Aaron Burr was born on February 6, 1756 in the Royal Colony of New Jersey. His father was the Reverend Aaron Burr and was the President of Princeton
University (called the College of New Jersey at the time) as his father before had been. Burr graduated from Princeton University in 1772. Burr rejected the idea of becoming a preacher as his father and instead became a lawyer (Lomask, 1979, p. 33). In short, Burr came from a somewhat privileged upbringing and considered himself an aristocrat.

In 1775 Burr and a friend joined the Continental Army to fight for independence from Great Britain. Aaron Burr was a Revolutionary War hero and rose to the rank of Colonel before leaving the army in 1779 in ill health. Burr had participated in the failed attempt to invade Canada under General Benedict Arnold and later commanded a regiment under General Washington.

After the Revolutionary War, Burr set up his practice of law in New York City which was the capital of the newly formed republic. Burr and Alexander Hamilton were frequently in the same courtroom trying cases (Lomask, 1979, p. 93). Burr had a successful law career and was elected to the New York State Assembly in 1784. Although he owned slaves from time to time, Burr unsuccessfully argued for the abolition of slavery in New York to the Assembly. In 1789, Burr was appointed Attorney General for the State of New York by Governor George Clinton. This was a post that he served in very well, although not without a certain amount of controversy over certain land deals that the state made that allegedly benefited friends of the Governor. Burr was elected to the United States Senate in 1791 by the New York State Assembly as was the custom at the time. In doing so he defeated a re-election attempt by Alexander Hamilton’s father-in-law, Philip Schuyler and thus earned the wrath of Hamilton (Schachner, 1961, p. 101).

The capital of the United States had moved to Philadelphia in 1790 and therefore the newly elected junior senator from New York attended to his duties of the 2nd Congress in that city. Burr began to politic in the Senate and form alliances. He was considered for the running mate position for Thomas Jefferson in the election of 1800 but wound up running against Jefferson instead in the convoluted politics of the time. By this time the capital was in the process of moving to Washington, D.C.

According to Senator Mark Hatfield (1997):

In the election of 1800, however, the constitutional system for electing presidents broke down, as both Jefferson and Aaron Burr received the same number of electoral votes. This impasse threw the contest into the House of Representatives, where for thirty-five separate ballots, neither candidate was able to gain a majority. When the stalemate was finally broken, the House elected Jefferson president, thus making Aaron Burr our third vice president. (p. xiii).

The result of the election of 1800 was a political disaster. It would be like George Bush being saddled with Al Gore as Vice President. The Vice President of the United States was now Aaron Burr and the President of the United States was Thomas Jefferson. Jefferson felt that Burr should have deferred and allowed some of his electoral votes to go to Jefferson since they had originally run together on the same ticket with Burr originally running for Vice President. Burr declined and the election
was deadlocked for a long time. As a result, this left him a bitter enemy of President Thomas Jefferson (Larson, 2007, p. 241-270).  

Burr had radial political disagreements with President Thomas Jefferson and Secretary of the Treasury Alexander Hamilton. Jefferson did not give Burr much power as Vice President and he was basically restricted to presiding over the Senate. As a result, Jefferson did not nominate Burr as his running mate in the election of 1804 and instead nominated Governor Clinton of New York. Burr tried to run for the Governorship of New York that was being vacated by Clinton. Hamilton and others opposed his candidacy vigorously and Burr lost the election. Burr blamed Hamilton for his electoral loss.

The Duel

Some of these disagreements led to a pistol duel between Burr and Hamilton in 1804. Burr shot and killed Hamilton in the duel. Burr returned to the Senate and finished out his term as Vice President. In the Northern and middle states Hamilton was much mourned and Burr vilified. However in the Western and Southern states, Burr was seen as defending his honor. Although Burr was indicted, he was never tried or convicted for killing Hamilton (Vail, 1973, p. 94-107).

The Plot

There had been suspicions about Burr’s intentions in the west as early as an article in the Gazette of the United States on August 2, 1805 that questioned Burr’s actions and motives (Lomask, 1982, p. 75). In 1806 Burr’s plot to gain power in western territories was uncovered. Burr had dreams of creating an independent nation in the Southwestern part of North America. Burr planned to do so by invading and taking over Spanish territory near the area that was then Mexico or by separating the Mississippi Valley from the rest of America. Burr tried to gain support from several political and military leaders in order to win support. In his attempts to get funding for his plot he even tried to get funding from England contacting Anthony Merry the British Minister to the United States, but failed and turned to private sources. Burr plotted with his old comrade in arms General James Wilkinson with whom he had served in the Quebec Campaign during the Revolutionary War. Wilkinson had been the commander of the army and was now the newly appointed governor of the just

---

1 Within four years of this deadlocked election, Congress had passed, and the necessary number of states had ratified, the Twelfth Amendment to the Constitution, instituting the present system wherein electors cast separate ballots for president and for vice president. (Hatfield (1997, p. xiii).

2 Linder (2001) observed that in 1806:

The United States seemed on the verge of a war with Spain, even as the Administration struggled to preserve neutrality. Americans west of the Alleghenies rejoiced in President Jefferson's acquisition of the Louisiana Territory, but boundary disputes and Spanish prohibitions on Louisiana residents' entry into Nueva Espana created resentment and threats of reprisal. The Viceroy of Mexico, allied generally with western Indians, sent troops to the Sabine River to protect the Spanish frontier from invasion by United States citizens. Most Westerners saw Spain as tyrannical and viewed Texas and Florida as a rightful part of the United States. Many of these same Westerners expressed a willingness to take Spanish territory by force. Meanwhile, Spain also worried about the designs of residents of its own dominion (especially Mexico), recognizing that the unprivileged masses had grown resentful of Spanish authority.
purchased Louisiana Territory. Wilkinson was playing both ends against the middle and was also a paid Spanish secret agent.

In August 1806 Burr began gathering forces and war supplies in the Ohio Valley. Burr sent a ciphered letter to Wilkinson outlining his plans and asking for Wilkinson’s cooperation. President Jefferson became aware of Burr’s activities and sent out directives to western officials telling them to carefully observe Burr’s actions and warning American citizens not to participate in his plan. Burr and about one hundred followers moved south along the Ohio River to Blennerhassett’s Island in Virginia. To obtain boats and military equipment for the plotted military action.

What Could Have Happened if the Plot Had Succeeded?

The Spanish government had blocked any further American immigration into their territories. There was considerable resentment by both Americans and Spanish about the passage of American trade goods through Spanish territory to the ports of the Caribbean. The Spanish sought to tax the goods and the Americans sought to avoid the tax. The Spanish were also afraid (with some justification as it turned out) that once the Americans had inserted themselves into the Spanish colonies, they would take over Texas and Florida. They wanted Louisiana as a French “buffer state” between themselves and the land hungry Americans. The Spanish were furious that the French sold the Louisiana Territory to the upstart Americans and were willing to fight to protect their interests (Schachner, 1961, 277-279).

If the plot had succeeded, we could have found ourselves at war with Spain and her ally England. Linder (2001) observed that:

The American and French revolutions worried traditional European powers, Great Britain and Spain, who were determined to keep the radical new doctrine from undermining the power of their royalty. Meanwhile, Napoleon’s empire-building produced sustained military conflict on the Continent.

Thus the combined forces of these two superpowers could have overwhelmed the new republic since our ally, France was at war in Europe and could not help us.

The Overt Act

Burr had assembled a force of men on Blennerhassett’s island to travel to New Orleans to begin their conquest of the Spanish Southwest. Harman Blennerhassett was building the boats. Militia arrived and arrested Blennerhassett after several boats filled with armed men had departed down the Ohio river. The militia latter intercepted some of the boats downriver.3

---

3 Investigations of Burr in 1805 and 1806 missed evidence of his efforts to obtain armed gunboats along the Ohio River. During Thomas Jefferson’s administration, shipyards along the Ohio were constructing sea-going gunboats. Burr arranged with several gunboat contractors to obtain boats and supplies. Burr persuaded John Jordan, Jr., a Lexington, Kentucky, gunboat contractor, and others to ally themselves in his schemes. Rumors about Burr’s plots and his designs for the boats as part of a military expedition to wrest Louisiana from the Union resulted in the government’s suspension of gunboat construction and the seizure of boats destined for Burr (Johnson, 2001, p. 28).
Burr initiated a trip down the Mississippi without gunboats, but when he saw Jefferson's proclamation against him, he tried to escape overland in November 1806. He was caught and tried, but a weak case put forth by the prosecution and lack of clarity regarding what constituted treason resulted in his acquittal (Johnson, 2001, p.28).

The Arrest

Aaron Burr made no attempt to flee and went about his business of organizing his military expedition on the Ohio River. According to Linder (2001):

A militia detachment of thirty men caught up with Burr when he and his expedition of between sixty and hundred men were camped across from Natchez, on the west bank of the Mississippi. Burr was handed letter from the Governor of Mississippi demanding his surrender. Burr responded to the letter by denouncing Wilkinson whose 'perfidious conduct' had 'completely frustrated' his 'projects.' The next day Burr met with the Governor who convinced him to surrender and allow himself to be conducted to the nearby town of Washington. A grand jury, after listening to evidence against Burr, declared Burr "not guilty of any crime or misdemeanor against the United States." The jury went on to condemn the arrest, suggesting that it had given cause to "the enemies of our glorious Constitution to rejoice." Burr demanded and received his release.

At this point, Burr realized that he would do well to make his escape while he could before the mob took further action. Wilkinson plotted to seize Burr in part to cover up his own actions in the affair. Once additional information about Burr's activities became known, a new warrant was issued for his arrest. Burr was arrested by military authorities on February 18, 1807 on the Tombigbee River, in present day Alabama and was taken to Fort Stoddart for two weeks. Burr was then conducted by a nine-man military guard on a one-thousand mile horseback trip to Richmond, where he would stand trial for treason.

---

4 Cvllelaw (2007) observed that:
After almost getting into a battle with Spanish forces at Natchitoches, Louisiana, Wilkinson decided he could best serve his conflicting interests by betraying Burr's plans both to President Jefferson and to his Spanish paymasters. Jefferson issued a proclamation for Burr's arrest, declaring him a traitor even before an indictment. Burr read this in a newspaper in the Orleans Territory on January 10, 1807. Jefferson's warrant put Federal agents on his trail. He turned himself in to the Federal authorities twice. Both times, judges found his actions legal and released him. But Jefferson's warrant followed Burr, who then fled for Spanish Florida; he was caught before he got there.

5 Wheelan (2005) found that:
After placing a $5,000 bounty on Burr, Wilkinson sent six picked men armed with pistols and dirks, but with no warrants, to apprehend him and bring him back to New Orleans for a drumhead court-martial—or, perhaps, kill him (p. 152).
Linder (2001) noted that: "He disguised himself as a boatman and disappeared into the wilderness on the eastern side of the Mississippi."
The Indictment

An attempt to get an arrest warrant for Burr in the United States District Court in Frankfort, Kentucky on the misdemeanor charge of “preparation of a military expedition against Mexico” on November 4, 1806 was unsuccessful and the motion was denied by the judge citing the lack of probable cause. Burr appeared before the court accompanied by his attorney, Henry Clay. Burr asked that a Grand Jury be convened to look into whether any of his actions were illegal. In effect, Burr was daring them to find that he did anything illegal. Judge Innes granted his request. The Grand Jury returned no indictment and was dismissed. The District Attorney made another attempt with a second Grand Jury on December 2, 1806, but the Grand Jury returned a verdict of “No True Bill” on the charge against Burr (Lomask, 1982, p 144-145).

A Grand Jury was called in Mississippi Territory on February 4, 1807 to indict Burr but returned a “No True Bill” verdict on the charges. A fourth attempt at indictment was finally successful, a Grand Jury in Virginia indicted Burr on Treason (felony) and attempting to instigate a military action against Spain (misdemeanor).

The Trial

The cipher letter was the government’s main piece of evidence of Burr’s intentions along with testimony from Wilkinson. Jefferson and government attorneys argued that Burr should be convicted because of the idea of constructive treason under common law. As defined by Black’s Law Dictionary, constructive treason is: “Treason imputed to a person by law from his conduct or course of actions though his deeds taken severally do not amount to actual treason” (p.1672). Virginia District Attorney George Hay also cited Burr’s flight from Mississippi as proof of Burr’s guilt.

Burr’s lawyers, Luther Martin, John Wickham, Edmund Randolph, Charles Lee, Benjamin Bott and John Barker argued Burr had not levied war as required by the constitutional definition of treason. The government argued that established case law on treason took a common law view that encompassed the doctrine of constructive treason (United States v. Vigol, 1795; United States v. Mitchell, 1795; and, Case of Fries, 1800). In the trial of Burr’s fellow conspirator Bollman, Hoffer (2008) noted that the government’s attorney:

Rodney now introduced the argument that the government would replay throughout the prosecution of Burr. ‘In treason all are principals. There are no accessories.’ If Bollman and Swartwout were culpable, even though they did no more than carry letters, the Burr was culpable, even though he never made it to New Orleans—and vice versa. This doctrine was a common law fixture but was not part of the constitutional definition of treason. One had to perform a treasonous act, not be a party to a plan to perform such an act (p. 113).

Gen. Wilkinson was an unimpressive witness for the government. Questions of Wilkinson’s decoding of the cipher, authorship of the document and possible alterations to the cipher letter were raised by Chief Justice Marshall and were never satisfactorily addressed by the prosecution (Wheelan, 2005, p. 170).

President Jefferson had made so many statements about the guilt of Burr to the congress and the press and the strength of the evidence that Jefferson allegedly
possessed against Burr, that Burr and his lawyers tried to subpoena President Jefferson to testify and bring forth this evidence in open court. The right to directly confront witnesses cited in the 6th Amendment was given as justification for the subpoena to the President. This nearly caused a Constitutional crisis as Jefferson refused to testify citing executive privilege. Chief Justice Marshall was urged to hold the President in contempt of court and have him arrested. In the end Jefferson provided some documents to the court but was not compelled to testify (Wheelan, 2005, p. 154-161).

Commodore Thomas Tuxtun was called as a government witness to testify on his conversations with Burr about the alleged plot (Schachner, 1961, p. 430). Tuxtun had allegedly been asked by Burr to go to Jamaica to secure British naval cooperation for the plot. According to Geissler (1997):

Commodore Thomas Truxtun’s straightforward testimony at Aaron Burr’s 1807 treason trial cleared Truxtun’s own reputation in connection with the ‘Burr Conspiracy,’ in which Aaron Burr and some of his associates were accused of plotting the secession of western US territories, and was also instrumental in Burr’s acquittal because Truxtun convinced the jury that Burr had planned aggression against Spain and not the United States (p. 31).

The Media Response

President Jefferson had made statements to the press declaring Burr “guilty” and that he should be hanged for treason. President Jefferson even made speeches and communications with Congress declaring Burr guilty. Jefferson missed no opportunity to denounce Burr to anyone who would listen and the media listened with great interest. The media howled for conviction. Chief Justice Marshall expressed doubts about how Burr could get a fair trial in such an atmosphere of biased reporting by the media.

The Result

In his instructions to the jury, Marshall narrowly defined treason on a constitutional basis as defined in Article III, Section 3 of the United States Constitution. Lomask (1982) noted that Marshall took a constitutional view of Treason. To support the charge of treason, Marshall had said,

[W]ar must be actually levied . . . To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by an assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed (p. 205).

This was sound constitutional law. For the Constitution of the United States had clearly defined treason against the United States to consist "only in levying war against them, or in adhering to their enemies, giving them aid and comfort" (U.S. Constitution, Article III, Section 3). Marshall rejected the argument that Jefferson and the government lawyers made of constructive treason. As a result, Burr was acquitted and so were his followers.
Effects on United States Law and Policy

The effects of U. S. v. Burr (1807) had lasting implications for the United States justice system. Accused traitors and terrorists would be tried in civilian courts rather than in military ones. Prior to the revolution, in colonial America, such trials were often held in military or admiralty courts. Burr in fact was arrested and transported to the magistrate by military authorities in spite of his request to be turned over to civil jurisdiction (Vail, 1973, p. 144).

In previous cases of accused treason, the common law definitions of constructive treason had been applied (i.e. United States v. Vigol, 1795; United States v. Mitchell, 1795; and, Case of Fries, 1800). Indeed in the previous treason trial of Burr’s co-conspirators Bollman and Swartwout (Ex parte Bollman, 1807) the common law definitions of treason applied, however a conviction did not follow. Marshall’s ruling reversed the common law definition of treason used in Ex parte Bollman in favor of a strict interpretation of the definition of treason expressed in Article III, Section 3 of the constitution. Thus, the definitions of treason used in U.S. courts would follow constitutional rather than common law.6

The possible affects of media coverage and bias were noted by the court, but no action was taken at that time.

The practice of the chief executive invoking “executive privilege” was expanded. Although Washington had refused Congress some documents previously citing the need to maintain secrecy for security reasons, he had latter relented and provided those documents in a modified form. The question became was one branch of the government (executive) subject to subpoena from another branch of the government (judicial or legislative)? The question of whether or not Marshall would have held Jefferson in contempt as asked for by Burr’s attorneys will never be answered as Jefferson reluctantly provided some documents eventually for the trial. For his part, Jefferson did not attempt to impeach Justice Marshall as he had previously attempted to impeach Justice Chase over the Case of Fries (Schachner, 1961, p.417-436). The trial in the Senate of that case interestingly enough was presided over by then Vice President Aaron Burr.

The Plotters: John Brown (1800-1859)

John Brown was born on May 9, 1800 in Torrington, Connecticut. He was brought up in a strict Calvinist family that later moved to Hudson, Ohio. John was raised on a farm and worked in his father’s tannery. His parents were against slavery. Brown married and moved to New Richmond, Pennsylvania where he opened up his own tannery. Brown had become obsessed by religion, taught Sunday school, and

---

6 Hodffer (2208) observed that:

Marshall’s opinions in these cases created important present on substance and procedural grounds. Today the notion of the law of evidence—what was admissible in court and what was not, which party bore the burden of proof at any given time in the trial—is a major part of law school curriculums and the subject of many treatises as well as a set of Federal Rules. But in 1807, the law of evidence was not well established. Hearsay and rumor, suspiciously produced documentary evidence that one party could not produce or the other party could not see in advance, could all be entered at trial. Marshall’s rulings on the admissibility of oral and written evidence would become the bedrock of American law of criminal evidence (p. viii).
spoke out often on subjects of morality. He thought that slavery was a sin against God and told anyone who would listen so. Brown had six children who lived and taught them his religious beliefs and anti-slavery views as well. Brown fell onto hard times. His wife died and he was going broke. He re-married and moved back to Ohio where his father lived.

Brown began to read with interest the newspaper anti-slavery campaigns of such authors as William Lloyd Garrison in the _Liberator_. Many Northern newspapers had actually called on the slaves to revolt against their masters. The editorial rhetoric was stirring and in true “yellow press” tradition. Brown began to assist runaway slaves that had wandered into his area from Kentucky.

Brown lost everything in the financial panic of 1837. Brown was forced into bankruptcy in 1842 as he was unable to pay his debts. During this time Brown had 5 more children by his second wife, making a total of 11 surviving children (2 had died in infancy). Brown even tried his hand at being a wool salesman without any luck. The passage by Congress of the Kansas-Nebraska Act in 1854 (which provided that the settlers would vote as to admission as a slave or free state and negated the Missouri Compromise of 1820) provided Brown an opportunity to escape poverty and failure in Ohio. After becoming involved with the Massachusetts Kansas Committee in their quest to have Kansas Territory admitted to the Union as a free state Brown moved west to Kansas (Rossbach, 1982).

A fierce Abolitionist, John Brown had taken part in the border wars of “Bleeding Kansas” with a vengeance. Brown became the Captain of a volunteer Militia company that was called the Liberty Guards in 1855 that supported the free-soiler cause. The Massachusetts Kansas Committee provided money and weapons to several such militias in the border wars of that period (Etcheson, 2006). On 05/24/1856 Brown and his sons murdered 5 pro-slavery men at Pottawatomie Creek, Kansas. Brown believed that slavery could only be stopped by force of arms.

Villard (1911) observed that:

In the light of all the evidence now accumulated, the truth would seem to be that John Brown came to Kansas bringing arms and ammunition, eager to fight, and convinced that force alone would save Kansas. He was under arms at the polls within three days of his arrival in Kansas, to shed blood to defend voters, if need be, and was bitterly disappointed that the Wakarusa ‘war’ ended without a single conflict (p. 185).  

---

7 Referring to the 1856 Pottawatomie Massacre and Brown’s participation in the murder of the pro-slavery settlers, Villard (1911) went on to say:

Fired with indignation at the wrongs he witnessed on every hand, impelled by the Covenanter’s spirit that made him so strange a figure in the nineteenth century, and believing fully that there should be an eye for an eye and a tooth for a tooth, he killed his men in the conscientious belief that he was a faithful servant of Kansas and the Lord. He killed not to kill, but to free; not to make wives widows and children fatherless, but to attack on its own ground the hideous institution of human slavery, against which his whole life was a protest. He pictured himself a modern crusader as much empowered to remove the unbeliever as any armored searcher after the Grail. It was to his mind a righteous and necessary act; if he concealed his part in it and always took refuge in the half-truth that his own hands were not stained, that was as near a compromise for the sake of policy as this rigid, self-denying Roundhead ever came. Naturally a tenderhearted man, he directed a particularly shocking crime without remorse, because the men killed typified the slaveholders who counted victims by the hundreds (p. 185).
On December 20, 1858 Brown led a nighttime raid into Missouri freeing some slaves and stealing livestock, wagons, and other goods. The border wars of “Bleeding Kansas” had not only provided John Brown a chance to do something about the expansion of slavery, it had left him a hero in the eyes of many liberal abolitionists in the North. Brown was viewed as a dreaded, murdering villain in the South and in Missouri in particular. Brown relished this attention and sought to do more for “the cause.”

The Plot

Brown plotted to seize arms at the Federal armory at Harpers Ferry, Virginia. He planned to transport these weapons back to his staging area in Maryland via wagon and use them to begin a slave rebellion to free the slaves. Maryland was a slave state at the time. Brown secured financial backing from anti-slavery forces in the North for the raid. Brown’s financial backers were eager to seek action and urged Brown forward thinking that he was not moving fast enough to act (Reynolds, 2005, p. 240). Brown began to recruit men for his plot and selected many who had been with him in Kansas.

Brown brought his would be raiders to his farm in Maryland to train for the raid. Brown elicited the services of Hugh Forbes to be his drillmaster and train his raiders. Forbes disagreed with Brown on the Harper’s Ferry raid and felt that the cause would be best served by raiding various plantations in Virginia and freeing the slaves there.  

On August 21, 1859 Brown met with anti-slavery crusader and former slave Frederick Douglas who had called for insurrection and the freeing of the slaves. Brown asked Douglas to join him and the other on the Harper’s Ferry raid.  

Although Brown did not have the complete support of all of the anti-slavery community, there were many who gave him money, arms and aid. A group known as the secret six were among those who financed Brown’s ambitions and planned insurrection (Rossback, 1982). Others aided if not in their complicity, but in their

---

8 Reynolds (2005) notes that:

Brown’s plan was far risker than Forbes’s not because Brown was foolhardy but because he was certain that blacks were capable of rising up, resisting capture, and forming a liberating army. When Forbes questioned him, Brown pointed to the history of African American culture, his main source of inspiration. Nothing, he said, terrified white Southerners more than slave insurrections. If Nat Turner with fifty men could hold a section of Virginia for several weeks, he declared, an ever-growing band of armed blacks and whites could topple slavery in the state and eventually throughout the South (p. 241).

9 According to Oates (1984):

Douglas was shocked. He pointed out that if Brown attacked federal property, it would ‘array the whole country’ against him and the invasion would be stamped out at once. But Brown argued that the attack was both feasible and necessary, because it would ‘serve notice to the slaves that their friends had come, and as a trumpet to rally the, to [my] standard.’ Douglas continued to object, insisting that the old man was ‘going into a perfect steel trap, and that once in he would never get out alive.’ How, Douglas exclaimed, could his friend ‘rest upon a reed so weak and broken?’ Douglas was certain that Virginia would ‘blow him and his hostages sky-high, rather than that he should hold Harper’s Ferry an hour.’ Brown disagreed and again argued Douglas to come with him on the raid. Douglas declined but a couple of Douglas’s friends that were former slaves agreed to go with Brown on the raid (p. 282-283).
silence and did not betray his plans to the government. The stage was rapidly being set for the planned slave insurrection.

Describing Brown’s raid on Harper’s Ferry, the West Virginia Archives & History (2008) noted that:

There were two keys to the success of the raid. First, the men needed to capture the weapons and escape before word reached Washington, D.C.. The raiders cut the telegraph lines but allowed a Baltimore and Ohio train to pass through Harper’s Ferry after detaining it for five hours. When the train reached Baltimore the next day at noon, the conductor contacted authorities in Washington. Second, Brown expected local slaves to rise up against their owners and join the raid. Not only did this fail to happen, but townspeople began shooting at the raiders.

**What Could Have Happened if the Plot Had Succeeded?**

Brown wanted to start a slave rebellion in order to secure freedom for those in bondage. In 1831, Nat Turner, an African-American preacher claiming to be divinely inspired, had led a slave rebellion in Virginia that killed many white people. The uprising was squelched but Southerners were paranoid about a repetition. Many in the South felt that the slave rebellion of Turner had been incited by articles in the Northern press (Oates, 1984, p. 27-28). Thus Brown felt that this area was ripe for implementation of his plot to free the slaves. If Brown had succeeded, it would have started a war, thus the civil war could have begun in 1859 in Virginia rather than in 1861 in South Carolina.

**The Overt Act**

On October, 16, 1859 Brown seized the federal arsenal at Harper’s Ferry, Virginia. While Brown and his 22 men cut the telegraph lines and captured prisoners. They stopped a Baltimore and Ohio train but allowed it to pass after holding it for 5 hours. However in doing this, they failed to keep word of the raid from getting out. The train crew wired Washington of what was going on in Harper’s Ferry. To their disappointment and surprise, the local slave population did not rise up and come to their aid as predicted. The government forces began to react to the threat posed by the raiders. As if to add insult to injury, townspeople of Harper’s Ferry shot at them and the Brown’s raiders were forced into an armory building by local militia forces. They were trapped and had no viable means of escape. The predictions of how the raid would turn out made by ant-slavery crusader Frederick Douglas had been right all along. Brown’s trapped men exchange fire with local Militia forces who surround the engine house where Brown was holed up.

**Arrest**

Colonel Robert E. Lee assumed command of all of the military forces surrounding the armory engine house. On October 18, 1859, Lee sent Lieutenant J.E.B. Stuart to negotiate a surrender of Brown and a release of the hostages. Brown reads Lee’s note but declines to surrender. A force of U.S. Marines led by Lieutenant Israel Green stormed the armory. Brown was wounded and some of his men were
killed. Most were captured, but 5 escaped. The raid ignited a firestorm in both the North and the South. Newspapers claimed everything from justice was at hand for the oppressed (the Northern view) to a general call to arms in the South because a more widespread slave rebellion was at hand and other raiders could be loose in “your” neighborhood!

The Indictment

Naturally due to the hard feelings between the North and the South, the criminal prosecution of Brown and his raiders quickly became an issue that officials could argue about in order to get political advantage for themselves. John Brown and his co-conspirators were indicted by a Virginia grand jury for treason against the state of Virginia (Brown, nor any of the other plotters were citizens of Virginia, which raised questions of how can you commit treason against a state of which you are not a citizen?), conspiracy, insurrection, and murder (DeWitt, 1969, p. 59-61). They were arraigned in Magistrate’s court on October, 25, 1859. The prosecutor, Andrew Hunter asked the court to move quickly on the case while observing the judicial decencies because he felt that there was risk that one of the defendants (Stevens) would die of his wounds before he could be hanged. The Northern press was outraged that the trial was being moved forward so quickly and before the raiders could recover from their wounds. Brown in typical fashion, stated to the press that they might as well forgo the trial and get on with the hanging, implying that he would not get a “fair” trial anyway from slaveholders.

The Trial

Brown was assigned Charles J. Faulkner (who promptly withdrew), Lawrence Botts, and Thomas C. Green (the mayor of Charlestown) as his counsel. The court restricted Brown’s access to the press as being disruptive and might incite the slaves to revolt (DeWitt, 1969, p.56). The jurors were selected without any objections from the defense team.

During the trial, Samuel Chilton from Washington D.C. was added to the defense team. During the trial, Brown’s attorneys attempted to argue insanity, which Brown rejected (Oates, 1984, p. 329) and the right of the State of Virginia rather than the Federal government to try Brown (which the court rejected citing the 10th Amendment).

Virginia Governor Wise knew a political opportunity when he saw one. Oates (1984) observed that:

Fearing that Brown and the other captured raiders would be murdered, the authorities hurried them by train to Charlestown, eight miles southwest of Harper’s Ferry, and lodged them in the county jail under a heavy guard. Governor Wise then made a decision that was to bear significantly on the outcome of Brown’s raid: although Brown had attacked and seized federal property at Harper’s Ferry, the governor decided to prosecute him in a Virginia court rather than turn him over to federal authorities. Wise argued that federal prosecution would take too long anyway, that if the law did not act swiftly, Brown would be lynched. But that by no means covered his motivations. He also wanted to enhance the prestige of Virginia at the expense of Washington, thus adding luster to his own political career among fellow Southerners. Luckily for the governor, the court calendar offered him an opportunity for a rapid trial: a grand jury was already in session in Charlestown, and Judge Richard Parker had just opened the semiannual term of the county circuit court. Thus the governor ordered Brown to stand trial in Parker’s court only one week after his capture, thereby allaying Southern demands that this crime be quickly avenged and at the same time invoking the power of the state of Virginia (p. 307-308).
Amendment). They argued how well Brown had treated his prisoners. Brown (having been wounded during the battle at Harper’s Ferry) at various stages of the trial laid on a cot in the courtroom. Civil disturbances occurred during the trial with barns of jurors being burned and other general vandalisms. This kept the state of public agitation very high and Governor Wise kept 400 Militia busy near Charlestown maintaining some semblance of order (Oates, 1984, p.336). Brown and his co-conspirators were found guilty and sentenced to death. Upon sentencing, Brown made a speech to the court that he had intended to free the slaves and while he objected to the penalty imposed, he stated the charges were fairly proven (Reynolds, 2005p. 354).\textsuperscript{11}

The Media Response

The media response in the North and in the South differed radically. The media reported the raid and the trial with great interest and their stories varied widely according to the very partisan editorial views on the subject of slavery and of politics in general. In the South, the raid fed on slave owner’s fears of conspiracy and a slave rebellion. Brown was portrayed as a traitor and a villain. In the North, Brown was portrayed as a hero and a saint. Calls for his rescue were frequent in the liberal papers. Writers such as Henry David Thoreau made Brown out as a saint and a hero for his actions to free the slaves. However, in the more conservative New York papers such as the New York \textit{Herald} and the New York \textit{Observer}, Brown and his men were portrayed as common criminals who should be dealt with according to law. Others such as the New York \textit{Journal of Commerce} denounced Brown but warned that hanging him would make him a martyr (Reynolds, 2005, p.334-369).

The Result

Fears of a rescue attempt from the North prompted Virginia Governor to call out the militia for Brown’s hanging planned for December 02, 1859. Brown was hanged on December 2,1859 among the Militia soldiers guarding the execution was a young man named John Wilkes Booth. Several of Brown’s followers were hanged shortly thereafter.

Brown had handed a note to one of his guards the morning he was to be hanged that read “I, John Brown am now quite certain that the crimes of this guilty, land: will never be purged away; but with Blood. I had as I now think: vainly flattered myself that without very much bloodshed; it might be done.” (Reynolds, 2005, p. 395). Rather than calm fears of a slave rebellion in the South it increased them as papers & music in the North portrayed Brown as a martyr for freedom.

\textsuperscript{11} According to Oates (1984):

Brown had hoped that, even if his invasion failed (as he probably knew it would), it would still provoke a crisis over the slavery issue, and that was exactly what was happening. As John Jay Chapman put it, millions of Americans who read about Brown’s raid in their newspapers ‘shuddered not only with horror, but with awe. The raid took place. It took place, not in Kansas, a long way off, but within a few miles of Washington. Innocent men were killed. No one could tell whether a slave insurrection would follow. A wave of panic swept across the South, and of something not unlike panic across the north. The keynote was struck. There was no doubt about that anywhere (p. 310).
The Effects on United States Law and Policy

In the case of John Brown there was no question that Brown and his companions had “levied war” on the United States. Shots had been fired and people had died during the raid on the arsenal at Harper’s Ferry. Yet, although the arrest once again had been made by military authorities, the actual trial was conducted in a civilian court. However, the statutes that Brown was convicted of were under Virginia state statutes rather than under federal law. Marshall had foreseen this possibility when he ruled that congress and by implication the states, could pass laws other than a federal treason charge to govern rebellion or other prohibited conduct (Ex parte Bollman, 4 Cr. (8 U.S.) 75,1807). Since the conviction was under state law, the execution was carried out by the State of Virginia. The military soldiers that guarded the execution itself were Virginia state militia troops (The state militias latter became the National Guard after 1903).

The Plotters: Timothy McVeigh (1968-2001)

Timothy McVeigh was born in Lockport, New York on April 23, 1968. He was raised in the Pendleton, New York area and lived with his father there after his parents divorced. Considered to be somewhat of a loner, McVeigh joined the army after graduating from high school.

Timothy McVeigh had been a soldier in the 1st Gulf War and had earned a Combat Infantry Badge and a Bronze Star for his actions in that conflict. McVeigh achieved the rank of Sergeant. Two of McVeigh’s army buddies were Terry Nichols and Michael Fortier. After failing qualifications tests for U.S. Army Special Forces, McVeigh left the army with bad feelings towards the government. He worked as a security guard for a while and began to drift across the United States.

McVeigh drifted through and around several right wing extremist groups including several Militia groups such as the Michigan Militia and the Viper Militia in Phoenix, Arizona. O’Brien and Haider-Markel (1998) noted that in 1995 the ADL estimated there to be Militia groups in forty states with an estimated membership of over 15,000 individuals. Government actions such as the August, 1992 siege at Ruby Ridge, Idaho by the U.S. Marshal’s Service and the Bureau of Alcohol, Tobacco and Firearms aid on the Branch Davidian compound at Waco, Texas in 1993 and the 51 day siege that followed enflamed the militia ideology that the government was physically, militarily and politically attacking all of those that disagreed with the Clinton administration and the federal government. The final assault in the siege on April 19, 1993 that resulted in the deaths of 76 Davidians did nothing to quell that idea. April 19, would become a critical date that was remembered by militia members and other extremist groups as time passed.

Michael and Herbeck (2001) observed that the siege at Ruby Ridge had an effect on both the American Militia movement and on Timothy McVeigh stating:

The killings at Ruby Ridge became a rallying cry for militia and survivalist groups, and a wake-up call for millions more Americans who were growing increasingly concerned about the issue of overzealousness by law enforcement. The incident reinforced McVeigh’s deepening fears that America was becoming an overtaxed police state. The evidence was all around him—he only had to read the newspaper or turn on the television news
to hear more reports about the government cracking down on people, like Weaver, who tried to resist (p. 109).

McVeigh was rumored to have had associations with the Aryan Republican Army around Pittsburg, Kansas and Elohim City, Oklahoma. At one point he was selling copies of the “Turner Diaries” at gun shows. He even showed up at the ATF’s siege at Waco, Texas and was selling ant-government bumper stickers at a roadside stand there (Michel & Herbeck, 2001, p.119).

The Plot

In 1994, McVeigh plotted to blow up the Alfred P. Murrah Federal Office Building with Terry Nichols using a Ryder rental truck filled with explosives made with ammonium nitrate and diesel fuel. The plot follows a script set in the Turner Diaries (MacDonald, 1980, p. 30-44) which is a fictional novel that advocates a genocidal race war set off by the bombing of a federal building using a truck bomb. McVeigh tells his friend Michael Fortier of the plot and even shows Fortier and his wife how he is going to construct the bomb using soup cans as a model. But Fortier does not warn anyone. Fortier also helped move stolen guns and property in the plot.

Why did the plotters chose to use a bomb? Bombs are cheap. Bombs are effective. America has always had a bomb orientated culture among its’ extremist population. The bombers can set the fuse and run away, thus minimizing the chances of getting caught. Corley, Mlaker, Sozen and Thornton (1998) while investigating the Oklahoma City Bombing observed that: “It is not possible to prevent all damage in the immediate area where the blast occurs. Not only can the exact location of a bomb never be pinpointed in advance, but hardening building parts such as walls, windows, and columns to resist the extreme impact is not feasible” (p. 112).

In a terrorist act, sometimes the symbolism involved supersedes the military or political value of the target. The bomb was set off on the anniversary of the federal raid on the compound of the Covenant, Sword and Arm of the Lord (a white supremacist group) in Bull Shoals, Arkansas in 1985, the fall of the Branch Davidian compound in Waco, Texas in 1993 and on the very day that another extremist, and former CSA member Richard Snell was executed for the murder of a state trooper in Arkansas. Snell had allegedly plotted to destroy the Alfred P. Murrah Murrah building with a rocket launcher in the early 1980’s, but the plot was never carried out (Jones, 1997, p.1).

---

12 O’Brien and Haider-Markel (1998) went on to observe that the rise of the Militia groups in the United States was based on the fact that all militia groups held certain common beliefs: Despite their diversity in operation, strength, and method, right-wing militias appear united in regards to certain key issues. As Doskoch (1995:738) notes, the militias believe the Federal government is not only on their backs, ‘but up their pant legs [and] in their pockets’. Taking a very narrow view of the U.S. Constitution, all militias fear the government’s confiscation of their firearms. This concern was reinforced by measures taken by federal agents at Waco, Texas, and at the Ruby Ridge conflagration. These two events came to symbolize that a master plan exists to undermine U.S. sovereignty, confiscate people’s firearms, and impose a UN-directed dictatorship on the world (p. 457).
What Could Have Happened if the Plot Had Succeeded?

In the Turner Diaries (1980), a race war is ignited by the bombing of a federal building using a truck bomb made with ammonium nitrates and diesel fuel. Many extremist groups have advocated a race war in the United States including the National Alliance whose leader William Pierce wrote the Turner Diaries using the name Andrew Macdonald.

The Overt Act

McVeigh and Nichols constructed a truck bomb using ammonium nitrates and diesel fuel in Hesston, Kansas. On April 19, 1995 McVeigh drove the truck containing the bomb to Oklahoma City and parked it in front of the Alfred P. Murrah building. McVeigh lit a 5 minute fuse to the bomb and walked away to an awaiting car that McVeigh and Nichols had stashed near the targeted building. McVeigh was wearing ear plugs to protect himself from the noise of the blast (Michel and Herbeck, 2001). The bomb exploded. Osteraas (2006) observed that the truck containing the bomb was parked in front of the Murrah building. As a result of the blast there was a crater in front of the building and “as the blast expanded, it exerted an upward force on the floor slabs.” The result was that much of the front half of the building suffered structural failure and collapsed killing 168 people and injuring hundreds. Millions of dollars of property was destroyed or damaged (p. 330). Although having participated in the plot, neither Nichols or Fortier were present for the blast.

The Arrest

McVeigh was arrested on I-35 near Perry, OK in a traffic stop for no registration tag on his vehicle by Oklahoma Highway Patrol Trooper Charlie Hanger (now the Sheriff of Noble Co., OK). Trooper Hanger noticed that McVeigh had a pistol in his jacket and arrested him for carrying a concealed weapon without a permit. At the time of his arrest, nitrates from the bomb were present on McVeigh’s jacket. McVeigh was booked in the Noble County, Oklahoma jail in Perry. Nichols was arrested by federal law enforcement authorities in Kansas and booked into the Sedgwick County jail in Wichita. Fortier was also arrested by federal authorities, but agreed to testify for the government in this case.

The Indictment

McVeigh and Nichols were indicted in the Western District of Oklahoma for: Conspiracy to Use a Weapon of Mass Destruction, Use of a Weapon of Mass Destruction, Destruction by Explosives, and 8 Counts of First Degree Murder (of a federal official). Interestingly enough, neither one was indicted for Treason. Although, the plot by the conspirators was to start a war to topple the government and they clearly levied war against the government of the United States by blowing up a government building (U.S. Dist. Ct. WD OK Case CR 95-110, 1995).
The Trial

The Judge ordered the trial moved to Denver for fairness and that Nichols and McVeigh be tried separately. U. S. Attorney Joseph A. Hartzler was named as the federal prosecutor for the trials and had previous experience trying domestic terrorists in a bomb plot (Samborn, 1995). Michael Fortier testified against McVeigh and Nichols in exchange for a plea bargain and a 12 year sentence. Fortier’s wife Lori also testified and is given immunity by the Government. 141 witnesses testified for the government, 27 for the defense.

McVeigh’s defense attorney Stephen Jones attempted to attack the reliability of the government’s evidence citing FBI lab errors but was unsuccessful Defense attorneys argued that McVeigh and Nichols were working for the FBI in a plot that went bad. The also argued that the BATF had an informant inside the plot who knew about, but failed to give timely warning about the bombing. Jones also argued that “Others Unknown” were involved in a wider plot to overthrow the United States government and that John Doe#2 had not been either identified or caught by the federal government’s incomplete and sloppy investigation. None of these theories were substantiated by physical evidence or were taken seriously by the jury (Jones, 1997; Jones and Israel, 2001, p.228).

Who was John Doe #2? He has never been identified or found. There are serious doubts among investigators that he ever existed. When the bombing suspects were being sought initially by law enforcement authorities from the Justice Department, the first composite drawings that first came out were of two possible suspects labeled John Doe#1 and John Doe#2. Although an extensive search for possible suspects was made and a $2,000,000 reward was offered, no John Doe#2 has ever been identified, much less arrested.\(^\text{13}\)

Ross (1997b) quoted from law professor James Jacobs of New York University who believed that the government had a very strong case and that the defense was unable to “poke any holes” in it. In an interesting sidelight that was somewhat prophetic, Ross went on to say that: “Besides, the jurors would be hesitant to return to the streets a man charged with the worst act of terrorism in American history, he says. They would fear ‘the guy’s going to blow up the World Trade Center the next time or the White House’.” McVeigh was found guilty on all counts of the indictment. Nichols was found guilty of conspiracy and 8 counts of manslaughter (p. 24).

Ross (1997b) felt that the trial was very well handled by the Judge and the prosecution. He stated that: “The circus-free, no-nonsense trial of convicted Oklahoma City bomber Timothy McVeigh may have provided a heavy dose of healing for the black eye the judicial system suffered in the O.J. Simpson trial. The guilty verdicts handed down by the Denver federal jury on June 2 were consistent with the widely held view that McVeigh was responsible for the April 19, 1995, bombing that killed 168, And the complete lack of the sort of shenanigans that

---

\(^\text{13}\) Ross (1997a) noted that: Although the search for the elusive terrorist is still officially open, some news accounts have quoted anonymous federal officials as saying they no longer believe that John Doe#2, if there is such a person, is part of the bomb plot. Further prosecutors have indicated that the famous sketch of him is unreliable. But the mystery man still poses problems for prosecutors (p. 20).
regularly rocked the Simpson trial had nearly everyone singing the praises of presiding U.S. District Judge Richard Matsch” (pg. 24).

The Media Response

The bombing and the trial drew media from all over the world. Law enforcement was extremely guarded in their statements to the media because they were afraid of negatively affecting the government’s case against the suspects. The media frenzy that is typical in high profile trials was in full bloom and no one (at least in law enforcement or the Justice Department) wanted another O.J. Simpson trial (Caeti, Liderbacj, and Bellew, 2005, p. 86-97). Fearing a mistrial, the trial judge (Judge Matsch) banned cameras from the courtroom, issued gag orders about talking to witnesses or attorneys and a strictly enforced media area was set up outside the courthouse to broadcast from.

The Result

McVeigh was executed on June 11, 2001 by the U.S. Bureau Of Prisons. Due to the large numbers of victim’s families and victims involved the United States Bureau of Prisons made the unique decision to allow the execution to be witnessed in a rather different way. Thus, the execution was televised by closed circuit TV to victims of the bombings in Oklahoma (Potter, 2001). Terry Nichols was sentenced to life imprisonment and is serving his sentence at Federal Correctional Institution: Florence Super Max). Michael Fortier served 7 ½ years and was released into the Federal Witness Protection Program on 01/20/06.

The Effects on United States Law and Policy

In the Oklahoma City Bombing case the conspirators were not charged with treason, but with other federal offenses even though an act or war was clearly committed against a government building. Unlike Brown v. Commonwealth (1859), the conspirators were not tried together, but separately. Again (as in Burr v. US and Brown v. Commonwealth) the conspirators were tried in a civilian court. The media’s participation was placed under strict control (at least on the grounds of the courthouse) by the judge to ensure that the defendants got a fair trial. Restrictions were also place on both defense and prosecution counsel on what they could communicate with the press during the course of the trial via a gag order issued by the judge.

In the development of government prosecution strategy in the prosecution of accused domestic terrorists since the 1980’s Damphouse and Shield (2007) discovered that U.S. Attorneys used one on three basic strategies:

1. Explicit politically strategy. The government labels the defendants as terrorists in trial document and to the public. Discussion of the defendant’s motives and use of charges that involve conspiracy alleging some type of political motive are key. This is most often used in charges of conspiracy or treason.

2. Exception vagueness strategy. The government avoids any mention of the defendant as a terrorist. Instead the government depicts the defendant as a
common criminal. This avoids any sympathy that a jury might have with the defendant’s political cause.

3. Subtle innuendo strategy. The government charges the defendant with a traditional crime or a crime under a presumed liability statute and avoids the issue of motive. In their prosecution then suggests in the course of the prosecution of the case that the defendant could be a part of a terrorist group (p. 177).

Summary

In each of these cases studied: Burr, Brown and McVeigh the defendants were accused of committing a terrorist act. Burr was accused of plotting to carve off a section of United States territory in the Mississippi Valley along with seizing Spanish lands to set up his own nations. Brown was accused of plotting to start a slave rebellion and seizing a federal arsenal. McVeigh was accused of blowing up a federal building in order to start a race war or a rebellion against the government as describe in the Turner Diaries. In dealing with domestic terrorists, the United States has not strayed very far from the principles established by Chief Justice Marshall in the trial of Aaron Burr in 1807. Accused domestic terrorists are still tried in civilian courts. Domestic terrorists are still generally accorded constitutional rights (if they are arrested on American soil). The media and pre-trial publicity still remain a factor in all trials in United States courts. Courts have made rulings on the conduct of the media and trial participants to ensure that the defendant’s right to a fair trial is not adversely effected by the media (i.e McVeigh v. U.S.).

In examining the way that accused domestic terrorists were tried in the Oklahoma City Bombing cases and the way accused foreign terrorists were tried in the 9/11 cases, Damphouse and Shields (2007) observed that while prosecution strategies remained fairly consistent in that the accused were tried as common criminals, defense strategies varied somewhat. They observed that:

Many defendants in terrorism trials have claimed that they are the targets of political persecution. The rationale is to defeat the motive element alleged by the prosecutor by showing that instead of possessing a terrorist or political motive, the defendants’ beliefs are benign while claiming that they are the targets of a overzealous witch hunt because they fall outside of the mainstream (p. 178).

In observing the tactics of defense counsel, Damphouse and Shield also found that some defense counsels pursued a “freedom fighter” strategy portraying their client as trying to legitimately replace a corrupt government. Others attempt to show that the alleged terrorist act was simply an act of civil disobedience. The defendants are not terrorists but merely using their right of self expression. Still other defense counsel attempt to take a purely legal strategy and attack evidence, attacking alleged due process violations or the constitutionality of the law (Burr’s defense). Some have even argued that the government lacks jurisdiction in the case (Brown’s defense). (p. 178).

In the three cases studied in this paper (Burr, Brown, & McVeigh), the prosecution of accused domestic terrorists had remained firmly within the civilian court system. Offenses are still investigated by civilian law enforcement (although
military forces may have participated in either the suppression of the alleged act or in the capture of the alleged offender. Offenses are either tried in Federal courts (Burr and McVeigh) or may be tried in State courts (Brown). However, thus far all of the alleged offenses of domestic terrorists over the past 200 years have been tried in civilian rather than in military courts.

References

Ex parte Bollman, 4 Cr. (8 U.S.) 75 (1807).
United States Constitution, Article III, Section 3.
United States v. Burr, 4 Cr. (8 U.S.) 469 (1807).
ABSTRACT
Much ink has been spilled over the question of “how” and to “what” extent the Judicial Department of the United States should exercise deference to the political branches in times of war and national security crisis. Scholars have debated whether the judiciary has the institutional ability to decide if national security measures are necessary or if such measures meet the actual national security threat. Over the past two hundred years the judiciary has entertained various theories on what standards of proof should be required of the political branches when they exercise national security powers. This paper will address these issues from a different perspective: Under the Madisonian model, does the judiciary have a role in national security policy, and if so, why? Hamilton described the Judicial Department as the least dangerous branch because it neither controls the sword or the purse. Madison designed a constitutional system in which the Constitution would be the Supreme Law of the Land. With the Constitution as the pantheon of all laws and actions under our system of government, the Supreme Court has developed into the final arbiter of “what” the Supreme Law of the Land allows the three branches of government to do both in peace and war. Concurrent with Madison’s and Hamilton’s design, history has placed its own requirements on the three branches and has made its own determinations on the power of the judiciary. This paper will argue why the Madisonian and Hamiltonian models as well as history give the judiciary a determinative role in times of war and national crisis.

On June 14, 1788 Alexander Hamilton published his famous Federalist Papers #78 essay defending the independence of the Judicial Department in the proposed Constitution. In defending the constitutional provisions appointing members of the Judicial Department to “hold their Offices during good Behavior” whose “compensation . . . shall not be diminished during their Continuance in Office,” Hamilton wrote that the development of these protections, in order to guarantee an independent judiciary, was “one of the most valuable of the modern improvements in the practice of government.” His reason for why it was one of the most valuable improvements is significant to the question of why the actions of the Bush Administration regarding the capture and detention of Al Qaeda and other suspected terrorists in the “War on Terror” is any of the Court’s business.

Hamilton asserted that judicial appointment “during good Behavior” and the prohibition of reduction in compensation of judicial officers were key aspects to protecting the Judicial Department from encroachments by the other two Departments as well as a way to protect liberty and the Constitution. The principle of judicial
independence for judges in a monarchy, Hamilton wrote, "is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." The ability of members of the Judicial Department, in the proposed constitutional system of checks and balances, to be free from arbitrary removal or monetary threats to their livelihood ensures judicial "firmness and independence", which Hamilton wrote must "be justly regarded as an indispensable ingredient . . . , and, in a great measure, [establishes the Judicial Department as] the citadel of the public justice and the public security." But why is an independent and permanent judiciary indispensable to public justice and public security? The answer goes directly to the power of judicial review, limited government, constitutional supremacy, the protection of liberty and the rule of law.

*****

Chief Justice Edward Coke in 1610 wrote that "It appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void." Hamilton, reflecting this principle of judicial independence and judicial review established by English common law, was an original proponent of judicial review for the national courts and the truism that it is the province of the Judicial Department to say what the law is. In Federalist Papers #78 Hamilton wrote:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

---

3 Id.
4 Id.
6 Federalist Papers # 78 (Emphasis added in part). Hamilton continued:

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that
Hamilton asserted in the same essay that the role of the Judicial Department is to be “inflexible and uniform [in the] adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice” both in the area of enforcement of limited government as well as treating as void “injury of the private rights of particular classes of citizens, by unjust and partial laws.” Judicial action, making such unjust partial laws void, “operates as a check upon the legislative body in passing them.”

Hamilton explained that the “courts must declare the sense of the law.” The role of the Judicial Department, Hamilton proposed, was that they act as “the bulwarks of a limited Constitution against legislative encroachments” and through judicial independence the Courts

. . . guard the Constitution and the rights of individuals from the effects of those ill humors, which . . . have a tendency . . . to occasion dangerous innovations in the government. . . , that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents [become], incompatible with the provisions in the existing Constitution. . . . Until the people have, by some solemn and authoritative act, annulled or changed the [Constitution], it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid. . . .

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Federalist Papers # 78 (Emphasis added in part).
James Madison in Federalist Papers #48 - 50 lamented that in designing a
government and a Constitution to govern the powers of government, the “mere
demarcation on parchment of the constitutional limits of the several departments, is
not a sufficient guard against those encroachments which lead to a tyrannical
concentration of all the powers of government in the same hands.”7 He concluded that
appeal to the general public by one or two of the branches against the actions of the
third for violations of constitutional powers would not prevent tyranny because in
such a contest “passion, not reason” will prevail.8 Thus concluding, in his famous
Federalist Papers #51, that “Ambition must be made to counteract ambition” for “If
men were angels, no government would be necessary [and if] angels were to govern
men, neither external nor internal controls on government would be necessary.”
Madison explained that the answer, to the problem that written law alone is not
equipped to govern the government, is to institutionally separate each Department with
its own interests, purposes and constituency, as well as provide each with enough
power to be distinct so as to control the usurpations of powers by the others. Madison’s model divided governmental power between the states and the federal
government (vertical federalism), between the three Departments of the national
government (horizontal federalism), and divided the Legislative Department into two
distinct chambers; one designed to provide inclusion of all classes and types of
citizens (the House of Representatives) and one to represent the states (the Senate).
Hamilton’s model centralized the judicial power of the national government into one
Department and divided the judicial power of the nation between the state courts and
federal courts with the U.S. Constitution being the supreme law over both. Although
the making of law and policy would be denied to the judicial power of the nation, the
judicial power of the nation would be granted final authority to enforce the
constitutional boundaries established by the Supreme Law of the Land. In such a
divided governmental system the political process would in toto provide protections of
civil rights and liberties for all citizens.

The Madisonian and Hamiltonian Models: “Why” the Courts Have a Role

Ultimately, it is not the nuts that are the greatest threat to
democracy, as history has shown us over and over and over again,
the greatest threat to democracy is the unbridled power of the state
over its citizens. Which, by the way, that power is always unleashed
in the name of preservation.”9

While Madison in Federalist Papers #51 depended on the structure and
dynamics of “politics” and human nature to protect individual liberty and freedom, Hamilton in Federalist Papers #78 focused on how the Judicial Department would
function within this dynamic and how to use the rule of law and the supremacy of the
Constitution, as the supreme law of the land, to maintain control of the predominant
Department of the National Government – the Congress.

Congress, in the Madisonian model, was the Department most feared as a
source of tyranny. To prevent the Congress from becoming tyrannical, Madison
divided it into two chambers with different political sources of power and

7 Federalist Papers # 48.
8 Federalist Papers # 49 – 50.
membership. With the most powerful\textsuperscript{10} of the three Departments divided, Congress was designed, nonetheless, to be able to check the activity of the other two Departments.\textsuperscript{11} For example, during the debate over ratification the Anti-Federalists asserted that the Constitution would allow Congress to raise and support a standing army in times of peace, which in the late 18\textsuperscript{th} century was considered a direct threat to liberty. Hamilton addressed this concern in Federalist Papers #26 by observing that

\begin{quote}
The legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not at liberty to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence.
\end{quote}

Thus, Congress was envisioned to review military policy, beginning with the preliminary issue of deciding whether to maintain the military, every two years. In fact, it was obligated to do so. Only after reviewing that policy was Congress to determine continued funding. But Congress, due to “political” constraints rather than “constitutional” ones, has failed for decades, if not centuries, to be the primary Department that determines military policy and approves it before continuing to fund it. Because it is an unquestioned “political” fact that the Congress will fund presidential use of military force or implementation of a foreign policy that implicates the possible use of the military, regardless of Congress’ approval or disapproval, Congress has lost one of the key Constitutional controls on presidential power. As a “political” matter, the President will always have supporters in Congress for his military actions, regardless of congressional approval, as well as those who believe Congress does not have a plenary role in national security or foreign policy matters in the first place. But aside from this, it is also a “political” fact that those who oppose

\begin{quote}
\textsuperscript{10} “[T]he legislative department” Madison wrote in Federalist Papers # 48 “alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.”
\end{quote}

\begin{quote}
\textsuperscript{11} Madison in Federalist Papers # 48 described the Congress and its powers compared to the Executive and Judicial as follows:

But in a representative republic, \textit{where the executive magistracy is carefully limited}; both in the extent and the duration of its power; and \textit{where the legislative power is exercised by an assembly}, which is inspired, by a supposed influence over the people, \textit{with an intrepid confidence in its own strength}; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; \textit{it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.}

The legislative department derives a superiority in our governments from other circumstances. \textit{Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.}

On the other side, \textit{the executive power being restrained within a narrower compass, and being more simple in its nature}, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves (emphasis added).
\end{quote}
funding presidential military policy without prior congressional approval are accused of failing to “support the troops” and threatening American national security. Congress has failed to assert the Constitutional principle congressional opposition to funding a military policy, which has been implemented prior to its approval, is required by the Constitution. Because Congress, as an institution, focuses on the political aspects of presidential action, rather than on its role as the source of funding and approval of military offensive action, it has lost the constitutional plenary control over military deployment and war policy. In 1990 it was asserted by the Bush 41 Administration that Congress had no constitutional authority to require the Administration to seek its approval to use force against Iraq. It was only the dictates of the three external controls on presidential power discussed below that forced the Bush 41 and later the Bush 43 Administrations to go to Congress for authorization to use military force against Iraq (1991), Afghanistan (2001) and Iraq (2003) respectively.

Another reason Congress functions only as a secondary force of political control and check on Executive power is because it does not (assuming it ever did) function as the primary constitutional institution for policy and governance, but rather it functions as an institution dominated by political party politics in support of or in opposition to the policies of the party holding the Presidency. Congress is a

12 In a 1996 Frontline interview, then Former Secretary of Defense Cheney explained that he opposed President George H. W. Bush going to Congress to seek authorization to use military force to extract Iraq from Kuwait. In a Frontline 2007 documentary, Cheney’s views on executive power were examined and his comments in the 1996 interview were discussed as follows:

NARRATOR: As secretary of defense, Cheney argued the President should not seek congressional authorization for the Gulf war.

Rep. MICKEY EDWARDS (R-OK), 1977-'92: The leadership in Congress generally was telling the first President Bush, “You have to get permission from Congress to go into the Gulf war.” The President didn’t think that was the case. He resisted it.

RICHARD CHENEY, Fmr. Defense Secretary: [FRONTLINE 1996] I argued that we did not need congressional authorization, and that legally and from a constitutional standpoint, we had all the authority we needed.

JACK GOLDSMITH: Secretary of Defense Cheney’s advice was that it was unnecessary and imprudent - unnecessary because the Constitution did not require it, imprudent because Congress might say no.

RICHARD CHENEY: [FRONTLINE 1996] If we’d lost the vote in the Congress, I would certainly have recommended to the President that we go forward anyway.

NARRATOR: In the end, Cheney’s view did not prevail. The President agreed to a congressional vote.

Frontline Documentary Cheney’s Law (2007)

13 Congress has the power to impeach and remove the President for “other high Crimes and Misdemeanors” and leaving aside what the full meaning of Article II, Section IV is, it has never been used or threatened upon Presidential use of military offensive force without prior congressional authority. Although the legal and constitutional scope of the purpose of impeachment is open to debate, it is a fact that impeachment is viewed more through political lenses than constitutional ones. To the party holding the presidency, impeachment is viewed as an act of “partisan politics” or “criminalizing policy disputes” while the party not holding the presidency views impeachment as a legitimate tool of the legislative branch to oppose presidential “abuse of power” and congressional protection of constitutional principles. If Article II, Section IV provided Congress with an additional institutional power to check the power of the President to act without prior congressional authorization, it has been lost both due to congressional failure to use it as such as well as to the historical politicization of the process during the Andrew Johnson and William Clinton Administrations; the impeachment hearings during the Richard Nixon Administration being the notable exception.
conglomerate of interests, some of which are always supportive of the President’s primacy over Congress in times of war or national crisis. Since Congress functions within the dynamics of political party politics rather than as an institution designed to check the power of the President, and since the Executive Department is a unitary branch with one person governing at its apex, the President always has the political upper hand in policy design and implementation.

A third reason Congress does not exercise primacy in military affairs is that Congress, over two hundred years of history, has acquiesced to the assertion of sole presidential power to use the military without advanced consent of Congress. Summarizing the history and fact of congressional acquiescence Deputy Assistant Attorney General John Yoo testified before the Senate Judiciary Committee, Subcommittee on the Constitution, Federalism and Property Rights, as follows:

Congress also has the power to declare war. This power to declare a legal state of war and to notify other nations of that status once had an important effect under the law of nations, and continues to trigger significant domestic statutory powers as well, such as under the Alien Enemy Act of 1798 (50 U.S.C. § 21) and Federal surveillance laws (50 U.S.C. §§ 1811, 1829, 1844). But this power has seldom been used. Although U.S. Armed Forces have, by conservative estimates, been deployed well over a hundred times in our Nation’s history, Congress has declared war just five times. This long practice of U.S. engagement in military hostilities without a declaration of war demonstrates that previous Presidents and Congresses have interpreted the Constitution as we do today.\[14\]

---

\[14\] Senate Judiciary Committee, Subcommittee on the Constitution, Federalism and Property Rights, *Applying the War Powers Resolution to the War on Terrorism* April 17, 2002 S. HRG. 107–892 Serial no J-107-74 at 12 (emphasis added). John Yoo explained that:

As the United States rose to global prominence in the post-World War II era, Congress has provided the President with a large and powerful peacetime military force. Presidents of both parties have long used that military force to protect the national interest, even though Congress has not declared war since World War II. President Truman introduced U.S. Armed Forces into Korea in 1950 without prior congressional approval. President Kennedy claimed constitutional authority to act alone in response to the Cuban missile crisis by deploying a naval quarantine around Cuba. Presidents Kennedy and Johnson dramatically expanded the U.S. military commitment in Vietnam absent a declaration of war.

In response to President Nixon’s expansion of the Vietnam War into Laos and Cambodia, Congress approved the War Powers Resolution, but that resolution expressly disclaimed any intrusion into the President’s constitutional war power. Accordingly, Presidents Ford, Carter, Reagan, and the first President Bush have committed U.S. Armed Forces on a number of occasions. In these cases, the Administration has generally consulted with, notified, and reported to Congress, consistent with the War Powers Resolution.

President Clinton deployed U.S. Armed forces in Somalia, Haiti, and Bosnia - all without prior congressional authorization. In 1999, the Clinton Administration relied on the President’s constitutional authority to use force in Kosovo. Assistant Secretary of State Barbara Larkin testified before Congress that April that “there is no need for a declaration of war. Every use of U.S. Armed Forces, since World War II, has been undertaken pursuant to the President’s constitutional authority. . . .This Administration, like previous Administrations, takes the view that the President has broad authority as commander in chief and under his authority to conduct foreign relations, to authorize the use of force in the national interest.”

In short, Presidents throughout U.S. history have exercised broad unilateral power to engage U.S. Armed Forces in hostilities. Congress has repeatedly recognized the existence of presidential constitutional war power, in the War Powers Resolution of 1973, and more recently in S.J. Res. 23.

Id.
During the same Senate hearing, Louis Fisher, Senior Specialist in Separation of Powers with the Congressional Research Service testified as to the “original intent” of the Founders to place the power to declare war with the Congress as follows:

While the “original intent” of many constitutional provisions is debatable, there is no doubt about the framers’ determination to vest in Congress the sole authority to take the country from a State of peace to a State of war. From 1789 to 1950, lawmakers, the courts, and the executive branch understood that only Congress could initiate offensive actions against other nations. . . . Admittedly, some scholars—particularly John Yoo—argue that the framers designed a system to “encourage presidential initiative in war” and that the Constitution’s provisions “did not break with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps.” . . . Suffice it to say that had the framers adopted the English model, they wouldn’t have written Articles I and II the way they did. Here it is unnecessary to debate the framers’ intent. It is enough to look at the plain text of the Constitution. If the framers had indeed adopted “the traditional British approach to war powers,” they would have written Article II to give the President the power to declare war, to issue letters of marque and reprisal, and to raise armies, along with other powers of external affairs that are reserved to Congress.

Id. at 16-17 (internal citation omitted). Louis Fisher stated that the evidence was clear that the founders did not empower the president with the power to declare and implement war. He concluded

I won’t repeat here the many statements of framers who believed that they had stripped the Executive of the power to take the country to war. At the Philadelphia convention, George Mason said he was “agst [sic] giving the power of war to the Executive, because not to be trusted with it. . . . He was for clogging rather than facilitating war.” At the Pennsylvania ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.” The power of initiating war was vested in Congress. To the President was left certain defensive powers “to repel sudden attacks.”

The framers gave Congress the power to initiate war because they believed that Presidents, in their search for fame and personal glory, would have too great an appetite for war. John Jay, generally supportive of executive power, warned in Federalist No. 4 that “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”

In studying history and politics, the framers came to fear the Executive’s potential appetite for war. Has human nature changed in recent decades to permit us to trust independent presidential decisions in war? The historical record tells us that what Jay said in 1788 applies equally well to contemporary times.

John Yoo recognizes that Congress has the constitutional power to check Presidential wars: It can withhold appropriations. Congress “could express its opposition to executive war decisions only by exercising its powers over funding and impeachment.” The spending power, he writes, “may be the only means for legislative control over war.” Constitutionally, this kind of analysis puts Congress in the back seat. Yoo allows Presidents to initiate wars and continue them until Congress is able to cutoff funds. The advantage to the President is striking. Executive wars may persist so long as the President has one-third plus one in a single chamber to prevent Congress from overriding his veto of a funding-cutoff.
During his oral testimony, Fisher asserted that for “over . . . 160 years” in American history it was acknowledged by Congress and the President that “when the country goes from the state of peace to a state of war, the President comes to Congress for authority in advance” but admitted that “over those years, 160 years, there were examples where Presidents used military force without authority from Congress. But those are fairly small-scale actions, chasing bandits over the borders and doing various things, certainly not major military actions.”

Although Fisher is correct that the Founders rejected the British model of exclusive executive power to declare (formally start / engage) and to implement (conduct / respond to hostilities) war, Congress has acquiesced in removing the distinction between these two powers. Over the past two centuries the Congress has ceded to the President the power to engage in war or to use military power offensively prior to congressional approval. It is no answer to assert that although various Presidents have used “military force without authority from Congress”, they were only “small-scale” uses. The significance in presidential use of the military prior to congressional approval is that it occurred in the first place without congressional resistance, thus establishing the legitimacy of the use of that power. The result of congressional acquiescence of its power to declare (formally start / engage) war prior to presidential use of military power is that it is now convincingly asserted that the President was never subject to prior congressional approval.

---

16 Id.

17 Id. at 14.

In his September 2001 memo John Yoo explained the significance of historical congressional acquiesce to Presidential use of military power without prior congressional approval as follows:

The historical practice of all three branches confirms the lessons of the constitutional text and structure. The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled. Both the Supreme Court and the political branches have often recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.” Youngstown Sheet & Tube Co., 343 U.S. at 610-11 (Frankfurter, J., concurring). Indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself: “the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.” Mistretta v. United States, 488 U.S. 361, 381 (1989) (citation omitted). In addition, governmental practice enjoys significant weight in constitutional analysis for practical reasons, on “the basis of a wise and quieting rule that, in determining . . . the existence of a power, weight shall be given to the usage itself - even when the validity of the practice is the subject of investigation.” United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915).


18 Citing prior opinions by the Office of Legal Counsel, John Yoo asserted that:

The Constitution confides in the President the authority, independent of any statute, to determine when a “national emergency” caused by an attack on the United States exists. … [T]he President’s role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further national interests such as protecting the lives of Americans overseas. … [C]onstitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.
John Yoo asserted in his September 2001 memo on presidential power post the 9/11 attacks:

Some commentators . . . argue that the vesting of the power to declare war gives Congress the sole authority to decide whether to make war. This view misreads the constitutional text and misunderstands the nature of a declaration of war. Declaring war is not tantamount to making war - indeed, the Constitutional Convention specifically amended the working draft of the Constitution that had given Congress the power to make war. An earlier draft of the Constitution had given to Congress the power to “make” war. When it took up this clause on August 17, 1787, the Convention voted to change the clause from “make” to “declare.” 2 The Records of the Federal Convention of 1787, at 318-19 (Max Farrand ed., rev. ed. 1966) (1911). A supporter of the change argued that it would “leav[e] to the Executive the power to repel sudden attacks.” Id. at 318. Further, other elements of the Constitution describe “engaging” in war, which demonstrates that the Framers understood making and engaging in war to be broader than simply “declaring” war. See U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”) . . . If the Framers had wanted to require congressional consent before the initiation of military hostilities, they knew how to write such provisions.19

But the Bush Administration’s assertion of plenary presidential power over foreign policy is not novel in American political and constitutional thought. The first great debate over presidential power occurred within the Washington Administration over the President declaring the United States neutral during the war between Great Britain and France in 1793. Jefferson and the Republicans were incensed that the President would declare neutrality in a war, an act which they believed favored Great Britain. Madison, on Constitutional theory grounds, opposed the President’s decision asserting in essence that Congress, not the President, has the final authority to determine the foreign policy of the nation, especially the decision of whether the nation should or should not become engaged in military hostilities. Hamilton defended the decision and authority of President Washington arguing in essence that the President as commander-in-chief was the responsible agent to determine what the nature of foreign affairs was and to take action to safeguard the nation. Although Hamilton accepted that Congress had the power to declare war, that power did not limit the President from determining the foreign policy of the nation even if that determination impacted or conflicted with the prerogatives of Congress. Although Hamilton acceded to the fact that only Congress could change the legal status of the

. . . Thus, there is abundant precedent, much of it from recent Administrations, for the deployment of military force abroad, including the waging of war, on the basis of the President’s sole constitutional authority.


19 Id at 6-7.
nation from peace to war, it was for the President to act in the formation and implementation of foreign affairs as the sole representative of the nation until Congress formally determined that war replaced peace. It is to Hamilton that the origin of the “unitary President” and “sole organ” theories of executive power are to be credited.\(^{20}\)

It is not proposed that the title of commander-in-chief was an empty title in the first place, but that Congress has abdicated its supremacy over the war power and the Bush Administration’s claim that as president he has independent constitutional and statutory power to use military force to implement his foreign policy, regardless of congressional prior approval, is not without precedent. Hamilton and Madison assumed that one political branch would assert power to the detriment of the other; the problem has been that Congress has not asserted its power to counteract presidential assertions of military policy making power. The result is that the President is now the plenary “political” power in our Constitutional system.

Within a month of the attacks of 9/11 President Bush, under his powers as commander-in-chief, created a military commission system to try terrorists outside of the Uniform Code of Military Justice or the civilian courts. By executive proclamation he also determined that “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”\(^{21}\) The Bush Administration further asserted that congressional action was not needed to create the commissions and the courts had no authority to review the decisions made by the President regarding his classification of individuals as enemy combatants. Within three years of such absolutist positions of executive power, the Bush Administration encountered significant judicial resistance\(^{22}\) as well as political resistance both domestically and internationally. Although President Bush was correct to assert that, as commander-in-chief, he had the power to create military commissions,\(^ {23}\) and detain enemy combatants captured during the war on terror,\(^ {24}\) the Supreme Court rejected the Bush Administration’s proposition that under his powers as commander-in-chief he could


hold such enemy combatants indefinitely\textsuperscript{25} without a formal hearing governed by laws and rules of evidence recognizable in civilian or military criminal proceedings.\textsuperscript{26} The Supreme Court affirmed presidential power to create commissions but rejected the assertion by President Bush that under his power as commander-in-chief alone, he had the authority to create a military commission system intentionally outside of the requirements of the Uniform Code of Military Justice and the Geneva Convention.\textsuperscript{27} Although Congress and the President together have the authority to limit the jurisdiction of the Court, the Supreme Court determined that the statutory and Constitutional right to challenge unlawful detention through the Great Writ of Habeas Corpus is a principle that supersedes the political needs to detain suspected terrorists without any meaningful review.\textsuperscript{28} The Supreme Court also rejected the proposition by the Bush Administration that the enemy combatant detention facility established at Guantanamo Bay, Cuba was outside of the United States, the jurisdiction of the Judicial Department and U.S. Constitutional requirements.\textsuperscript{29}

Even in times of war the rule of law must govern a society, otherwise in times of stress such a society lives under the rule of men and as such never lived under the former.\textsuperscript{30}

\textbf{The Rule of Law and Why it Matters}

\emph{Nothing is more fitting for a sovereign than to live by and within the laws, nor is there any greater sovereignty than to govern according to the due process of law, and the sovereign ought properly to yield to the tradition and process of law that makes him king.}\textsuperscript{31}

In our constitutional system, as it functions today, there are only three external factors that control the Executive Department. The first factor involves the dynamics of presidential political power. The dynamics of presidential political power are comprised of three aspects: constitutional limits, institutional power, and political power. The constitutional limits on the presidency involve the restrictions on the power of the President imposed by the text of the Constitution itself and by congressional action, e.g., the twenty-second amendment or congressional statutes specifically prohibiting action. The institutional power of the presidency includes the “inherent” or “executive” power to act. The theories of “executive privilege”, “unitary President,” “inherent powers,” and “sole organ” all reflect the range of institutional power of the chief executive. Lastly, political power defines the ability of a specific President at any given time during his administration to achieve or prevent action. This power defines what the President wants to do and can do without and/or over “political” resistance. The second external control of the Executive Department is the


\textsuperscript{30} See similar conclusions by the judiciary in \textit{Ex parte Merryman}, 17 F. Cas. 144 No. 9,487 (1861) and \textit{Ex parte Milligan}, 71 US 2 (1866).

support of the principles of separated and limited powers by the American people. The third is the supremacy of the rule of law (as defended by the Judicial Department) and the assent of the American people to the results of the application of the rule of law. Because the principle of the supremacy of law and its implementation through the rule of law has prevailed through American history as the governing value of the Constitution itself, the boundaries of presidential power have been made “legally” and “politically” subservient to the voice of the rule of law, the judiciary.

Hamilton wrote in Federalist Papers #22, “The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.” In Federalist Papers #81 Hamilton spoke of the power of the sovereign, the people, and the rule of law in the Constitutional system. The principles of the rule of law should be more than cavalierly acknowledged, for “without the law there can be no freedom and without justice there can be no law.”32 More importantly, history has no example of a democracy, republic, or society long enduring without falling into tyranny when rule by law is employed over the rule of law.

Reflecting on the history of Rome, the historian Cornelius Tacitus remarked that the rule of a single man is the only remedy for a country in turmoil. As history has proven a democracy, through the demands of pro bono publico, the people can elect a republic into dictatorship or tyranny if placed under sufficient social, political, military and/or economic stress. So it was in 47 BCE when the Roman Senate elected Julius Caesar dictator after he defeated Pompey in a civil war (49-48 BCE), which Caesar himself started when he entered Rome with his army in defiance of the Senate and Roman law. Under his dictatorship Caesar initiated various political and economic reforms including providing land and grain to the poor to ensure that there was no starvation in Rome. Upon his assassination, the benign dictator, was declared a God by the people. In 31 BCE, after twelve years of civil war resulting from the assassination of Caesar, Octavian unified power into himself. With the assent of the Roman people the Roman Senate, in January of 27 BCE, continued to effectively end the Roman Republic by bestowing on Octavian exclusive military and political powers, control over the major provinces of the Republic, and appointing him with the title Augustus (a religious title of near divinity) for life; the very titles and powers that Caesar was assassinated, on March 15, 44 BCE, for seeking. Centuries after the election of Octavian as a near divinity and primary ruler of Rome, the First French Republic fell in 1793. Under the initiation and applause of an armed mob, the French National Convention passed the September 1793 resolution ordering the arrest of its Girondists members and established the policy of terror as the chosen means to protect the ideals of the revolution from internal enemies.33 The revolution to establish Liberté, Égalité, and Fraternité and the principles of Declaration of the Rights of Man were abandoned for social order, the promise of safety, and victory over the enemy. The result being the rise of Robespierre and the Jacobins, the reign of terror, the establishment of the government of the guillotine, the death of more than 10,000 Parisians, and later, the rise of Emperor Napoleon. It was under the threat of internal economic and political disorder, more than a century later, that the Germans ended the Weimar Republic in March 1933 through the passage of the Enabling Act (“Law to

Remedy the Distress of the People and the Nation”). The March 1933 act gave Hitler and his government law-making power independent of the legislative supremacy of Reichstag. The Reichstag remained a rubber stamp for Hitler until the fall of the Third Reich in May 1945.

Those who believe that the process of democracy, by itself, guarantees “justice and the rule of law . . . . forget that the popular will can rule with or without constitutional and legal limits. Without constitutional and legal limits, popular will can be as destructive as, or even more destructive than, the unfettered discretion of ‘the few.’” Madison made the same observation more than two centuries ago during the ratification debates on the Bill of Rights. In a letter to Jefferson on October 17, 1788 he wrote on the limits of depending on written law alone to keep the power of government in control. He observed:

> [T]he invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents but from acts in which the government is the mere instrument of the major number of the constituents. … Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince.

One of the protections against electing away individual and structural freedoms is to establish that those freedoms are above the political process and above governmental power to disregard; to establish, value, and defend the governing of government by the rule “of” law above rule “by” law.

The difference between “rule by law” and “rule of law” is important. Under the rule “by” law, law is an instrument of the government, and the government is above the law. In contrast, under the rule “of” law, no one is above the law, not even the government. The core of “rule of law” is an autonomous legal order. Under rule of law, the authority of law does not depend so much on law’s instrumental capabilities, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures such as politics and religion. As an autonomous legal order, rule of law has at least three meanings. First, rule of law is a regulator of government power. Second, rule of law means equality before law. Third, rule of law means procedural and formal justice.

In a society under the rule of law, the law governs the people and the government. Conversely, in a society under rule by law, the law governs the people and the government governs the law. The difference was exemplified in November 2007 when Pakistani President Pervez Musharraf suspended his country’s Constitution, fired the Chief Justice of the Supreme Court and declared martial law. His suspension of the Constitution was done partly due to fears of political and social disruption; in the wake of the assassination attempt on his significant political rival, former Prime

---

36 Id.
Minister Benazir Bhutto; as well as due to concerns that the Pakistani Supreme Court would rule that his election to a third term as President was unconstitutional. Musharraf was elected President while holding the position of Chief of the Army during the election which was in violation of the Pakistani Constitution. Rather than risking the decision of the Court, President Musharraf suspended the Constitution and removed the Chief Justice and other members of the Court viewed as a threat to his reelection. The suspension of the Constitution was lifted, but only after a new and more friendly Court was constituted. Such is a government by the rule by law. Conversely, it was due to internal institutions and the Pakistani people supporting the principles of the rule of law, along with international pressure, that resulted in the lifting of the martial law, reinstatement of the Constitution and Musharraf surrendering the position of Chief of the Army in compliance with the Constitution. It was also the application of the rule of law and the Pakistani parliament threatening impeachment that led to the resignation of Musharraf in August 2008.

Put simply, rule by law puts the government above the law; thus not being subject to it, the government does not have to follow the law when doing so frustrates its desires. A government based on the rule of law has no such latitude. The rule of law frustrates the government for it protects the individual from governmental power and the “ill temper” of society through the requirements of procedural due process as well as equal protection under the law.

The answer to why the actions of a President are subject to judicial scrutiny draws from the English Common Law principles of the rule of law that Hamilton and Madison wrote into the Constitution. These principles that executive power is subject to the law and not superior to it were developed centuries before the Philadelphia Convention. In the early thirteenth century Lord Justice Henry Bracton wrote on the boundaries of executive power by subjecting it to the rule of law as well as due process of law. On the importance of the rule of law and its sovereignty over the King, or in our language the President, Lord Justice Bracton wrote in *On the Laws and Customs of England*

His power, therefore, is that of justice and not of injustice and since he himself is the author of justice, an occasion of injustice ought not arise from the source whence justice comes, and likewise he who has the right from his office to prohibit others, ought not commit this same injustice himself. . . . Indeed it is said that he is king from ruling well and not from reigning, because he is king while he rules well and he is a tyrant when he oppresses with violent domination the people under his charge. Let him temper his power through the law which is the bridle of power, that he might live according to the law because a human law has established it as inviolable that the laws bind the lawgiver (lator), and elsewhere in the same (lex humana) it is said that it is worthy of the majesty of one who reigns that the prince avow himself bound by the laws.37

Lord Justice Bracton explained why executive power should be under the law by invoking the basis of English Common Law:

The King himself must be, not under Man, but under God and the Law, because the law makes the king . . . For there is no king where arbitrary will dominates, and not the law. And that he should be under the law because he is God’s vicar, becomes evident through the similitude with Jesus Christ in whose stead he governs on earth. For He, God’s true Mercy, though having at His disposal many means to recuperate ineffably the human race, chose before all other expedients the one which applied for the destruction of the devil’s work; that is, not the strength of power, but the maxim of Justice, and therefore he wished to be under the Law in order to redeem those under the Law. For he did not wish to apply force, but reason and judgment.  

Under the Rule of Law, the *Law* makes the King, King; it is not the King that makes law, *Law*. It was under the principle that the sovereign must not act contrary to the law for the sovereign is under the Law and the sovereign is sovereign because of the Law, that Chief Justice Edward Coke in 1610 ruled that laws that violate the higher Common Law were void. Two years later Chief Justice Coke, while standing before King James, defending the independence of the Judiciary and the supremacy of law; echoed Lord Justice Bracton, and answered the King’s protest of judicial supremacy over his wishes, saying “*Rex non debet esse sub homine sed sub Deo et lege*.”

Centuries before Hamilton and Madison drafted the Constitution it was an accepted principle of Western government that it was for the judiciary to hold the law sovereign over Kings and Presidents. The principle that the law is sovereign over executive power is as old as Scriptures as reflected in the Old Testament *Book of Esther*, “whatever is written in the King’s name and sealed with the King’s signet ring no one can revoke” not even the King himself.

---


And so therefore, the king ought to [do likewise], lest his power remain unchecked (infrenata). Therefore there ought to be none greater than he in the administration of justice (in exhibitone juris), but he ought to be the least, or nearly so, in submitting to judgment if he seeks it. (Lord Justice Henry Bracton *On the Laws and Customs of England* quoted in S. J. T. Miller, “The Position of the King in Bracton and Beaumanoir” 31 (2) Speculum 263, 272 (1956)).

The king ought, therefore, to exercise the power of justice as the vicar and minister of God on earth because that power is from God alone; however, the power of injustice is from the devil and not from God, and the king will be the minister of him whose work he does. Therefore while he does justice he belongs to the Eternal King; when he turns toward injustice he is the minister of the devil. (Id. at 269).

41 Let the King not be under any man, but he is under God and the Law. See, *Youngstown Sheet & Tube Co. et al v Sawyer* 343 US 579, 655 ft 27 (Jackson concurring) (1959).

42 *Esther* 8:8 New King James Version. Lord Justice Bracton echoed the scriptural principle that the king is bound by the Law and by the laws he himself makes as follows:

Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledges himself bound by the laws.


http://law.bepress.com/cgi/viewcontent.cgi?article=1067&context=unswwps (Emphasis added).
Defending the Rule of Law: The Role of Hamilton’s Least Dangerous Branch in Times of War and Crisis

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up. 39

Is it enough to say that because Congress has abdicated its role as the primary check on presidential power, that it falls to the Judiciary to place practical checks on President Bush’s assertions of broad and sole executive power in the “War on Terror”? Does Hamilton’s view in Federalist Papers #78 that it is the duty of the Judicial Department to be the “faithful guardians of the Constitution, where legislative invasions of [the Constitution] had been instigated by the major voice of the community”, equally apply in the face of presidential action in time of war? Has history changed Hamilton’s model to require the Judicial Department “to be an intermediate body between the people and the legislature [as well as the Executive], in order, among other things, to keep the latter within the limits assigned to their authority [?]” Does the Constitution itself demand judicial action and review of presidential assertions of power?

Article VI, Clause II of the Constitution reads in part, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land . . . .” Article III, Section II of the Constitution reads in part, “The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States. . . .” Hamilton explained, in Federalist Papers #80, that “Cases . . . arising under this Constitution” refers to cases involving prohibitions and limitations proscribed in the text of the Constitution itself. Thus the Constitution, which creates the three Departments, is supreme above all laws passed and all actions taken under its name and authority. The Judicial Department is empowered to hear all disputes “in Law” arising under the Constitution. As Hamilton reminds, “Laws are a dead letter without courts to expound and define their true meaning and operation. . . . [A]ll nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.” 40

Beginning with the assumption that the political branches cannot act out of the Constitution and that the Constitution is not only “law” but the Supreme Law of the Land; the Judiciary has the power to hear disputes arising from congressional and presidential activity under the authority of the Constitution. The category of actions by the President either in domestic or in foreign affairs does not mitigate the fact that the Judiciary has the authority to hear assertions of violations of law by the President. Thus the question of why the judiciary has a role in addressing how President Bush uses executive power to meet the post September 11 world is answered. The question of how and to what extent the Judicial Department advances or limits the use of executive power in times of war and national crisis, as well as what limits the Judicial Department places upon

39 Youngstown Sheet & Tube v Sawyer 343 US 579, 655 (1952) (Justice Jackson, Concurring).
40 Federalist Papers # 22.
itself to assess specific presidential actions in times of war or crisis under judicial review, is a separate question.\footnote{For example, see William Brennan, “The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises” 18 Israel Yearbook on Human Rights 11 (1988) and Arthur Garrison “The Judiciary in Times of National Security Crisis and Terrorism: Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipso Custodies?” 30(1) American Journal of Trial Advocacy 165 (2006).}

Conclusion

In order to ensure our security and continuing stability, the Republic will be reorganized into the first Galactic Empire, for a safe and secure society.

So this is how liberty dies, with thunderous applause.\footnote{Star Wars, Episode III: Rise of the Sith (2005).}

Democracy, in and of itself, does not guarantee freedom nor does the rule of law, in and of itself, guarantee the supremacy of the law. Cultural, social, legal, and political institutions must support the rule of law and the supremacy of the law for both to successfully resist the overstepping of governmental power. Hamilton and Madison valued this truth and drafted a Constitution to both ensure that the American constitutional system would be based on the rule of law as well as ensure that the government in practice could make certain the supremacy of the rule of law and avoid the concentration of political power, the very definition of tyranny. Madison presumed that power balanced against power would provide the practical mechanisms to allow the rule of law to prevail. Part of that balance is the institutional separation of legislative, executive, and judicial functions. Hamilton envisioned that the Judicial Department would protect the principle of limited government, declare laws in violation of the Constitution void and protect individuals from the “ill humor” of the majority, which could cause injury to “the private rights of particular classes of citizens.”

It is the business of the Judicial Department to provide protection and “judgment” as to the boundaries of majority rule. Hamilton intended the judiciary to defend the provisions and limitations of the Constitution against the “ill tempers” of the people and the Departments of government that are subject to those passions. The President is just as subject to those “ill tempers” of the public as is Congress. In fact, he is more so as demonstrated by the public reaction to the terror of September 11. It was to the President, not the Congress, that the people turned to for protection, and it was to the Presidency that demands for action were levied. As a result, the nation approved the assertions made by President Bush that as commander-in-chief it is his duty, and exclusive power, to protect the American people from terror. It was only as the “ill temper” of the people cooled and President Bush was perceived as extending his power beyond what the nation was prepared to tolerate in the long term that the courts rejected his assertions of sole power.\footnote{See, Arthur Garrison “The War on Terrorism on the Judicial Front, Part II: The Courts Strike Back” American Journal of Trial Advocacy 27(3): 473 (2004); Arthur Garrison “Hamdan v Rumsfeld, Military Commissions, and Acts of Congress: A Summary.” 30(2) American Journal of Trial Advocacy 339 (2006).}

The same principles of constitutional boundaries that limit the public and its representatives in Congress, which Hamilton wrote the judiciary was authorized to enforce, are the same boundaries that limit the powers of the President acting as
commander-in-chief. Although the “how” of judicial review of presidential action is open to discussion, the “why” of judicial review of such actions is settled by the Constitution itself. As Hamilton concluded, “the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution . . . .”\(^{44}\) Under the U.S. Constitution, the rule of law, the muse of justice, finds her voice in Hamilton’s least dangerous branch.

As the actions of Congress exercising its powers are subject to the mirror of the Constitution, so are the actions of the President subject to the same mirror. The actions placed before the mirror of the Constitution are the President’s business. The holding of the constitutional mirror and declaring what it beholds in the reflection is the Court’s business.

---

\(^{44}\) Federalist Papers #81.
AN INSIDE VIEW OF DUTCH COUNTERTERRORISM STRATEGY: COUNTERING TERRORISM THROUGH CRIMINAL LAW AND THE PRESUMPTION OF INNOCENCE

Marianne Hirsch Ballin*
Willem Pompe Institute for Criminal Law and Criminology
Utrecht University

ABSTRACT
As part of its counterterrorism strategy, the Netherlands has introduced a preventive investigative system in criminal procedural law. It is now possible to use investigative methods to prevent terrorist attacks, rather than use such methods only for crimes that have already been committed. Law enforcement agencies can now apply methods that infringe upon civil liberties, such as wiretapping or systematic observation, to prevent terrorist attacks. A shift towards prevention in the criminal system, however, might prejudice the fundamental principal of presumed innocence, because the presumption of innocence, as a normative principle, forbids the government from using such far-reaching powers arbitrarily.

The Dutch government has repeatedly expressed its intention to make every effort to increase both the government and society’s capacity to prevent any future acts of terrorism. It has also expressed its intention to do so without going beyond the rule of law. In the light of this reasoning, the Dutch government aims to confront terrorism largely through criminal law.

This article focuses on counterterrorism legislation adopted through the Act of 20 November 2006, which expanded the system of special methods under criminal procedural law for the investigation of terrorism, and which built on the existing system for investigating traditional and organized crime. This legislation replaced the traditional ‘reasonable suspicion’ threshold with the new ‘indications of a terrorist crime’ threshold for the use of investigative methods in terrorism investigations.

In order to confront terrorism the Dutch government considered it necessary to enable a proactive system of terrorism investigation in the sense that it aims to prevent terrorist attacks. The methods used in such investigations include wiretapping, systematic observation and infiltration. Changing the threshold to ‘indications of a terrorist crime’ has significantly expanded the use of proactive terrorism investigation for preventive purposes. On the one hand, these significant amendments to the law

* Direct correspondence to M.HirschBallin@law.uu.nl.
© 2008 by the author, published here by permission.

2 In the context of this paper ‘proactive’ assumes there is a lack of a suspicion of a particular crime.
3 Hereinafter collectively called special investigative methods.
attempt to introduce a system that can effectively confront the immediate and catastrophic threat of terrorism; on the other hand, this new category of special investigative methods has encountered criticism because the Public Prosecutions Department seems to be following the lead of the intelligence agencies and are transgressing acceptable limits of governmental infringement of civil rights.\(^4\)

The main consequence of this counterterrorism legislation is the application of the lower ‘indications of a terrorist crime’ threshold for the use of investigative methods and for the initiation of criminal procedural action against an individual. The ability to initiate criminal procedural action brings with it the additional risk that the government may subject innocent people to far-reaching investigative methods. In light of potential infringements of civil liberties, the threat of terrorism is used as an argument to strike a different balance between protecting people against such a threat (the interest of the terrorism investigation) and providing sufficient legal protection against the danger that innocent people are subjected to intrusive governmental actions.\(^5\) The article will examine whether this fundamental change is compatible with the presumption of innocence and whether combating terrorism may justify a different assessment of the *presumptio innocentiae*.

### I. Dutch Counterterrorism Measures in Criminal Law

The Netherlands has diligently implemented the strategies to combat terrorism developed by the European Union, and has also enhanced its own capability to prevent terrorist attacks on Dutch soil.

The European Union adopted the 2002 Framework Decision on Combating Terrorism, which obliged the Member States to penalize terrorist offenses and to establish jurisdiction over these offenses.\(^6\) The Netherlands implemented this framework decision through the Act of 24 June 2004 on Terrorist Crimes, which added an Article to the Dutch Criminal Code specifying terrorist crimes (Article 83), defining terrorist intent, and increasing the penalties for certain crimes committed with terrorist intent. Participation in a terrorist organization was also criminalized (Article 140a) as well as the conspiracy to commit crimes with a terrorist intent, which significantly expanded the use of the concept of conspiracy in the Dutch Criminal Code.\(^7\)

In order to confront terrorism, the Netherlands also prohibited terrorist organizations, listed as such on a European Union terrorism list, by the Act of 20 November 2006.\(^8\) As well as having ratified and implemented all United Nations Treaties on terrorism, it has also implemented the legislative measures outlined in the Council of the European Union’s Declaration on Combating Terrorism of 24 March 2004.\(^9\)

This article focuses on the counterterrorism measures in criminal procedural law that have been developed by the Dutch legislature in order to effectively trace and

\(^5\) Matthias J. Borgers, *De vlucht naar voren* 17 (Boom Juridische uitgevers 2007).
\(^7\) Stb. 2004, 290 [Act on Terrorist Crimes of 24 June 2004].
\(^8\) Stb. 2006, 600.
prevent terrorism. The Act of 20 November 2006 is aimed at providing the Public Prosecutions Department with sufficiently efficient investigative tools to prevent terrorist crimes as early as possible.\(^\text{10}\) The Netherlands has taken these measures in line with the European policy on its own initiative, considering that no binding obligations in this regard have been established on a European or other international level.\(^\text{11}\)

**II. The Procedural Embedding of the System of Investigative Methods**

The Netherlands has chosen criminal procedural law rather than national security law to utilize the preventive measures mentioned above as, ultimately, the measures aim to prosecute potential perpetrators for acts of terrorism. Adapting the existing system of criminal procedural investigative methods has made it possible to use the information obtained through applying investigative methods in a criminal investigation and prosecution as well as to exert control over the legitimate use of investigative methods in trial. This control would not be possible if terrorism investigations were solely conducted by the intelligence agencies. It is the task of the AIVD (the General Information and Security Service) to warn of serious risks in due time, and not to investigate criminal offenses for the purpose of prosecution as law enforcement agencies do.

However, the AIVD can send official reports to the public prosecutor. These reports can be used as basic information for launching a criminal investigation and as evidence in a criminal trial.\(^\text{12}\) Thus, in the situation prior to the terrorism legislation of 2006 such information could be used for establishing a (reasonable) suspicion, and currently also for establishing indications of a terrorist crime.\(^\text{13}\) As the AIVD reports can only include information about a specific threat, without revealing anything about the source or method of obtaining or the level of knowledge of the agency, no judicial control can be exerted over the way the information has been obtained. The reliability of the information originating from the AIVD can only be challenged in trial, which can imply the hearing of AIVD employees as witnesses by the examining magistrate.\(^\text{14}\) However, this judicial examination will remain limited because of the secrecy of the work of the AIVD. Enabling the criminal justice system to intervene at

---

\(^\text{10}\) Kamerstukken II, 2004-2005, 30 164, nr. 3 [MvT] [Explanatory Memorandum], p. 2.


\(^\text{12}\) As decided in the ‘Hofstad I’ case (concerning terrorism suspects), Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 5 september 2006, NJ 2007, 336 (ann. Sch) (Neth.) §4.6.

\(^\text{13}\) The Court of Appeal of The Hague ruled in a case concerning the pre-trial detention of a terrorist suspect that also the suspicion can be based on information originating from the AIVD. Gerechtshof [Hof] [ordinary court of appeal], ’s-Gravenhage, 17 januari 2003, LJN: AF3039, 1000013402 (Neth.), § 3.

\(^\text{14}\) The act on protected witnesses of 28 September 2006 provided for a statutory basis for the use of AIVD-information as evidence (in the form of testimony of a witness or an official report) and provided that the trial judge refers to the examining magistrate for the examining of the information, when the public prosecutor refuses to summon the witnesses in trial (Article 264(2)(b) Wetboek van Strafverordening [Sv] [Code of Criminal Procedure] and Article 288(2) Sv). The examining magistrate can hear the AIVD officer as a protected witness if national security reasonably requires that he/she be heard as a protected witness (Article 226m(1) Sv). Stb. 2006, 460.
an earlier stage means that the work of the AIVD can result in criminal investigations and in subsequent prosecutions earlier than before.\textsuperscript{15}

Although disclosure of information from the AIVD to law enforcement agencies is possible and has been made easier (by allowing AIVD employees as witnesses), counterterrorism measures which enhance investigative methods for terrorism offenses have been addressed in criminal procedural law. As a consequence, the procedural safeguards of the Code of Criminal Procedure, which are typically elaborations of the rule of law, also apply in terrorism investigations when prosecution is sought. These procedural safeguards would not apply if the investigations were conducted under the responsibility of the intelligence agencies. Criminal procedural law has been expanded to include the investigation of terrorism in order to preclude intelligence agencies from carrying out such investigations. Such intelligence agency investigation would inevitably occur because satisfying the conditions required in criminal investigations, such as reasonable suspicion, would take too long to avert the act of terrorism. On the one hand, using a lower threshold of suspicion and the possibility to use information originating from the AIVD will harm the legal position of the defendant compared to his/her legal position when ordinarily criminal investigation is started upon a reasonable suspicion. On the other hand, the procedural safeguards of the Code of Criminal Procedure will still apply and the range of counterterrorism measures in criminal procedural law, instead of national security law will further the subsequent legal position of the defendant should prosecution be instigated.

In addition, it is relevant to note that the decision of the public prosecutor to authorize the application of special investigative methods is determined in the first place by his position as a magistrate.\textsuperscript{16} The public prosecutor is the first person responsible for determining whether the statutory requirements, most importantly the establishment of indications of a terrorist crime, are met. Subsequently, if an authorization of the examining magistrate is additionally required, which is the case for the most intrusive investigative methods such as the recording of private communications, the examining magistrate will again examine whether the statutory requirements are met. The trial judge can finally give his judgment on the legitimacy of the use of the method, which entails a judgment as to whether the examining magistrate could reasonably make his judgment on the authorization.\textsuperscript{17}

\textsuperscript{15} Kamerstukken II, 2004-2005, 30 164, nr. 3 [MvT], p. 33.
\textsuperscript{16} In the Netherlands, the Public Prosecutions Department is part of the judiciary. The public prosecutor has, therefore, a different position than the prosecutor in the United States. The Dutch public prosecutor is required to act not only in favor of establishing ‘a case’ (the guilt of the suspect or defendant), but should also continuously take into account the interests of the suspect or defendant. However, as a result of increasing adversarial influences, the position of the Dutch prosecutor is also changing. Besides, the prosecutor functions under the responsibility of the minister of justice, which position can, especially when terrorism is involved, put political pressure on the prosecutor to decide in favor of investigating and leave a judgment on legitimacy to the trial judge. See: Hans de Doelder, Terrorisme en de rol van de rechter 19-20 (Boom Juridische uitgevers) (2006).
\textsuperscript{17} HR 11 oktober 2005, NJ 2006, 625 (Neth.).
III. From a Reasonable Suspicion to the Threshold of ‘Indications of a Terrorist Crime’

Obviously the key change that has been made for the use of special investigative methods in terrorism investigations is requiring indications of a terrorist crime instead of a reasonable suspicion of a crime or a reasonable suspicion that crimes are being planned or committed in an organized context. For terrorism, it is considered even more necessary than for organized crime that the criminal justice system is able to function proactively, because prevention is the central goal for confronting terrorism.

Proactive use of special investigative methods is in classic criminal investigations basically precluded. A different approach was already chosen for confronting organized crime by requiring a reasonable suspicion that crimes are being planned or committed, which includes the proactive application of special investigative methods. For investigating organized crime the prosecutor is permitted to use special investigative methods without a suspicion of a particular crime in the case of the planning or commission of serious crimes (crimes for which pre-trial detention is also permitted) in an organized context, whereas these crimes should also result in a serious infringement of the legal order due to their nature or connection with other crimes being planned or committed in that organized context.

The lowered threshold of ‘indications of a terrorist crime’ for the use of investigative methods must be seen in relation to the interpretation that has been given to the threshold of a reasonable suspicion. This interpretation can be better understood by comparing it to Fourth Amendment probable cause, to which in the United States the application of special investigative methods in criminal investigations is subjected. The required level of information establishing reasonable suspicion is in the Netherlands lower than the required level for establishing probable cause. The precise object of probable cause depends on the investigative method, but must concern information of criminal activity. Case law in the Netherlands demonstrates that anonymous information or AIVD information without support from another source is sufficient for establishing a reasonable suspicion and justifying the use of special investigative methods.

---

18 Except for situations in which the investigation concerns a suspicion of a crime which has already been committed and other crimes committed after the date of issuing an authorization for a special method are simultaneously discovered (HR 7 oktober 2003, NJ 2004, 118 (Neth.), § 3.3). Further, the use of special investigative methods in reactive classical investigations to suspicions of criminal preparation, conspiracy or membership of a criminal organization (as criminalized acts) are also proactive in their prevention of crimes which are being prepared, conspired or may be committed in the context of the criminal organization.

19 Article 126o Sv.

20 According to case law, the following is insufficient for establishing a reasonable suspicion that someone is guilty of a criminal offense: the facts and circumstances that a person who has an appearance that matches groups of people involved in the drugs trade runs out of a bar which is known to the police as a place where drugs deals take place, Hof Amsterdam 3 June 1977, NJ 1978, 601. More recent case law only gives guidance as to facts and circumstances that have been considered as sufficient for establishing a reasonable suspicion, such as: anonymous information (HR 13 June 2006, NJ 2006, 346, § 3.5); information from the AIVD without supporting information from police investigations (Hof 's-Gravenhage, 17 January 2003, LJN AF3039); and official reports from the criminal intelligence unit of police agencies (CIE) (HR 20 April 2004, LJN A00616, § 37 and Rechtbank [Rb] [ordinary court of first instance] Rotterdam 19 december 2006, LJN AZ8683).
investigative methods. For establishing probable cause in criminal investigation, in the US such information requires support from an independent police investigation or another reliable source.\footnote{Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure §3.3 and § 4.2 (4d ed. West Group 2004) (1985). In more detail see: Marianne F.H. Hirsch Ballin, Preventing Terrorism through Criminal Law 38-49, 90-95 (Celsus Legal Publishers 2007).}

The explanatory memorandum to the anti-terrorist legislation of 2006, amending the Code of Criminal Procedure, formulates as a guideline for the interpretation of indications of a terrorist crime requiring that the information points to something concrete.\footnote{Kamerstukken II, 2004-2005, 30 164, no. 3 [MvT], p. 9.} Critical to this analysis is whether the information concerned is of such a nature that it has to be taken note of in order to prevent terrorism.\footnote{Id. at 13-14.} The interest of the investigation must be the primary concern, which is directly connected to prevention. To illustrate this, one should think about difficult to verify rumors about the preparation of a terrorist crime or conspiracy thereto as well as about information originating from the AIVD concerning an analysis of threats.\footnote{Id. at 9.} It is also not per se required that the facts and circumstances show which specific crime is being prepared or conspired, such as information from different sources about the specific interest of certain people for the constructional specifications of government premises. Concrete facts and circumstances, from which their accuracy is difficult to verify and originating from an unclear source, such as anonymous tips, can be sufficient for meeting the standard of indications of a terrorist crime.

However, considering the case law it is questionable whether this information would be insufficient for establishing a reasonable suspicion. The interest of the investigation, namely preventing terrorist crimes, will therefore be decisive for the distinction between reasonable suspicion and indications. When, for the purpose of preventing terrorist crimes, an investigation is considered necessary and the information available is insufficient for establishing a reasonable suspicion, the information must be considered as sufficient for initiating a terrorist investigation. The conclusion can be drawn that the threshold of indications of a terrorist crime must be resorted to in the – likely exceptional – situation in which a reasonable suspicion cannot be established and the use of special investigative methods is nevertheless desired in order to make sure that terrorism is prevented. The prevention of crimes is now placed in the central position, which means that terrorism investigations will almost always concern situations in which the terrorist crime has not yet been committed and will therefore be proactive.

In comparison to the changes with respect to terrorism investigations in the United States, as established by the USA PATRIOT Act of 2001\footnote{Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 209, 115 Stat. 272, 283.}, changing the standard of a reasonable suspicion to indications in the Netherlands is actually a rather small step considering that reasonable suspicion was already a considerably low standard compared with the Fourth Amendment probable cause standard. In the United States, as a consequence of removing the legal barrier between law enforcement and intelligence agencies, the probable cause standard of the Foreign
Intelligence Surveillance Act of 1978 (FISA)\textsuperscript{26} will in practice apply to terrorism investigation in the US, which is actually a more drastic change. This FISA probable cause standard is even lower than the lowered standard of ‘indications’ in the Netherlands. In the Netherlands, some involvement in criminal activity concerning terrorism is still required, whereas in the United States the application of special investigative methods under FISA can occur without evidence of any involvement in criminal activity by the person investigated. Rather, the probable cause showing that the person under investigation is an agent of a foreign power will suffice. Besides, control on the use of investigative methods when prosecution has subsequently been initiated cannot be exerted, because of the secrecy of all national security information. When seeking prosecution, the Netherlands still attributes terrorism investigations to primarily be the responsibility of law enforcement agencies. This choice has however necessitated that law enforcement agencies be given broad powers to investigate in order to effectively prevent future acts of terrorism.

\textbf{IV. The Implications of Respecting the \textit{Presumptio Innocentiae} in Criminal Procedural Law}

The fundamental \textit{Presumptio Innocentiae} is recognized in various international treaties, most importantly in Article 14(2) of the International Convention on Civil and Political Rights and Article 6(2) of the European Convention on Human Rights (ECHR). The presumption is considered an element of the right to a fair trial and can in general be considered a fundamental principle of law. The Dutch Constitution or Code of Criminal Procedure does not explicitly mention the presumption of innocence. However, the acknowledgement of the presumption can be recognized in the arrangement of the Code of Criminal Procedure as a whole, such as the prosecutor bearing the burden of proof. As will be explained later, the requirement of a reasonable suspicion before investigative methods can be applied also reflects the respect for the presumption of innocence.

The presumption of innocence can be considered as a fundamental notion for the criminal justice system in a state governed by the rule of law, as it recognizes the inviolability of human dignity and its reflection on the government’s use of its power. The presumption of innocence is in this regard the fundamental notion that has its effect on the elaboration of criminal procedural law as a whole in the sense that the entire criminal procedure is aimed at establishing the truth by being continuously oriented towards the possibility that the suspect is innocent until the contrary – his guilt – has been proven in a court of law.\textsuperscript{27}

This section aims to give an overview of the implications of the presumption of innocence as part of the protections by the ECHR for Dutch criminal procedural law. The presumption of innocence is protected in Article 6(2) of the ECHR: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” Article 6(2) “governs criminal proceedings in their entirety,

\textsuperscript{26} Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1871 (2007).
irrespective of the outcome of the prosecution," which is similar to the general interpretation of Article 6 that the fairness of the trial depends on the proceedings as a whole. The applicable principle for determining whether there has been a violation of the presumption of innocence reads as follows:

[T]he presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to the law and, notably without having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may even be so in absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.  

This principle from the Minelli case has been extended to any statements made by public officials (e.g. in the media) about the guilt of a person when his guilt has eventually not or not yet been proved according to the law. However, a distinction must be made in this regard between statements reflecting the idea that the person concerned is guilty and statements about a state of suspicion of the person concerned.

As to the case law of the ECHR, it is important when determining a violation of the presumption of innocence to examine whether the defendant has been given an opportunity to exercise his rights of defense with regard to the statements that have been made by the State officials regarding his guilt.

It clearly follows from the judgments of the European Court of Human Rights that a statement of a reasonable suspicion should be distinguished from statements about the guilt or innocence of someone. This is logical, because otherwise it would be impossible to investigate crimes and initiate criminal proceedings at all. The presumption of innocence must be considered as a normative notion for the criminal process and therefore controls the procedure rather than hinders the criminal process. Using investigative methods subject to the condition of the establishment of a reasonable suspicion (or eventually a different threshold) will therefore never directly result in a violation of the presumption of innocence as protected by the ECHR. The use of investigative methods in themselves cannot be regarded as a statement as to the guilt of the person(s) involved; rather, it merely concerns the state of a reasonable suspicion against the person(s) involved.

The presumption of innocence must, however, be seen as having consequences for the criminal procedure as a whole. The presumption of innocence is a fundamental notion governed by the rule of law recognizing respect for human dignity when giving the government the power to infringe civil liberties. From that point of view, the presumption of innocence has a normative effect on the regulation

32 Carl F. Stuckenberg, Untersuchungen zur Unschuldsvermutung 74 (Walter de Gruyter & Co. 1997).
of criminal procedural authorities. Increasingly, the presumption of innocence is elaborated in procedural guarantees, which depends on what specific phase the criminal procedure is in. By way of example, compare the phase in which wiretapping techniques are used against an individual, the phase in which pre-trial detention is imposed, and the phase in which prosecution is initiated. The extent to which the presumption of innocence must be taken into account increases contemporaneously with the severity of the governmental interference in civil rights in each successive phase of these proceedings. Establishing the threshold of a reasonable suspicion must be seen as an elaboration of respecting the presumption of innocence. Whether this requirement suffices and how this threshold must be interpreted, also depends on the specific phase of the proceedings and the severity of the interferences with human rights in that specific phase.

V. Reasons for Establishing the Threshold of a Reasonable Suspicion

In Dutch criminal procedural law the establishment of a suspicion has traditionally been considered as the threshold for initiating a pre-trial criminal investigation and using investigative powers that interfere with the private life of the person in question. A definition of the concept of suspicion is not provided in law. However, for its interpretation guidance is sought with Article 27 of the Code of Criminal Procedure, defining the suspect. A person can, before the prosecution has been initiated, be considered as a suspect when a reasonable suspicion that he or she is guilty of having committed a criminal offense can be derived from facts or circumstances. A suspicion is thus the reasonable suspicion that someone is guilty of having committed a criminal offense, which can be derived from facts and circumstances. A reasonable suspicion that a crime has been committed should be established before special investigative methods can be used. Thus, the pre-trial investigation must traditionally be linked with the commission of a criminal offense or with the planning or commission of crimes in an organized context in order to be legitimate.

The threshold of a reasonable suspicion as the central threshold for using investigative or coercive methods against someone was already introduced during the drafting process of the current Code of Criminal Procedure that entered into force in 1926. The explanatory memorandum to the Code of Criminal Procedure of 1914 formulated as the goal of the criminal justice system to pursue the conviction of those guilty of having committed a criminal offense and to avoid subjecting the innocent to conviction and prosecution. From the latter, it can be derived that within the administration of criminal justice subjecting the innocent unnecessarily to investigative methods must also be avoided. A balance must be struck between the interest of the investigation in the specific circumstances and the risk that innocents are subjected to investigative methods. This is deemed to be guaranteed by

34 Krauβ, *supra* note 27, at 158.
35 Article 27(1) Sv.
36 Nicolaas Rozemond, Strafvorderlijke rechtsvinding 359 (Gouda Quint 1998).
establishing the threshold of a reasonable suspicion. The explanatory memorandum of 1914 acknowledged that the state of a reasonable suspicion would create awareness among people that also the suspect, who is brought to trial, is only under a suspicion as to his guilt. The explanatory memorandum further explains that using far-reaching investigative methods against someone such as arrest, body searches, or pre-trial detention is only possible against a person relating to whom such a reasonable suspicion can be established.

In the first place, the regulation of investigative methods in law results directly from the requirements which follow from the protection of civil liberties. The use of investigative powers against citizens has serious implications for the privacy of the citizen investigated. For this reason the protection of privacy by human rights treaties (for the Netherlands this is most importantly Article 8 of the ECHR and Article 10 of the Dutch Constitution) requires that the government can only interfere with the private life of citizens when a legitimization has been established in law. This basis in law must be sufficiently accessible and foreseeable to the person concerned and, as an additional requirement of the Dutch Constitution, must be established by an Act of Parliament. The regulation in Dutch law of privacy rights interfering with investigative methods corresponds with these requirements.

Choosing to use the specific threshold of a ‘reasonable suspicion’ can be considered as the acknowledgment that the presumption of innocence is respected. The presumption of innocence requires that nobody shall be considered guilty until his guilt has been proved in a court of law, which also implies that one should be subjected as little as possible to any criminal procedural measures having implications for the (private) life of that person. The use of criminal procedural investigative methods will be experienced to a certain extent as being considered guilty. In 1764 Beccaria used the *presumptio innocentiae* as an argument for rejecting the use of torture as an investigative method for establishing the truth (a confession), because using torture is a punishment imposed before guilt has been established in a court of law. Also the *Déclaration des Droits de l’Homme et du Citoyen* (1789) formulates in Article 9 the regulation of coercive methods in the pre-trial investigation on the basis of the presumption of innocence. The risk of subjecting innocent persons to investigative methods must therefore be avoided as much as possible and should only occur in the situation that the interest of the investigation in order to prosecute the

---


39 Article 10 Grondwet voor het Koninkrijk der Nederlanden [Gw.] [Constitution of the Kingdom of the Netherlands].

40 Of course, torture is not acceptable under any circumstance, not only because the presumption of innocence forbids torture as an investigative method, but also as a punishment after someone has been found guilty. Beccaria, however, uses the presumption of innocence as an argument for rejecting certain investigative methods which are intrusive and can be experienced as punishment (torture being an extreme example thereof).

41 Keijzer, *supra* note 33, at 242.
actual perpetrators is more important than the risk that (also) innocent persons are subjected to investigative methods. Further, the use of investigative or coercive methods must be limited to their purpose, namely the clarification of a reasonable suspicion (or, eventually, a different level of suspicion) and can never be used for punitive purposes.

For this reason, the use of investigative methods that have implications for the (private) life of the persons involved is subjected to a threshold of a reasonable suspicion, a threshold beyond which the investigation aimed at prosecuting the actual perpetrators is more important than the risk of investigating innocent persons. In the situation where someone can reasonably be suspected of having committed a (traditional) criminal offense (whereas his mere guilt should still be proved in a court of law), the interest of the criminal investigation aimed at establishing the truth about the committed criminal offense justifies interference by the government in the private life of the person concerned within the scope of a criminal pre-trial investigation. The reasonable suspicion in the phase of the criminal pre-trial investigation of traditional crime thus functions as sufficient ‘good cause’ that justifies the use of intrusive investigative methods against persons. When the authority used is more intrusive, such as pre-trial detention, the standard of reasonable suspicion will be harder to meet. This clearly follows from the procedural safeguards adopted in the Code of Criminal Procedure by which criminal procedural powers are surrounded, such as the requirement of grave presumptions against the suspect in particular in addition to a reasonable suspicion of a serious crime. The gradation of the intrusiveness of investigative methods thus depends on the level of suspicion. The level of suspicion must therefore be seen as the ‘balancing point’ in the field of tension between using intrusive investigative methods and the presumption of innocence.

VI. Conclusion: Is a Different Threshold for Using Criminal Procedural Methods Acceptable?

The language of the ECHR regarding the protection of the presumption of innocence does not have direct consequences for using and maintaining the threshold of a reasonable suspicion before allowing the use of investigative methods. Rather, the Guidelines on Human Rights and the Fight against Terrorism adopted by the Committee of Ministers of the Council of Europe on 11 July 2002 explain – although in the context of arrest and police custody, which according to the guidelines must be based on reasonable suspicions – that the interpretation of reasonable depends “on all circumstances” and that “terrorist crime falls into a special category.” A different

---

42 See in this regard: Rozemond, supra note 36, at 359.
43 Namely, the situation in which the interests of the investigation aimed at establishing the truth about a committed criminal offense justifies the subsequent risk that (also) innocent persons are subjected to criminal investigative methods.
44 Article 67 Sv and for other additional requirements Article 67(a).
45 See in this regard also: Rolf J. Köster, Die Rechtsvermutung der Unschuld, Historische und Dogmatische Grundlagen 178 (Diss. Bonn 1979).
interpretation of reasonable suspicion might be quite similar to using a new threshold of ‘indications of a terrorist crime.’

Although not directly, the presumption of innocence as a fundamental principle of law does have an influence on each separate phase of criminal proceedings. It can thus be actually said that Article 6 of the ECHR has a reflex function on the phase of the pre-trial investigation, because guaranteeing a fair trial including respect for the presumption of innocence begins with ensuring that the pre-trial investigation is conducted with due regard for the rights of the persons under investigation.

The reasons for creating the threshold of a reasonable suspicion can be found in the presumption of innocence. However, the criminal investigation in itself should not be considered to be restricted to the situation in which a reasonable suspicion can be established. Already before 1999, before the entry into force of the legislation regulating the use of special investigative methods for the investigation of traditional or organized crime, proactive investigation beyond the threshold of reasonable suspicion was considered permissible. The criminal investigation must be considered to be restricted with regard to its goal, namely making prosecutorial decisions, which includes investigative action without showing a reasonable suspicion. For the purpose of confronting organized crime it was already found necessary to investigate the complex nature of organized crime proactively and, for that reason, a different threshold was established, which already breaks with the traditional threshold of a reasonable suspicion that someone has committed a criminal offense. If we accept that there is in fact a threat of terrorism that requires that investigations are initiated at an earlier point and if these investigations are still aimed at making prosecutorial decisions rather than merely gathering information, a different threshold for terrorism investigation is not incompatible with the traditional system of pre-trial investigation. The advantage of building on the already existing system of special investigative methods is that also terrorism investigations that aim to make prosecutorial decisions fall under the procedural protections of the Code of Criminal Procedure as well as under the scope of Article 6 ECHR.

Nevertheless, this is still not a sufficient argument for changing the threshold from reasonable suspicion to indications of a terrorist crime in the light of the presumption of innocence. As stated before, the presumption of innocence must be interpreted as requiring ‘good cause’ before using investigative methods that have aggravating consequences for the person(s) involved. This ‘good cause’ must prevent the arbitrary application of investigative methods resulting in infringements of the rights of persons under investigation. The good cause must also be considered as the reason why the balance is tipped in favor of the prevention of terrorist crimes rather than the avoidance of subjecting innocent persons to intrusive measures. What can be considered as a sufficient good cause depends on the specific phase of the criminal

---


47 See in this regard: Geert Knigge & Nicolaas J.M. Kwakman, Het opsporingsbegrip en de normering van de opsporingstaak, in 125 Het vooronderzoek in Strafzaken, Tweede interimrapport onderzoeksproject Strafvoordering 2001 at 325 (Marc Groenhuijsen & Geert Knigge eds., Gouda Quint 2001).

proceedings and the seriousness of the interference with human rights by using specific investigative methods. On the one hand, in more intrusive circumstances, additional procedural requirements to the threshold of a reasonable suspicion are established. On the other hand, in less intrusive situations (a situation can also be considered as less intrusive when the crimes involved are more serious, such as organized crime) the reasonable suspicion threshold is itself interpreted as requiring ‘less’. 49

From the point of view of the presumption of innocence, a ‘reasonable suspicion’ is a logical threshold, since it concerns a suspicion of guilt, namely a reasonable suspicion that the person under investigation has in fact committed the criminal offense. The threshold of ‘indications of a terrorist crime’ is still considered to be a cause for using special investigative methods against persons. Further, the threshold is lowered (indications rather than suspicion) but it is applicable only in situations concerning terrorism. This limited application can be considered a restrictive addition, although arguably of little practical consequence. If we consider terrorism as a serious threat that might result in many innocent victims, then respecting the presumption of innocence of the potential perpetrators of terrorist crimes must also be put in a different perspective. Criminal pre-trial investigations of terrorism must then be put at the bottom of the ladder of different stages with increasing intrusiveness by investigative powers and with an increasing elaboration of the presumption of innocence in procedural thresholds and conditions. Accepting a lower threshold for terrorism investigations is neither inconsistent with the established procedures of the Code of Criminal Procedure nor with the interpretation of the presumption of innocence in criminal procedural law. The use of the threshold of ‘indications of a terrorist crime’ can from this perspective in principle function as a sufficient ‘good cause’.

This having been said, it will, however, be difficult to determine whether this threshold is then sufficient for the use of all investigative methods, considering that some methods are much more far-reaching than others. The legislature has now established the possibility of also using the more intrusive methods on the basis of indications in terrorism investigations. From the point of view of effective investigation in these probably complex cases, this is a logical decision. However, the public prosecutor (and the examining magistrate when his authorization is required) must at all times be reluctant when deciding on using far-reaching investigative methods on the basis of indications of a terrorist crime. The precise interpretation of the threshold in the light of the presumption of innocence must in each specific case be given on the basis of an assessment of all the relevant factors: the intrusiveness of the intended method in the specific situation (proportionality), the interest of the investigation and any additional protections which may be applicable. Therefore, in each specific case, it must be determined independently whether the prevention of terrorism outweighs the risk that far-reaching methods are used against the innocent.

49 See additional explanation of argument, at text at nn. 33-34, supra.
ABSTRACT

In a survey of college students' responses about the level of coercion, including torture, that they recommended for various interrogation scenarios, 91 subjects wrote explanations of their choices. These recommendations are content analyzed for the types of justifications given for each level of coercion. Eighty percent of subjects recommend at least Level 4 coercion, which many would consider to be torture. For all subjects, utilitarian explanations were more common, with subjects indicating that the level of coercion that they recommended was based primarily on how much the information was needed and how effective the coercion/torture was likely to be. A few subjects rejected torture on strictly moral (deontological) grounds, while others did so on utilitarian grounds. For many subjects who supported torture, the moral guilt of the interrogee was an important issue. Using Scott and Lyman's (1968) classification system, subjects used the terrorist's guilt to justify, rather than excuse, the use of torture. Kohlberg's (1969) theory of moral development was also found to provide a helpful model for looking at subjects' responses; most subjects who rejected torture appeared to be using postconventional reasoning. For subjects supporting torture, however, it was less clear as to which level of moral reasoning was being employed.

The "war on terror" continues to present the United States with the issue of the level of coercion that is appropriate in interrogation of captured al Qaeda members and others thought to hold vital information. For example, on March 8, 2008 President Bush explained his veto of a bill that would have prohibited waterboarding. He argued that limiting interrogation to techniques approved in the Army Field Manual could seriously handicap intelligence gathering (Loven, 2008).

Whether or not waterboarding fits various legal definitions of torture continues to be debated (Cooper and Santora, 2007). Regardless of whether it is legally torture, many would absolutely prohibit it because the use of this level of coercion hurts the moral standing of the United States (McCoy, 2006). The purpose of the present research is to look at the degree of support for various levels of coercion, including torture, in interrogation. This article will especially focus on the moral reasoning used to justify or prohibit torture. It will begin by briefly reviewing the arguments in the current professional literature.
Historical Background

A good place to begin in examining moral reasoning about torture is with the utilitarian philosophy of Jeremy Bentham (Bowring, 1962). Writing prior to 1780, at a time when brutal physical punishments were common, Bentham's concern was with finding punishments that could be effective in maintaining civil order (an aspect of the "common good"), while at the same time minimizing the "evil" of physical and psychological pain.¹ Despite his general disapproval of inflicting pain, Bentham did recognize possible "ticking bomb" situations in which the greater good required torturing someone to get the information needed to diffuse the bomb (cf. Morgan, 2000; Twining and Twining, 1973).

Deontologists and Consequentialists

Since the time of Bentham, as a result no doubt of the Enlightenment that he was a part of, it has become much more common to express abhorrence at torture and indeed any number of barbarous punishments. The Catholic Church, for example, has gone from support, to tolerance, to absolute condemnation of torture, whether for interrogation or punishment (Perry, 2005). More recently, when noted civil libertarian Alan Dershowitz (2002) published an article in support of "torture warrants," the argument over the desirability of torture was renewed, especially in a number of law review articles. (See generally: Bell, 2005; Besoglu, Livanou, and Crnobaric, 2007; Covey, 2005; Crank and Gregor, 2005; Greenberg and Dratel, 2005; Hafetz, 2007; Weissbrodt and Bergquist, 2006.)

In the current debate, those in favor of an absolute prohibition on torture are generally referred to as "deontologists," from the Greek root "deon" connoting what is (morally) required. Those supporting at least the possible use of torture are referred to as "consequentialists," meaning that the morality of an act is determined by weighing all of the results of doing one thing versus another. This is basically the same thing as Bentham's utilitarianism (or Charles Pierce's pragmatism), though a philosopher may want to draw distinctions.

The deontology argument is represented by McCoy (2006), Perry, 2005, Rumney (2006), and Saul (2004). Although these writers may buttress their arguments by pointing to the negative consequences of the use of torture (e.g. to the torturer, to a country's reputation, or to civil liberties in general), for the most part they argue that the very essence of human dignity creates an absolute right against being tortured. Recently, the editors of Washington Monthly stated an absolute "No Torture, No Exceptions" stance that was supported by Jimmy Carter, Wesley Clark, Gary Hart, John Kerry, Carl Levin, Nancy Pelosi, and numerous political, military, academic, and religious leaders—some 37 notables in all (No Torture, 2008).

Does this mean that it is better to let a nuclear bomb go off in the middle of a metropolis rather than use any level of torture to get needed information to stop it? Perry (2005) comes close to answering with a yes: there are simply some moral prohibitions that are absolute. Other deontologists are more likely to argue that such a

¹ Interestingly Bentham describes, with disapproval, a process much like modern waterboarding, though used for a punishment as much as for interrogation. "Suffocation was produced by drenching and was practiced by tying a wet linen cloth over the mouth and nostrils of the individual and continually supplying it with water, in such manner, that every time the individual breathed, he was obliged to swallow a portion of the water, till his stomach became visibly distended." (Bowring, 1962: 414)
scenario is a myth. In real life we could never be sure we had the right person, never be sure we were getting the right information, or there would be other ways to deal with the problem. Tim Roemer, of the Center for National Policy, argues that even if torture might be successful in a ticking bomb situation, it would simply make it less likely that anyone would volunteer critical information in future terrorist situations (No Torture, 2008). The deontologists seem to be unwilling to concede any exception for fear this would open the door to the consequentialists.

The consequentialists are represented by such writers as Bagaric and Clark (2005), Cohan (2007), Dershowitz (2002), and Posner and Vermeule (2006). These authors differ primarily in terms of how they would regulate torture. Proposals include torture warrants (Dershowitz), the legal defense of necessity (Cohan), and a priori rules specified by law (Bagaric and Clark; Posner and Vermeule).

The consequentialists are consistent in their views that there are or could be circumstances where torture is called for (or would inevitably be used). A concern, however, is that the consequentialists seem to lack a clear basis for limiting torture. Perhaps because their primary goal is to establish that there can be a time when torture is justified, the consequentialists have done little to clarify when torture may not be used. What should we do as we move away from the "ideal" ticking bomb situation? When, for example, the interrogee is only probably a member of a terrorist organization that probably has serious plots afoot, about which the interrogee might be able to provide critical information—which we may not be able to separate from "disinformation." Furthermore, how do we set limits on the amount torture? The consequentialists seem to be confident that "torture lite" will work (what is termed Level 5, below). Cohan (2007) does raise the possibility that there could be a situation where only the torture of the innocent—such as the terrorist's infant child—could induce the terrorist to talk. Deontologists refer to this as the slippery slope: once we open the door to any level of torture, there's no way to set a limit; consequentialists reply that not being able to set all the limits is not a good reason to avoid dealing with the ticking bomb situation, whether real or hypothetical.

Legal Precedent

While no reported U. S. judicial decision was found that deals directly with torture, two cases seem very relevant. In Leon v Wainright (1984) a federal appeals court implied that it was reasonable for a police officer to physically coerce a kidnapper to reveal the location of the victim. In Chavez v Martinez (2003) the U. S. Supreme Court ruled that in the event of a coercive interrogation in which the information obtained was not used as evidence against the interrogee, the standard for a constitutional rights violation was whether the overall situation met the 14th Amendment Due Process standard of shocking the conscience, rather then the much stricter 5th Amendment Privilege Against Self-Incrimination standard against forced interrogations. This ruling could have obvious implications if a tortured interrogee tried to bring a civil suit against law enforcement personnel (absent specific laws against torture).

Public Opinion

There have been relatively few surveys of the public's opinion about the use of torture to get information from terrorists; we found three relevant to our research.
A May, 2004, poll conducted by ABC News and the Washington Post found 35% of Americans supportive of torture in at least some cases; a total of 46% were accepting of physical abuse short of torture (Pious, 2006). An October, 2005, poll by the Pew Research Center found that 63% of Americans approved of torture at least rarely (Carney, 2006). A November 3 and 4, 2007 CNN (2007) Poll found that most Americans (69%) considered waterboarding to be torture, but 40% would allow its use against suspected terrorists. In summary, from 35% to 63% of the U.S. public were found to support torture, depending on how the question is presented.

Purpose of Present Research

The purpose of the present study, therefore, was to explore the rationales given by college students for their support of and opposition to various levels of coercive interrogation, up to and including torture, in a ticking bomb scenario.

Method

This present study is based on the analysis of qualitative data obtained from 252 college students' responses to six interrogation scenarios. Although the research was primarily designed to obtain quantitative data, subjects were given the opportunity to state reasons for their responses. Thirty-six percent (N = 91) of the subjects did so, producing an unexpected amount of detail explaining the levels of coercion that they recommended. Complete details on the methodology and quantitative data from this research can be found in Homant and Witkowski (2008). Here those details of the methodology are provided that are important for understanding our analysis of subjects' comments.

Subjects

Subjects for this research were obtained from four sections of an introductory sociology course (n = 189), one introductory corrections course (n = 27), and one graduate section in an Intelligence Analysis Master's program (n = 36). Subjects were more likely to be female (68%), young (median age 20), and white (63%). Half of the subjects were college freshmen, representing a wide variety of majors. About half (52%) were in the health or science fields, with the remainder in the liberal arts, social sciences (including criminal justice), and business.

Data Gathering

Data were obtained from a five page questionnaire that was distributed and filled out at the end of a class session. Participation was voluntary, but all subjects present during the particular class session agreed to participate. Average time to complete the questionnaire was about 25 minutes.

After measuring a variety of demographic and attitudinal variables, the questionnaire defined six levels of coercion and then asked subjects to indicate which was the highest level of coercion that they would approve of in each of six interrogation scenarios.
Levels of Coercion

The six levels of coercion ranged from no coercion through physical torture. The first three levels are clearly not torture, though a confession obtained under Level 3 conditions would likely be ruled inadmissible in U.S. courts. Level 4 would not be a legal procedure with an interrogee. While many might consider it a form of torture, the United States government maintains that it does not fall under the U.N. Convention Against Torture. Because of the direct application of significant physical pain Levels 5 and 6 are clearly torture. More specifically:

**Level 1. No Pressure:** no use of threats or discomfort; no penalty for not responding.

**Level 2. Negative Consequences:** not cooperating brings penalties, such as being subjected to maximum legal prosecution or even imprisonment for contempt of court.

**Level 3. Physical Discomfort:** The interrogee is made to endure unpleasant temperatures, uncomfortable postures, drug withdrawal, etc.

**Level 4: Psychological Coercion:** this includes threats of torture or death, violating the interrogee's most sacred values, playing on phobias or taboos, etc.

**Level 5: Physical Pain:** Increasing pain, including body blows, electric shock, and partial suffocation, but no mutilation or other permanent damage. ²

**Level 6. Maximum Pressure:** Serious and permanent injury to the interrogee is permitted, such as "extraction of finger nails, amputation of body parts, burning of the skin, breaking of bones, etc."

Interrogation Scenarios

Subjects were then presented with six scenarios, each involving the need to get information for some legitimate law enforcement goal. The first three scenarios were not terrorist related. They were meant to establish a baseline of what each subject thought about the use of coercion in more or less normal law enforcement situations. The fourth through sixth scenarios all refer specifically to terrorism or terrorists. The fifth scenario exemplifies the classic "time bomb" scenario that is usually given as the ideal case for justifying torture. We present the complete wording for that scenario while the other scenarios are abbreviated below.

**Scenario 1. Good Sister:** Police want a woman to tell them where her armed robber brother is hiding out.

**Scenario 2. Robber:** Man involved in a robbery is required to give the name and address of his accomplice.

**Scenario 3. Kidnapper:** A man who kidnapped a 6 year-old girl is caught but refuses to tell where he has locked the girl away. He wants to be released with a ransom or the girl will be left to starve to death. ³

² Our reference to "partial suffocation" is the closest we come to including waterboarding in our six levels. Those government officials who would place waterboarding at level 4 (i.e., not really torture) may see waterboarding as inducing a fear or suffocation rather than the physical pain of suffocation. We thought it best to avoid the issue in our data collecting by simply referring to "partial suffocation."
Scenario 4. **Terrorist Cell**: A member of a terrorist sleeper cell has been identified and is being pressed to reveal the names of his fellow cell members.  

Scenario 5. **Time Bomb**: Undercover work reveals the identity of a "sleeper" terrorist. When Homeland Security forces arrest him, it is clear that he has had the material to assemble a very powerful bomb. The man laughs at the security forces and readily admits that he has deployed a bomb. It is set to go off in a crowded shopping area in three hours. There is every reason to believe that he is being truthful about the bomb, but there is no clue as to where the bomb is deployed.  

Scenario 6. **Terrorist's Wife**: A terrorist is killed in a police shootout. It is highly likely that he has planted a bomb somewhere. He has a wife who played a part in what he did but it is possible that she does not know the bomb's location. There are about nine hours before the bomb is expected to go off.

It should be noted that except in the Terrorist's Wife scenario, subjects were assured that the interrogee has the information and that the interrogators would be "able to detect any attempt to lie or mislead them."

**Results**

**Basic Findings**

As expected, the Time Bomb scenario generated the highest level of recommended coercion. Thirty-six percent of subjects supported Level 6 (Maximum Pressure) and 25% supported Level 5 (Physical Torture). An additional 19% supported Level 4 (Psychological Coercion). Scenarios 3, 4, and 6 also produced fairly high levels of support for torture (i.e., Levels 5 and 6): 40%, 35%, and 44% respectively. (Including Level 4 coercion would increase all percentages to well over 50%.)

A few attitudinal variables were predictive of support for torture. Those recommending torture were more likely to believe that there have been instances where torture has resulted in useful information in the war on terror and that sometimes one has to choose the lesser of two evils. Those against torture were more likely to believe Arab-American Muslims have been unfairly suspected of terrorist involvement and that any information gained by torture is too unreliable to be of use. Anti-torture subjects were also more against the death penalty. None of the demographic variables showed any correlation with attitudes toward torture. Intelligence Analysis students showed more support for torture than did the group as a whole, but this was largely accounted for by differences in the attitude variables mentioned above.

Overall, only 14% of the variance in support for coercion/torture was accounted for by demographic and attitudinal variables. The purpose of the present analysis is to examine the reasons given by subjects for their choices. In total, 91 subjects offered some 320 comments by way of explanation for the level of coercion they chose in the various scenarios. The central issue is the extent to which the

---

3 Scenario 3 is analogous to *Leon v Wainwright* (1984), in which the federal district court commented favorably on what could be construed as level 5 coercion against one of the kidnapper's of a taxi driver.
circumstances present in Scenario 5, Time Bomb, can be used to justify torture. Therefore, we focused our analysis of comments related to this scenario. We also took into consideration the comments to the other five scenarios, insofar as these comments would help us understand a subject's thinking concerning the Time Bomb scenario.

**Rationale for Low Coercion: Levels 2 and 3**

Of the 252 subjects, 50 recommended Levels 1 through 3 for the Time Bomb scenario. We refer to these as the anti-torture subjects. The one subject who scored at Level 1 did not comment. Twelve of the subjects at Levels 2 and 3 offered explanations for their choices. These explanations fell into three categories: no need, reject, and pragmatic.

The most common theme that we found in the anti-torture subjects was the idea that *torture is not needed* (seven subjects). Examples of this reasoning are:

An 18 year-old white female freshman majoring in business recommend Level 2 and said: "Keep everyone clear of the mall and keep this possessed man in jail." This subject incorrectly assumed that the particular shopping area was known and therefore that an evacuation was feasible. She recommended torture (Level 6) in scenarios 4 and 6.

An 18 year-old female freshman majoring in nursing recommended Level 2 and wrote: "If the person doesn't come clean, there should be a reasonable amount of pressure involved." From this and her other comments it was clear that she felt that Levels 2 and 3 already represented a high level of pressure and could be effective.

Five other subjects, all of whom responded with Level 3, seem to also fit here, although there is not enough information in their comments to be confident about this. For example, "[Level] 3 is sufficient" and "It is a matter of life and death" are given as justifications for going as high as Level 3 and imply that this level is high enough. Two other subjects in this group did recommend a higher level for one of the other scenarios (e.g., Level 5 for kidnapper).

A second theme for the anti-torture subjects was a *categorical rejection of torture* (four subjects). One example of a categorical rejection of torture was a subject who based the total rejection of torture on utilitarian terms. A 21 year-old male senior majoring in biology limited his coercion level to no higher than 2 in all cases. He explained: "If we allow any psychological and/or physical harm to be done by our government, who are the people to dictate what is fair and sufficient? An all controlling, psychological/physical punishing government would be worse than a society in chaos. In an extreme case this would be 1984."

A second example of a categorical rejection was a 19 year-old black male sophomore in criminal justice who stated a position that is more deontological. Responding with a Level 2 to all six scenarios, he argued: "My morals will not be bent under any circumstances. If we break American laws in order to get information we are no better than them. . . . The terrorists will win if we sacrifice our liberty for security." In wrestling with the notion that his position could result in many people being killed, he added: "Evacuate the city. If law enforcement is as prepared as they should be, they can evacuate in time." In other words, torture is wrong and we should
be able to cope without it; if harm does occur [because we fail to use torture] it is not the fault of the moralists who forbid the torture.

One subject expressed the theme that torture is not likely to work. Since effectiveness is the key issue, we labeled this response pragmatic. This 38 year-old white male junior majoring in addiction studies recommended Level 2 and explained: "He is prepared to die himself. Let him go and follow him or something that matters to him to potentially use it against him."

**Rationale for Moderate Coercion: Level 4**

Of the 252 subjects, 49 responded with Level 4 for the Time Bomb scenario. Thirteen of these subjects commented on their choice. Basically they had two problems to address: how did they justify this level of coercion, a level that many authors consider torture (Cohan, 2007; Covey, 2005; McCoy, 2006; No Torture, 2008), and—given that torture is called for—how do they justify stopping short of Level 5. Three themes were found in these comments, about equally present in the group: deserts, legal, and pragmatic.

Five subjects seemed guided by the idea of just deserts. They seemed to take for granted that Levels 5 and 6 should not be used, but that Level 4 could be justified because the interrogee deserved harsh treatment. The interrogee is referred to with such key words as: deserves, (is to) blame, at fault, and no excuse. A good example here is a 19 year-old Hispanic female, a sophomore in social work, who responded with Level 4 both to the Time Bomb and the Terrorist's Wife scenarios. She then changed her response to the Terrorist's Wife, to Level 3 "because she might have been forced to purchase the equipment for the bombs against her own will." In other words, a critical issue was whether the interogee was responsible for the problem. A complete utilitarian would not care how the Terrorist's Wife came by the knowledge, but only whether she had critical knowledge that she could be coerced into revealing.

Four subjects took a legalistic approach. Their focus was on what the law permitted. A 21 year-old black female junior in criminal justice said, "I do not believe that any person's due process rights should be violated for any reason." A 21 year-old white male just beginning the Intelligence Analysis graduate program answered with Level 4 but added, "[Level] 5 if not an American citizen." This same subject had first answered Level 5 for the Kidnapper but then changed it to Level 4 and added, "Constitutional interpretation."

Four subjects took a pragmatic approach, as was identified for one of the anti-torture subjects. These subjects expressed or implied a willingness to go to Level 5 if they thought it would be effective. Two subjects wanted to try Level 2 first and move to Level 4 only if Level 2 failed. A 26 year-old white female graduate student in Intelligence Analysis said, "[Level 4] is the best choice because most terrorists don't care about what the punishment is." Another subject recommended Level 6 for the Terrorist's Wife but stopped at Level 4 for Time Bomb because he believed Level 4 would be more effective with the committed terrorist in that scenario.

**Rationale for High Coercion: Level 5**

Of the 63 subjects responding with Level 5, 26 gave written comments. Three main themes were found in these comments: necessity, just deserts, and pragmatic.
Seventeen subjects highlighted the theme of *necessity*. As a 21 year-old black female nursing student put it: "Since it is clear that [the terrorist] has no conscience or respect, physical and psychological pain and fear should be allowed to save others." An 18 year-old white male nursing freshman wrote, "Violating one person might be inhuman but it could save the lives of many."

Within the *necessity* group, there were two subgroups, one which stressed the limits of torture, the other the willingness to go to Level 6. Examples of limiting torture to Level 5 were: "I don't believe in horrible torture so this is the highest I could think of agreeing with," and "Physical pain to [get him to] speak, but not Level 6!" Five other subjects seemed willing to go to Level 6. For example, a 19 year-old black female communications studies student wrote: "If a bomb is in action that means lives are at stake, so they should do whatever they can to get info out of this man." In a few cases these subjects did endorse Level 6 for another scenario.

Three subjects gave a *just deserts* answer, similar to some of the subjects at Level 4, except that they thought that the interrogee deserved a high level of pain. A 19 year-old white male freshman nursing student wrote, "He plans to do the worst to others, so that's what he gets." A 20 year-old female sophomore in biology wrote: "Screw this guy. He is nuts and going to kill tons of people."

Six subjects represented the *pragmatic* approach. These subjects differ from the *necessity* subjects in that they do not show any need to justify the level of coercion; they simply focus on what will work. Most of these answers were quite brief, and perhaps they take the "necessity" of the situation for granted as justifying the coercion. The response of an 18 year-old white female freshman nursing student is typical: "Physical pain would do the trick." A 21 year-old white female criminal justice senior gave a Level 4 response to the Kidnapper and explained, "Physical pain most likely would not affect this type of person [one who kidnaps a child]." In explaining her Level 5 response for Time Bomb she stated, "Even still, this may produce no location." In other words, her choice of level seemed solely determined by her judgment as to what would work.

**Rationale for Extreme Coercion: Level 6**

Of the 90 subjects responding with Level 6, 40 gave at least some comment. Many of the comments were very brief; in eight cases they were so brief that we could not confidently assign any particular rationale to it. There seemed to be a sense that it was obvious that we should use extreme torture in the Time Bomb situation. Many of these subjects responded with Level 6 for scenarios 3, 4, and 6 as well. A few responded with Level 6 even for scenario 2. The 32 responses that could be categorized fit well into two of the categories developed above: *just deserts* or *necessity*. The modal response, however, was a *blend* of *desert* and *necessity*, which we will explain below.

The logic of the *just desserts* responses was similar to that reported above for Levels 4 and 5, but clearly more extreme. Here extreme torture should be imposed as a punishment, even if the needed information is not obtained. Eight subjects fell into this category. A 21 year-old white male senior biology student put it this way: "[The terrorist can be] subjected to whatever [you want] because he is willing to kill people for no reason, so you can kill him for all I care because of his blatant disregard for human life that is not his [own]." An 18 year-old female freshman nursing student wrote simply, "[Those] planning terrorist attacks should get the maximum penalty."
Eleven subjects' answers represented a simple necessity response. These responses were similar to those of the Level 5 subjects, except of course there was no indication of any upper limit on what necessity would allow. A 19 year-old white female freshman nursing student responded with Level 5 for scenarios 3 and 4 and with Level 6 for scenarios 5 and 6. For the Time Bomb she wrote, "When so many lives are endangered every possible amount of force is acceptable." Responses by this group were not concerned about punishing the interrogee, just about getting needed information.

Thirteen subjects gave answers that blended together necessity and just deserts. For example, a 22 year-old black female, a sophomore in accounting, wrote, "[Even Level 6] probably wouldn't even help in that this heartless creature could care less about anything. He has nothing to lose." In these responses, the interrogee is devalued because of his extreme, wrongful behavior. In Benthamite terms, his pain does not count as much in the utilitarian calculus. Nevertheless, the focus is on getting the needed information, which is the primary justification for the torture.

Because the blended response is necessarily more complex, it is certainly possible that some the subjects who were categorized as simply necessity or just deserts may have been placed in the combined category had they been pressed to explain their answers further. The blended subjects, it is surmised, may have felt more of a need to justify their recommendation for torture, and this may be why they stressed both necessity and just deserts.

Table 1. Rationales Given for Recommended Level of Coercion in the Time Bomb Scenario.

<table>
<thead>
<tr>
<th>Level</th>
<th>N</th>
<th>Comment</th>
<th>No need</th>
<th>Reject</th>
<th>Pragmatic</th>
<th>Legal</th>
<th>Desert</th>
<th>Necessity</th>
<th>Blend</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>0</td>
<td></td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>17</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>9</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>49</td>
<td>13</td>
<td></td>
<td>4</td>
<td>4</td>
<td>5</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>63</td>
<td>26</td>
<td></td>
<td>6</td>
<td>3</td>
<td>17</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>90</td>
<td>40</td>
<td></td>
<td></td>
<td>8</td>
<td>11</td>
<td>13</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>252</td>
<td>91</td>
<td>7</td>
<td>11</td>
<td>16</td>
<td>28</td>
<td>13</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: for the Level 6 subjects, 8 of the responses were too brief to be assigned to a rationale.

Table 1 summarizes the types of responses obtained from subjects for different levels of coercion. As noted above, the approach has been taken of not combining rationales that resulted in very different conclusions. For example, we do not know whether the "no need" subjects are using the same basic logic as the "pragmatic" subjects. Would they opt for torture if they were convinced that lesser levels of coercion would not work? Nevertheless, there would seem to be one simple way of organizing the seven rationales that we found. Three categories (torture is not needed, pragmatic, and necessity) focus on the effectiveness of torture and could be combined as "utilitarian." Three other categories, rejection of torture, legalistic, and just deserts, are concerned with whether torture is right or wrong in this situation. These categories could be combined under the heading of "justice," with some subjects believing that torture is never justified, some that it is simply illegal, and still
others believing that the guilt of the terrorist justifies torture. The seventh category, a blend of necessity and deserts, simply combines the two concerns.

Discussion

As part of a quantitative study of students' attitudes toward the use of torture in interrogation (Homant and Witkowski, 2008), 91 subjects offered comments explaining their choices of six different levels of coercion to be employed in six interrogation scenarios. In this research we have examined these qualitative data, especially as they apply to a Time Bomb scenario, in which a terrorist who has planted a bomb clearly has knowledge that would enable the authorities to disable the bomb and save numerous lives. In this scenario, 61% of the subjects recommend torture (Levels 5 or 6), with an additional 19% recommending Level 4 coercion, which many would also consider torture.

Deontological and Utilitarian Reasoning

In examining subjects' rationales, we found that subjects used seven different approaches to explain their responses. These rationales fit nicely into the deontological (justice) vs consequentialist (pragmatic, utilitarian) debate that is found in the professional literature. Subjects were about twice as likely to give a utilitarian as a deontological response: 51% vs. 26%, with 14% showing a blend of the two and 9% being too brief to classify.

Besides the distinction between deontological and consequentialist thinking, two other ways of classifying subjects' responses should also be mentioned, one based on the work of Scott and Lyman (1968), the other based on the work of Kohlberg (1969). These will be briefly explored below.

Excuses versus Justifications

Scott and Lyman (1968) have presented a theory of "accounts," which focuses on how people defend their attitudes and behaviors when challenged. Their primary distinction is between excuses and justifications. An "excuse" refers to an explanation that minimizes one's responsibility for doing something deviant; a "justification" is an explanation that normalizes the behavior. Some of the responses reported above, especially for the higher levels of coercion/torture, did seem to have a defensive aspect to them. When a Level 6 subject says, "So that's what he gets" we suspect that he is aware that many might object to the aggressiveness of his choice. Using Scott and Lyman's categories (adapted from Sykes and Matza, 1957), this might be an example of "denial of victim." This is a justification rather than an excuse. That is, the person to be tortured clearly deserves it and therefore cannot be considered a victim. No real harm is done by the torture. Insofar as Scott and Lyman's work is applicable to our research, we find that subjects offered justifications rather than excuses.

Level of Moral Development

Kohlberg (1969) has authored the most widely used approach in the social sciences for measuring moral choices. His system, which has been applied
Homant, Witkowski, & Howell  163

specifically to legal issues by Tapp and Kohlberg (1977), describes three levels of moral development, each of which has two distinct stages. These different stages are based on the reasoning that subjects give for their choices in a series of moral dilemmas. Higher stages of moral development are "better" in that they are the result of more mature development and use more complex reasoning than do lower stages. However, one cannot tell simply from the decision reached by the subject what the level of moral development is; one has to examine the reasoning.

In the case of using torture during interrogation, our Time Bomb scenario certainly presents a moral dilemma: torture is undesirable (if not simply morally wrong), but without it several innocent victims are likely to die. At least based on the professional literature, both sides to the argument would be likely to claim "postconventional reasoning," i.e., the higher level that includes stage 5 (social contract) and stage 6 (universal ethic). The deontologists identify an absolute ethic that prohibits torture regardless of circumstances or human law. The consequentialists might deny the existence of such an ethic (other than an obligation to choose the lesser of two evils), but they are still postconventional if they point out that the terrorist has placed himself outside the social contract, or that "necessity" provides an exception to the law.4

In the reasons given by our subjects, the most obvious application of Kohlberg would be the legalistic approach. The (Level 4) subject who predicated his level of coercion on whether the interrogee was an American citizen, for example, was clearly using stage 4 (law and order) reasoning. Most subjects who rejected torture (Levels 2 and 3) seemed to be postconventional in their thinking, either focusing on the harm to the social contract (stage 5), or on an absolute moral standard (probably stage 6).

It is stated "probably stage 6" because more information is needed to distinguish stage 4 and stage 6 thinking; each can involve absolutist statements about what is acceptable. Stage 6, however, requires "conscientious decisions of right based on principles that appeal to logical comprehensiveness, universality, and consistency" (Tapp and Kohlberg, 1977: 92)—a stage that very few are thought to reach. The difficulty of applying Kohlberg's stages without additional information is especially evident with the subjects who cite just desserts as their basis for recommending severe torture (Level 6). In some cases it seemed as if a subject was venting his or her emotions—the interrogee deserved pain and death whether he talks or not. This would reflect stage 2 (instrumental relativism), in which "right action consists of that which instrumentally satisfies one's own needs. . . . Elements of fairness . . . are present, but interpreted pragmatically, not as a matter of . . . justice." (p. 91). On the other hand, some subjects who invoked just desserts seemed to do so reluctantly; the guilt of the interrogee entitles one to overcome the strong presumption against torture. This logic was especially evident for subjects who blended desert and necessity, and this reasoning could easily be considered stage 5 (social contract).

---

4 The idea that "necessity knows no law" has a long legal history. In English, the saying can be traced at least to Langland's Piers Plowman in 1377: "Nede ne hath no law." Prior to that we find it in Latin in the monk Gratian's Decretals of 1140: "Necessitas non habet legem." Perhaps the defense of necessity is such a long standing part of English common law that we should not credit someone with stage 5 moral development for going beyond the standard law.
Limitations of Research

There are two major limitations to the current research. Because the primary purpose was to measure the overall level of support for coercion, as well as demographic and attitudinal correlates for that support, mostly qualitative data were obtained. The analysis of the qualitative reasoning presented here is based on only 36% of the total sample, and many responses were brief and incomplete. While this gives the advantage of more spontaneity, we cannot be confident that the non-responders would have expressed themselves in similar terms.

A second limitation is that once the subjects' responses were examined, especially when the theories of Scott and Lyman (1968) and Tapp and Kohlberg (1977) were applied, it became clear that a series of follow up questions would have been needed to get a more complete picture of subjects' reasoning. Nevertheless, it is believed that the responses that were observed were sufficient for a broad categorization of subjects' reasoning. The data certainly suggest that the basic argument in the professional literature between deontologists and consequentialists is represented in subjects' reasoning. Kohlberg's moral development model also appears to be a useful approach for examining such reasoning.

Implications

In conclusion, we would like to stress that in this research we are not trying to put the issue of torture to a vote. Even if our sample were representative of the country as a whole, simply because 61% to 80% recommend torture in a Time Bomb situation does not mean that policy should be set accordingly. We recognize that the Time Bomb scenario is rare in real life, though we do believe that analogous situations do occur. While we ourselves might accept some level of coercion or torture in some situations, we do not pretend to know the parameters involved—how much torture to prevent what level of harm at what probability of success? We doubt such a moral calculus is possible, at least prior to an actual situation. Would those urging a law against any torture in any situation (No Torture, 2008) accept the defense of necessity for employing torture in a sufficient emergency, such as in Leon v Wainwright? Our goal here has been simply to contribute to an understanding of how people think about the issue.

References


PREVENTIVE DETENTION–RESTRICTING THE FREEDOM TO HARM

H. Martin Jayne*
Truman State University

ABSTRACT
Increasing concern about terrorism has reinforced what has long been apparent in other contexts—that there are dangerous people in the world who are not deterred by the threat of criminal prosecution. Whether or not he is labeled a terrorist, when an individual poses an imminent threat of serious danger that cannot be deterred by the criminal law, philosophical regard for human autonomy often yields to pragmatic solutions to the need for security. In addition to relatively brief detentions such as Terry stops, legal measures exist for more prolonged involuntary commitments. Those include the mentally ill, sexual predators, and arrestees who are denied bail. This article contends that a more general approach to preventive incarceration is needed to candidly focus on the true reason for custody—dangerousness. It proposes a standard and a process for involuntary commitment of dangerous people.

Definitions of terrorism vary in respect to the terrorist’s motivation, but the term always connotes a criminal act unlikely to be prevented solely by the criminal law. Increasing concern about terrorism has reinforced what has long been apparent in other contexts—that there are dangerous people in the world who are not deterred by the threat of criminal prosecution. The debate over the morality of preventive detention is not new. Ben Franklin maintained that “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” But regardless of how we feel about confinement without culpability in principle, it happens in practice. Whether or not he is labeled a terrorist, when an individual poses an imminent threat of serious danger that cannot be deterred by the criminal law, philosophical regard for human autonomy often yields to pragmatic solutions to the need for security. If a police officer encounters a drunk trying to get in his car to drive home, and cannot convince him to find alternative means of transportation, we do not complain if he locks him up—in fact, we would if he did not—despite the fact that the

---

1 “[T]he criminal law, which may once have seemed a sufficient mechanism for combating terrorism, may no longer appear adequate to the task. Rather than relying on a system that punishes only past conduct, we believe that a more effective means of preventing terrorism is needed, one that actively seeks out and eliminates those who may attack American interests in the future.” NOTE: RESPONDING TO TERRORISM: CRIME, PUNISHMENT, AND WAR 115 Harv. L. Rev. 1217, 1231 (2002).
3 Ben Franklin, Historical Review of Pennsylvania, 1759.
drunk may not yet have committed a criminal offense. In addition to relatively brief detentions like Terry stops, involuntary mental health evaluations, and protective custody, legal measures exist for more prolonged involuntary commitments in specific circumstances. This paper contends that a more general approach to preventive incarceration is needed, not to detain more people, but to candidly focus on the true reasons for custody.

In reviewing cases of protracted preventive detention, the Supreme Court has approved confining those said to be insane and dangerous to themselves or others, juvenile arrestees thought likely to reoffend, convicted sex offenders like Leroy Hendricks who are labeled sexual predators with a “mental abnormality,” and arrestees who are expected to commit certain new offenses if granted bail. In recent controversial responses to terrorism, with less judicial supervision (and in an apparent effort to avoid it), those deemed by the executive department to be a threat have been locked up as material witnesses or enemy combatants.

Although the Supreme Court has said “A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment,” the additional grounds required have not been ones strongly predictive of future behavior. This paper argues that there are circumstances in which the gravity of the predicted dangerous behavior combined with the degree of certainty of the prediction warrant preventive detention. In order to balance the interests in protecting the public from harm and keeping non-dangerous individuals from losing their liberty, we ought to have a system that confronts the question of dangerousness directly, not one that uses disingenuous labels like “material witness” or “mental abnormality” as a legal artifice to justify deprivations of liberty in the interest of public safety, or that lessens the moral credibility of the criminal law by overusing it

---


5 Terry v. Ohio, 392 U.S. 1 (1968) “a law enforcement officer’s reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further” Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 185 (2004).

6 The history of a typical state statute, Florida’s Baker Act, 7. Fla. Stat. § 394.451 et. seq. authorizing a 72-hour commitment for evaluation may be found at http://www.dcf.state.fl.us/mentalhealth/laws/histba.pdf. Those having been subjected to such evaluations are sometimes referred to as having been “Baker Acted”, even in other states.

7 See, e.g. § 67.315 R.S.Mo. 1. “A person who appears to be . . . intoxicated may be taken by a peace officer to [any] appropriate local facility, which may if necessary include a jail, for custody not to exceed twelve hours . . .”


as a preventive measure.\textsuperscript{15} Part I discusses the need for detention to prevent certain offenses. Part II argues that neither the criminal law, nor existing civil detention measures adequately address the potential threat. Part III notes recent makeshift alternatives adopted for the war on terrorism. Part IV outlines the procedural requirements of a more comprehensive and transparent approach to preventive detention.

\textbf{I. Threats and The Need for Preventive Detention}

The idea of locking up people who have not yet done anything criminal makes us uncomfortable–or should. Yet consider some possibilities:

\begin{itemize}
  \item A man on the street is the subject of a \textit{Terry} stop,\textsuperscript{16} He tells the officer that he needs money to support his drug addiction, has a gun in his car (lawfully), and is looking for a store to rob, but has not decided which one, nor the precise timing. He plans to act as soon as the officer leaves and he can find a suitable victim, despite knowing that he will be a prime suspect in any robbery in the near future.
  \item Over the course of two years, through letters containing both threats and offers of gifts, a prisoner repeatedly solicits promises of sexual intercourse, anal intercourse, and oral intercourse upon his scheduled release, from a twelve year-old girl for whom the prisoner is a father-figure.\textsuperscript{17} The letters, accompanied by pictures and diagrams illustrating the solicited activities, leave no doubt of his intentions. His release date is rapidly approaching.\textsuperscript{18}
  \item A man testifies that he has repeatedly committed violent crimes whenever he was not confined. He explains that when he "gets stressed out," he "can't control the urge" to hurt people. Although he recognizes that his behavior harms others, and he hopes he would not do it again, he states that the only sure way he could keep from committing violent crimes in the future is "to die." He has no medically diagnosable mental illness.\textsuperscript{19}
  \item In a contemporary example, the government has credible and convincing evidence that a suspect is a member of a terrorist organization and has engaged in a conspiracy to commit terrorist acts that he will personally carry out. The evidence was obtained from witnesses in the custody of foreign governments who cannot be brought to the United States for a trial, and whose prior statements are inadmissible under the confrontation clause.\textsuperscript{19} Or
\end{itemize}

\textsuperscript{15} \textit{See}, e.g. Paul H. Robinson, \textit{Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders}, 83 J. Crim. L. & Criminology 693 (1993). Robinson argues that as it becomes harder to civilly commit the mentally ill, the criminal system is used to confine them and that civil commitment is preferable to the criminal law’s loss of moral credibility engendered by applying it to blameless “offenders”.

\textsuperscript{16} \textit{See} note 5 supra.

\textsuperscript{17} Missouri v. Bates, 70 S.W. 3d 532 (Mo. App. W.D. 2002).

\textsuperscript{18} The example is from Kansas v. Hendricks, 521 U.S. 346, 355 (1997).

\textsuperscript{19} The Sixth Amendment to the U.S. Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." After more than 20 years of allowing hearsay evidence that either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness," Ohio v. Roberts, 448 U.S. 56, (1980), the Supreme Court applied a much more restrictive standard, banning the use of "testimonial" statements made without the opportunity for cross-examination, Crawford v. Washington, 541 U.S. 36 (2004).
perhaps the evidence was obtained through intelligence sources that cannot be disclosed without losing access to vital information in the future.  

Much of the philosophical debate about the morality of preventive detention gives great weight to concerns about free will and moral culpability, demanding the absence of the former, and the presence of the latter, before involuntary commitment is acceptable. The concepts, however, are too abstract to be useful in deciding real cases. If the individual is a serious threat, whether he suffers from a medically-diagnosable mental disorder, has a “mental abnormality” in the legal, Hendricks sense, or just will not follow the rules, the need for preventive measures is not diminished. The author does not share the humanitarian concerns voiced by Professor Slobogin, who finds:

palpably dehumanizing, . . . preventive detention that occurs when both punishment and preventive detention are options, and the state decides to use the second form of social control rather than the first. In that instance, illustrated by the sexual predator regime, the case against preventive detention is much stronger.

The author finds no moral distinction between the first option - imposing a “punitive” sentence (at least in part) purely for incapacitation and the second, imposing preventive detention after a court determines that a retributive sentence will not have a significant specific deterrent effect. Although the author does not have great confidence in post-sentence predictions of future dangerousness, the objection to the present approach to confinement of sexual predators is the claim that such confinement is acceptable because the confinement is for “treatment” of a “mental abnormality” even though mental health professionals assert that there is no mental disorder that makes a person likely to reoffend and the “treatment”, if any, is unlikely to be effective. Confinement of sexual predators, like that of other risky individuals such as those in the above examples, may well be warranted by their dangerousness, but we should be forthright and justify it on that basis. Some people pose too great a threat to be left at liberty.

---

20 Concerns about protection of classified information prompted the President to make a rule for military commissions under which the accused and his civilian counsel could be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decided to "close." The Supreme Court found that failed to meet the requirements of the Geneva Conventions and the “common law” of military commissions in *Hamdan v. Rumsfeld*, 2006 U.S. LEXIS 5185.

21 *Hendricks*, note 10 supra.


24 Id, 531 U.S. at 260.

II. The Inadequacy of Criminal Law and Civil Measures

A. Criminal Law

Why does the present combination of criminal and civil law not provide adequate protection from dangerous people? Although criminal law is intended to provide a deterrent, it does so primarily through the imposition of punishment for prior acts. One cannot be punished without having committed a criminal act (or omission),\(^{26}\) defined with sufficient specificity to give notice of the prohibited (or affirmatively-required) conduct.\(^{27}\) Would-be criminals who can and do exercise restraint in order to avoid a significant risk of punishment arguably are adequately deterred by the threat of criminal sanctions. Not everyone can be deterred, however, and some of those that are dangerous do not fit any of the narrow categories in which the Supreme Court has authorized preventive detention.

Future dangerousness alone is not a crime. Although the law has never required that harm be done before one who is dangerous may be punished (and thereby incapacitated for some period), attempts and conspiracies, often referred to as “inchoate offenses”, require more than proof that the defendant’s specific intent or purpose is to commit a crime. It is not always difficult to identify those who intend to commit dangerous offenses, yet the criminal law requires more than a risky mental state, insisting on proof of some act before imposing punishment.

Conspiracy statutes penalize those who, with specific intent or purpose to commit a crime, agree with one or more others to do so.\(^{28}\) Most state statutes require more than the act of entering into the agreement, at least one of the conspirators must commit an overt act in furtherance of the conspiracy. While the overt act need not be a crime in itself, a mere agreement to commit a crime, standing alone, is a crime in only fourteen states.\(^{29}\) The Supreme Court has held that conspiracy to violate the international law of war is not, in itself, a violation of the law of war triable by military commission.\(^{30}\)

Agreements not followed by overt acts are hard to prove. In the absence of direct evidence, criminal agreements are often inferred from the actions of the alleged conspirators.\(^{31}\) Conspiracy statutes therefore provide little protection from those who have not yet acted to advance the aims of the agreement. They of course provide no protection at all from a single individual with the same criminal purpose who makes no agreement to act with others.

Attempt was an offense in early common law.\(^{32}\) Courts then and now, however, have shown a reluctance to punish those who intend to be criminal, but have

---

28 Although some federal and state statutes, e.g. 18 U.S.C. §371, criminalize an agreement to commit an “offense” which may not be a crime, United States v Hutto, 256 U.S. 524 (1921), prosecutions on that basis are rare.
29 Florida, Maryland, Massachusetts, Michigan, Mississippi, Nevada (some offenses), New Jersey (serious offenses), New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Vermont, and Virginia.
32 Oliver Wendell Holmes, The Common Law, 65-70
not come perilously close to accomplishing their illicit goals.\textsuperscript{33} Those with bad aim, or who were otherwise inept, have created little trouble. But when the would-be-criminal has not yet done everything he could to commit the offense, or it is “legally” impossible to do so, he often escapes punishment.\textsuperscript{34} The common law approach has never been able to clearly distinguish those lawful acts that it describes as “mere preparation” from those sufficient to qualify as a punishable attempt, nor to draw a principled line between legal and factual impossibility.\textsuperscript{35}

The difficulties in applying the common law rules stem from the law’s philosophical approach that what should be punished are dangerous acts. The drafters of the Model Penal Code thought it appropriate instead to punish dangerous people, regardless of the danger created by the act, as long as the nature of the act was strongly corroborative of the criminal purpose.\textsuperscript{36} But even in states that have adopted the language of the Model Penal Code, courts have been reluctant to impose punishment for acts that the common law would not have penalized,\textsuperscript{37} and have continued to require that the act do more than just corroborate the criminal purpose.\textsuperscript{38} Neither the common law nor the Model Penal Code approach to attempt provides any protection from one who fully intends an offense, but has not yet picked a means and a victim.\textsuperscript{39}

**B. Civil Detention Measures**

Even if convicted of conspiracy or attempt, one may continue to be predictably dangerous after serving his sentence. When the criminal law has been inadequate, civil procedures have often been utilized to incapacitate those thought to be dangerous. The Supreme Court has, at least in theory, required more than

\textsuperscript{33} Although early courts in both England and America did use security bonds and recognizances, not as punishment, but to prevent repeated offenses, sometimes by those who had not been found guilty of a first one. William Blackstone, 4 Commentaries, 248-254. Lawrence Friedman, Crime and Punishment in American History 38-40 (1993).

\textsuperscript{34} For a classic example, see State v. Davis, 319 MO. 1222, 6 S.W. 2\textsuperscript{nd} 609 (1928) (arranging with undercover officer to kill defendant’s spouse, delivery drawings and photographs, and payment of part of the agreed consideration before officer arrived at the house at the appointed time were “mere acts of preparation”).


\textsuperscript{36} Model Penal Code § 5.01, comment.

\textsuperscript{37} Robert Batey, Minority Report and the Law of Attempt, 1 Ohio St. J. Crim. L. 689 (2004), (noting the problems with the common law requirement for an act and lack of judicial support for the Model Penal Code approach)

\textsuperscript{38} See, e.g. State v. Bates, 70 S.W.3d 532 (Mo. App. W.D., 2002) in which defendant’s letters, diagrams, and pictures mailed to twelve-year old from prison left little, if any, doubt about his intention to engage in sexual activity with her upon his pending release, but the court held his acts insufficient for an attempt.

dangerousness alone. Those who cannot be deterred because of a lack of volitional control may be confined through civil process if they are both mentally ill and dangerous. Convicted criminals who suffer from a mental abnormality or personality disorder effecting volitional capacity which makes them likely to engage in predatory acts of sexual violence may be detained beyond the completion of their sentences. None of these options account for those who are willing to commit acts of violence despite the consequences, e.g. suicide bombers, and are neither subject to civil commitment, nor deterred by the threat of criminal sanctions.

III. Contemporary Expedient Measures

Since the September 11th, 2001 terrorist attacks on the World Trade Center and the Pentagon, government officials have been aggressively moving to detain those thought to pose a threat of future terrorist acts. Given the inadequacies of traditional criminal law or civil commitment procedures, other measures have been utilized to justify detention and to avoid judicial review. In the months after 9/11, a number of people were detained through the use of material witness warrants, many of whom apparently have never been called to testify as witnesses.

Others have been detained as enemy combatants. International law has long recognized the legitimacy of detaining enemy combatants - typically captured on the battlefield - as prisoners of war. Lawful combatants cannot be punished for their participation in a war, but can be detained for its duration. Unlawful combatants, those who committed war crimes or failed to follow four basic rules of warfare, can

---

40 See, e.g., Foucha v. Louisiana, 504 U.S. 71, 76 (1992): “[a dissenting] Justice cites no authority, but surely would have if it existed, for the proposition that a defendant convicted of a crime and sentenced to a term of years may nevertheless be held indefinitely because of the likelihood that he will commit other crimes.” and Kansas v. Hendricks, 521 U.S. 346, 358, (1997): “A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a "mental illness" or "mental abnormality."


Respondent finally contends that staying the release of a successful habeas petitioner pending appeal because of dangerousness, even when guided by the standards we have enunciated, is "repugnant to the concept of substantive due process, which . . . prohibits the total deprivation of liberty simply as a means of preventing future crimes." United States v. Salerno, 794 F.2d 64, 71-72 (CA2 1986). We have just held in reversing the judgment of the Court of Appeals for the Second Circuit in Salerno, however, that the quoted language is an incorrect statement of constitutional law.


43 Reported numbers differ, http://www.cnn.com/2005/LAW/06/26/material.witnesses/?section=cnn_allpolitics and the Department of Justice will not release a specific number.


45 The basic requirements for being a lawful combatant were codified in the Geneva Conventions of 1949, which require fulfilling the following conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
likewise be detained for the duration of the conflict. Additionally, they are subject to trial and punishment for their unlawful activities, an action some argue is important to maintain international legal standards. In the United States, such trials of enemy combatants have traditionally been conducted by military commissions, not civil courts.

For example, in *Ex parte Quirin,* the Supreme Court upheld the trial of saboteurs by military commission, one of whom claimed American citizenship, for violation of the law of war. During the Second World War, Quirin and others had surreptitiously entered the U.S. by German submarine, immediately replaced their uniforms with civilian clothing, and, carrying explosives, proceeded to various locations with orders to sabotage war industries and facilities. Their status as combatants in a declared war was not contested, and Congress had specifically authorized trials by military commission.

The Court distinguished *Ex parte Milligan,* a Civil War-era case, in which Milligan was not a member of the Confederate Army (or the U.S. forces) and did not...
admit to being a combatant. Milligan was tried by a military commission for various charges and specifications, including joining and aiding a secret society for the purpose of overthrowing the Government; holding communication with the enemy; and conspiring to seize munitions of war stored in the arsenals and to liberate prisoners of war.\textsuperscript{52} The Court held that Milligan, an American citizen who “was not engaged in legal acts of hostility against the government”, and therefore not entitled to the immunities of a prisoner of war, could not be tried by military commission while the civil courts were open and functioning.

Neither of those cases provides any guidance in deciding when a war exists\textsuperscript{53} or what standard is to be applied in what forum to determine whether an individual is a combatant, lawful or otherwise. Recently, in a challenge to military detention of an American citizen following his capture in Afghanistan, the Supreme Court held that due process demands that a U.S. citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.\textsuperscript{54} The Court has also limited executive authority to try enemy combatants without notice of the evidence or on charges other than violations of the international law of war.\textsuperscript{55}

The standards for treatment of enemy combatants as prisoners of war are set forth in the Geneva Conventions\textsuperscript{56} and are relatively straightforward when applied to a declared war with clear battle lines. The United States Congress, of course, has not declared war since 1941. As was discovered in Viet Nam, knowing who is a combatant in unconventional warfare is not always easy. The “war on terrorism”\textsuperscript{57} makes application of the traditional rules regarding enemy combatants even more problematic, given the difficulty of determining when the war starts and ends and who qualifies as a combatant. Individuals captured by American forces engaged in hostilities overseas, should be treated in accordance with the provisions of the Geneva Conventions and traditional, pre-9/11, American practice (regardless of citizenship). They should be considered prisoners of war, entitled to all the protections of the Geneva Conventions, unless and until they are determined, by the process set forth in military regulations,\textsuperscript{58} to be unlawful combatants. Using American courts to review the decisions made on the battlefield or in administrative hearings is unwarranted.\textsuperscript{59}

No concern about military efficiency is raised, however, when an individual is apprehended in the United States. Troops on the battlefield may get the facts wrong

\textsuperscript{52} Milligan at 5.
\textsuperscript{53} The Supreme Court said in The Prize Cases, [The Brig Amy Warwick.; The Schooner Crenshaw.; The Barque Hiawatha.; The Schooner Brilliante] 67 U.S. 635, that “War has been well defined to be, ‘That state in which a nation prosecutes its right by force.’” 67 U.S. at 666, but found that definition hard to apply in practice, with four justices dissenting, in part, on the issue of whether a war existed at the time.
\textsuperscript{57} “The enemy has not gone away -- they're still there. And I expect Congress to understand that we're still at war, and they've got to give us the tools necessary to win this war.” -- President George W. Bush in remarks promoting reauthorization of the Patriot Act, January 3, 2006
\textsuperscript{58} The current directive, applicable to all of the Armed Forces, is Army Regulation 190-8, 1 Oct 1997, paragraph 1-6.
\textsuperscript{59} The Supreme Court is sensitive to those issues, but recently ruled that Congress cannot limit habeas corpus review of the decisions of Combatant Status Review Tribunals conducted at Guantanamo Bay, Cuba. Boumediene v. Bush, 2008 U.S. LEXIS 4887.
in identifying enemy combatants, but the need to keep those troops fighting far outweighs the value of bringing them back to the U.S. to testify in court as to the basis for detention, or even of having them respond to subpoenas for documentation. That is a far different situation than occurs if a civil law enforcement agency captures an individual in the United States and the President declares him an enemy combatant to be held in a military brig without trial. World history is replete with examples of government abuses of liberty committed in the name of national security. A threat to national security is, as Lord Chief Justice Matthew Hale said of rape, “an accusation easily to be made and hard to be proved, and harder to be defended by the party accused”. Similarly, “[n]arratives of exigency are notoriously difficult to question or rebut.” Ex parte decisions by the executive branch may be an efficient means of protecting against terrorist threats, but they are woefully inadequate for protecting individual liberties. Indeed, such an application of the law of armed conflict comes with a chilling corollary. International law does not require the detention of enemy combatants unless they surrender or are incapacitated. Those still in the fight are lawful targets. The assertion that an individual in the U.S. is a combatant means that he is a lawful target, subject to preemptive execution. That degree of executive discretion is clearly unacceptable.

IV. A Proposal for Civil Detention

Those who are intent on committing terrorist acts or similarly dangerous ones that cannot be prevented by the criminal law should indeed be detained. But the authority to approve detention should be based on domestic, not international law, and be vested in the judiciary, not the executive. The judiciary does not have a strong record of protecting individual liberties in times of crisis. Some would suggest that, in balance, deference to executive decision to detain may even be the best approach. But an open, adversarial proceeding has a far better likelihood of giving appropriate consideration to individual rights than an ex parte decision by the executive branch.

Our constitutional protections stem from more than just a veneration of individual liberties, they reflect a distrust of government, and of government power wielded by individuals. One arrested without a warrant, for example, is entitled to a

60 See Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).
61 1 M. Hale, The History Of The Pleas Of The Crown 635 (1680).
64 The internment of Japanese Americans during the Second World War is the best known, but not the only example. See William H. Rehnquist, All the Laws but One: Civil Liberties in Wartime, Vintage, 1998; Peter Margulies, ABOVE CONTEMPT?: REGULATING GOVERNMENT OVERREACHING IN TERRORISM CASES, 34 SW. U. L. Rev. 449, 453 (2005).
65 “Again, we see the truth in the maxim Inter Arma Silentes Leges—[in] time of war the laws are silent. To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the greater scheme of things it may be best for all concerned.” Remarks of Chief Justice William H. Rehnquist, 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association, Norfolk, Virginia, May 3, 2000, available at http://www.supremecourts.gov/publicinfo/speeches/sp_05-03-00.html.

For the view that, in circumstances where the court cannot adequately review the facts and the executive branch may not comply anyway, it would be better to hold that the matter is a political question than to apply traditional standards of review, see Robert Pushaw, Jr., DEFENDING DEFEERENCE: A RESPONSE TO PROFESSORS EPSTEIN AND WELLS, 69 Mo. Law Rev. 959 (2004).
prompt hearing before a magistrate for an independent determination of probable cause. Even if the judge agrees, bail may not be excessive and the defendant is entitled to a speedy trial. A system of preventive detention must consider not only the risk of erroneously restraining those who are not dangerous on the basis of good intentions but bad information, but the risk of the executive seeking to restrain those with unpopular ideas, whether as a punishment, means of censorship, or both. What is needed is a process for judicial review of executive branch decisions to detain dangerous individuals that is as public as a normal criminal trial.

The threat of terrorism does not demand a unique system of preventive detention. Whether the danger is from mob activity, mental abnormality, mental illness, or terrorism, non-criminal involuntary commitments should all be decided by the same constitutional principles of due process. No attempt is made here to replace existing procedures for mental health commitments, which appear to work reasonably well. Likewise, the processes for denial of bail, or for converting...

67 See, e.g. Stack v. Boyle, 342 U.S. 1, 5 (1951), in which the Court stated that "bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment."
68 Arrest "starts the clock" for speedy trial purposes, Dillingham v. United States, 423 U.S. 64 (1975).
69 The process is described as a review of an executive branch decision because of the assumption that the danger is thought to be imminent, thus justifying detaining the individual first, then seeking court approval for continued confinement.
70 Terrorism cases and others may sometimes involve classified information. To the extent that such information is needed in court, the procedures provided in 18 U.S.C. App. § 6 for criminal cases could also be applied to close parts of detention proceedings.
71 Although it has prompted such a system in the United Kingdom. The United Kingdom has used internment to combat terrorism. "Internment is an executive measure meaning detention without trial of persons believed to be a danger to the state." The Detention of Terrorists Order of 1972 allowed anyone "suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organization or training of persons for the purpose of terrorism" to be detained for twenty-eight days. After twenty-eight days, the detainee was released or referred to a commissioner, someone with legal experience appointed by the secretary of state. The commissioner would hear the case, but the hearing was primarily an executive procedure and not a judicial one. For example, the detainee could be excluded from the proceeding if national security was at stake. The hearing could be based on hearsay. These measures denied defendants traditional common-law rights. At various times the procedure was modified, but internment was ultimately abandoned in 1980.
72 In U.S. v. Salerno, 481 U.S. 739 (1987), the evidence was that Salerno participated in conspiracies to commit violent (future) offenses, including two homicides. The Court approved denial of bail following his arrest on unrelated charges.
73 In Kansas v. Hendricks, 521 U.S. 346 (1997), Hendricks was found to have a “mental abnormality” (pedophilia), defined by Kansas statute as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." The Court approved civil confinement following expiration of Hendricks' sentence for a sex offense.
74 In Addington v. Texas, 441 U.S. 418 (1979), there was evidence that Addington suffered from psychotic schizophrenia and was assaultive. The Court approved indefinite confinement based on clear and convincing evidence that Addington was mentally ill and dangerous.
75 In Padilla v. Hart, 423 F.3d 386 (4th Cir. 2005), Padilla was detained as an enemy combatant on the grounds that he was a terrorist who planned to blow up an apartment building. His case has arguably been mooted by the government's subsequent decision to charge him criminally with unrelated offenses.
confinement under criminal sentence to civil commitment for treatment of sexual offenders need not be modified. While the same constitutional standard should apply to any involuntary civil commitment, the process described below is intended for those not already in custody for reasons other than prevention of future danger.

While there is something to be said for the idea that those who have not committed a crime should be detained in the least restrictive manner possible, as a practical matter, separate facilities are unlikely to be available. Except for those mental health commitments initiated by family members or medical providers, involuntary confinement will typically involve law enforcement officials and prosecutors. The criminal system provides a process model for the first steps of an involuntary civil commitment. If the individual (hereinafter the respondent) thought to be dangerous is at large, the police could seek a warrant for his apprehension. Alternatively, they could apprehend him based on probable cause that he is an imminent danger to himself or others, and that the danger can only be adequately prevented by confinement. As in the criminal context, the respondent should be entitled to a prompt hearing for a judicial determination of probable cause.

Following that judicial determination of probable cause, however, the process should diverge from criminal practice. The right to a speedy criminal trial, guaranteed by the Sixth Amendment, is, in most cases, assured by application of statutory, rather than constitutional, rules. In the federal system, for example, an information or indictment must be filed within 30 days of arrest, and the trial must begin within 70 days thereafter. In the case of preventive detention, a high level of certainty should be required before the respondent is confined. That means that little time should be required for further investigation, and that the trial should begin as soon as the respondent is ready and the court is available, presumably in far less than one hundred days.

The respondent should be entitled to a jury trial in which the government has the burden to prove, by clear and convincing evidence, that the respondent poses a substantial and unjustifiable risk of imminent danger to himself or the public. Because, “in wartime, the jury itself may be most susceptible to inflamed opinion and return convictions which judges, if the responsibility were theirs, might deny,” the respondent should have the right to a bench trial at his request, an option that is not constitutionally required in criminal cases. The respondent may, however, feel that a jury offers the best protection against overreach by the executive branch. He should, therefore, be entitled to trial by jury if that is his preference.

The words “substantial and unjustifiable risk” will be recognized by those familiar with the Model Penal Code’s definitions of recklessness and negligence. “Substantial” is intended to connote the probability of the threatened harm, while “unjustifiable” refers to its gravity. As Peter Margulies notes, “Traditional standards

77 See, e.g. Seling v. Young, 531 U.S. 250 (2001) in which the treatment center for sexual predators was located wholly within a state Department of Corrections facility.
78 Due process requires a prompt hearing following a warrantless arrest, Gerstein v. Pugh, 420 U.S. 103 (1975). In County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the Court held that “prompt” generally meant within 48 hours of arrest.
79 18 USC §3161 et seq. There are, of course, exceptions for extenuating circumstances.
80 Robert H. Jackson, WARTIME SECURITY AND LIBERTY UNDER LAW, 1 Buff. L. Rev. 103, 112 (1951).
82 Model Penal Code §2.02 (1962).
of reasonableness have always contemplated some trade-off between the probability and gravity of harm.\textsuperscript{83} The more minor the harm, the closer the probability should be to certainty. Conversely, when the harm threatened is of disastrous proportions, action is warranted on a lower level of confidence.\textsuperscript{84} The combination of the two should be sufficient to clearly outweigh the individual’s right to liberty.\textsuperscript{85}

The term “substantial” is intended here to encompass more than just the statistical probability that the respondent intends to commit a dangerous act. It implies finding that the respondent is readily capable of committing it, that he is likely to do so imminently, that other, less restrictive means are inadequate to prevent it,\textsuperscript{86} and that he is not subject to the normal deterrent effect of the criminal law. Like Professor Slobogin, the author would limit preventive detention to those who are either ignorant of the likelihood of punishment (because of mental incompetence), or undeterred, even by a high risk of punishment (would act even with a “policeman at the elbow”).\textsuperscript{87} The government should not be allowed to create a situation in which the criminal process is inadequate because denial of constitutional rights such as the right to silence or counsel, or because a coerced confession makes needed evidence inadmissible. On the other hand, when the inadequacy of the criminal process is not due to government overreaching, but to problems of proof such as those stemming from the confrontation clause,\textsuperscript{88} preventive detention may still be warranted.\textsuperscript{89} In some cases, the same evidence that predicts danger may prove some crime or crimes have already occurred. If the punishment for those crimes is insufficient to prevent the future dangerous act, preventive detention is still in order.

A risk of harm is “unjustifiable” only if it involves death, grievous bodily harm, or extensive economic or social disruption. Thus a sexually violent predator,
defined in a typical statute as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence,” creates an unjustifiable risk, while a “serial flasher,” would not. Regardless of the probability of the harm, it must meet that minimum level of gravity to warrant consideration of involuntary confinement.

It might seem logical to argue that if punishment for a previously committed crime requires proof beyond a reasonable doubt, confinement to prevent a future crime should require that same high level of certainty. As Chief Justice Burger noted in Addington v. Texas,

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

The practical importance of the language used in the jury instruction is impossible to measure. Juries may base their verdicts as much on the impact of the decision as on the instructions, but the symbolism of the language used is still important. The same reasoning that the Court used in Addington applies here. A preponderance of the evidence standard would put too much of the risk of an erroneous decision on the respondent, but predicting dangerous behavior beyond a reasonable doubt is likely to be an impossible standard. The clear and convincing criterion best balances the individual interest in liberty with the public need for safety.

The Supreme Court has approved indefinite confinement of those who are mentally ill and dangerous and of sexually violent predators. Following the decision to confine, preventive detention statutes sometimes shift the burden to the confinee to prove that conditions have changed sufficiently to warrant release. The Supreme Court has not directly ruled on the constitutionality of such burden-shifting provisions, but they have been upheld by lower courts.

Preventive detention need not be indefinite if a lesser period is sufficient. In other cases, however, an indefinite commitment may appropriately be imposed. Despite Justice Rehnquist’s assertion that “there is nothing inherently unattainable

---

90 Kansas statute § 59-29a02 (2005).
91 Joey Bunch, SERIAL FLASHER SPURES CONCERNS, Denver Post, May 11, 2006, at B-5.
93 Addington at 425.
94 The Court has also approved the use of the clear and convincing standard for denying bail when the defendant is likely to commit additional serious offenses, U.S. v. Salerno, 481 U.S. 739 (1987). An even lower standard was applied in Jones v. United States, 463 U.S. 354 (1983), where the Court permitted indefinite confinement following a criminal trial in which the defendant had proven, by a preponderance of the evidence, that his act was the product of his mental disease.
97 See, e.g. United States v. Wallace, 845 F.2d 1471 at 1474 (8th Cir.), cert. denied, 488 U.S. 845 (1988), regarding continued commitment of those found not guilty by reason of insanity in federal criminal cases.
about a prediction of future criminal conduct” predicting dangerousness is difficult at best. Given that the imposition of preventive detention itself may have some deterrent effect, uncertainty regarding the need for continued commitment should be resolved in favor of the respondent. The respondent should be entitled to a hearing (again with or without a jury, at the respondent’s election) at any time a court finds probable cause that new evidence or changed circumstances warrant ending the commitment. In order to resolve doubts in favor of the respondent, but avoid relitigating the original decision, the burden in the hearing should be on the government to show by a preponderance of the evidence that neither new evidence nor changed circumstances warrant terminating the detention.

V. Conclusion

In summary, the initial commitment would require a judicial determination of probable cause that the respondent is an imminent danger to himself or others, and that the danger can only be adequately prevented by confinement. The respondent would be entitled to a speedy trial by jury, and confinement could only be continued on a finding by clear and convincing evidence that the respondent poses a substantial and unjustifiable risk of imminent danger to himself or the public. That confinement could be continued unless and until the respondent made a showing of probable cause that new evidence or changed circumstances warranted release. The respondent would then be entitled to release unless the government could show at trial that it was more likely than not that neither new evidence nor changed circumstances justify relief.

This paper is not intended to suggest that more people should be confined, but rather that in certain cases, preventive detention is warranted based purely on future dangerousness. Although the Supreme Court has not approved preventive detention for “dangerousness alone,” the additional factors authorizing it, such as mental illness, conviction of a violent sexual offense, or arrest for an unrelated offense are arguably nothing more than evidentiary factors that increase the certainty of the prediction. If the evidence in a given case creates that same level of certainty, there is no reason to require the additional factors. From a moral perspective, restriction on individual liberty is warranted when the gravity of the predicted harm, combined with the certainty of the prediction is such that a judicious

---

100 “The general argument is that although some forms of preventive detention can be theoretically justified, the increased use of preventive detention would be unwise because the resulting increase in safety would not justify the corresponding massive liberty deprivation.” Stephen J. Morse, SYMPOSIUM: BLAME AND DANGER: AN ESSAY ON PREVENTIVE DETENTION, 76 B.U.L. Rev. 113, 115 (1996).
and careful juror, having heard clear and convincing evidence of imminent, serious
danger, can lay his head on the pillow that night and go to sleep, knowing that he got it right.\textsuperscript{105} Because predictions of future behavior will always be imperfect, it is important to consider not just the certainty of the prediction, but also the gravity of the predicted harm before such a prediction is “adequate for legal purposes.”\textsuperscript{106}

The approach does not take lightly the dangers of government abuse and of unsympathetic jurors who may place far too much emphasis on the risk and far too little on the rights of respondents, particularly those that are mentally ill, minorities, or social outcasts. But those dangers cannot be eliminated if any form of preventive detention is to be possible. Society has always detained those thought to be dangerous, and will continue to do so, using the civil processes already discussed, employing vague criminal charges, such as vagrancy,\textsuperscript{107} or by imposing sentences based on concerns about future dangerousness without regard to the severity of the offense.\textsuperscript{108} When the real concern is not what has been done, but what the respondent is likely to do, we should employ a process that faces the issue directly. Dangerousness “alone,” if highly likely and serious, should be a sufficient basis for detention.

\textsuperscript{105} The exegesis of “clear and convincing” is adopted from the testimony of Dr. William M. Morlang, DDS, Col, USAF, ret., who used the “lay my head on the pillow” description to explain his view of the term “reasonable medical certainty” to a court-martial convened at Incirlik Air Base, Turkey.

\textsuperscript{106} Christopher Slobogin, in A JURISPRUDENCE OF DANGEROUSNESS, 98 NW. U.L. Rev. 1, at 62 (2003), argues that despite the uncertainty of predictions of dangerousness, they are “adequate for legal purposes.”

\textsuperscript{107} Despite the Supreme Court’s holding in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) that an overly vague vagrancy statute violates due process if it “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or encourages arbitrary and erratic arrests and convictions, constitutionally permissible versions still offer considerable enforcement discretion. Professor Slobogin implies an overuse of vagrancy laws for preventive detention, Christopher Slobogin, A JURISPRUDENCE OF DANGEROUSNESS, 98 NW. U.L. Rev. 1 (2003).

\textsuperscript{108} See, e.g. People v. Marsh, 329 Ill. App. 3d 639 (2002), in which a convicted sex offender, having served his sentence, was sentenced to four years imprisonment for failure to register as a sex offender. He had registered on his release–his offense was failing to notify authorities that he had moved across the street, an action that clearly did not increase the danger to neighboring children. The appellate court found that he should not have received an enhanced sentence based on his criminal history, but never-the-less approved a sentence of a year and a $500 fine.
TERRORISM AND HUMAN RIGHTS: THE SOUTH AFRICA AND NORTHERN IRELAND EXPERIENCE

Joanne Katz
David Tushaus
Missouri Western State University*

ABSTRACT
This article looks at the consequences of government policies that denied human rights in both Northern Ireland and South Africa to maintain control and combat “terrorist” groups. In South Africa, the de jure discrimination against the black majority ended up with the empowerment of the African National Congress. In Northern Ireland de facto discrimination against Catholic nationalists directly increased paramilitary participation by this group. In the end, the change of these policies brought about a peaceful resolution. The governments labeled these opposition parties as “terrorist group.” The governments then used this characterization in part to justify laws that violated peoples’ human rights. Only through negotiation with these groups, and a change in policy and laws, were these conflicts resolved.

Human rights are at risk in all societies, especially where there is a perceived threat of violence. Oppression and the violation of civil rights do not necessarily result in a safer or more peaceful society. While a government may label a group as a “terrorist organization” with which it will not negotiate, this is not always the best strategy to take to make the nation safer. Certainly long term resolutions for peace when dealing with terrorist groups have happened with dialogue. In fact, it has been difficult for nations or academics to come up with a consensus definition of terrorism. The State Department’s definition from 1984 is helpful for our purposes: “Terrorism means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience” (Schmid, 2004, p. 377). Given this definition, some groups labeled as terrorist may legitimately claim they have not engaged in terrorist activities.

This article will look at Northern Ireland and South Africa for lessons to be learned from these governments’ reactions to violent conflicts within their countries, when these actions are conceived as liberation movements. It will also examine the peace processes that came out of these conflicts. The people of Northern Ireland and South Africa have experienced similar histories of invasion, civil rights violations through legislation and police actions, and working through difficult negotiations to

* Direct correspondence to katz@missouriwestern.edu
© 2008 by the authors, published here by permission
The Journal of the Institute of Justice & International Studies Vol. 8

1 Northern Ireland will be referred to as a country in this article; however, it is actually a part of the United Kingdom.
achieve peace. Northern Ireland has even looked to South Africa’s violent past and peace process to deal with its own post-conflict issues (Crooke, 2005). In another case study, Northern Ireland and South Africa have been compared to look at non-governmental organizations engaged in conflict resolution, in part because the countries experienced such similar, protracted conflicts (Gidron, Katz, Meyer, Hasenfeld, Schwartz, & Crane, 1999). For this article, we will compare South Africa and Northern Ireland to gain some understanding of terrorism, human rights, and conflict resolution.

**South Africa**

**Invasion and Early Oppression**

Slavery and oppression of the indigenous population and other non-whites were part of the early settlement period in South Africa. Europeans first started to settle the southern tip of Africa in the 17th Century. The Dutch East India Company was given sovereign rights over the territory. It first used the southern tip of Africa as a place for ships to refuel with fresh food and water on their way to and from their eastern empire. In less than 10 years the settlement had taken on an independent nature. Because of labor needs and difficulty with many of the indigenous population, slaves were imported from areas other than Africa. By 1793 there were 14,747 slaves in the Cape Colony, slightly more than the 13,830 free citizens. While a few slaves given their freedom originally had the same legal rights as white settlers, this soon changed. Laws discriminating against non-whites began in 1760. By the 1790’s non-whites were required to carry passes (Thompson, 2001). Pass law requirements would later become a central tool in the repressive apartheid era, and in the movement to overthrow the apartheid government. In 1795, the British captured the Cape. In 1807, the British abolished the slave trade, causing slave owners to demand more work from their remaining slaves. The British outlawed slavery in 1833 when laws to protect slaves proved ineffective (Thompson, 2001).

**Race Classifications**

Whites initially created political, social, and cultural barriers to prevent freed slaves from becoming full citizens and assimilating into society as equals (Thompson, 2001; Tihanyi, 2006). Britain and the colonial government adopted a constitution in 1853 which was color blind. However, the colony was anything but color-blind. Four racial classifications were used during the apartheid era. First, “Coloured” is a term used to refer to several groups. One of the groups making up the Coloured category is the Khoikhoi, a group indigenous to the Cape area, which has been compared to the United States indigenous population, having suffered a drastic reduction in population due to wars and disease carried by the new settlers (Cornwell, 1986). Coloured is also used to refer to non-whites of mixed race heritage, and those brought in as slaves and then freed. At the time it included a cohesive group of Muslims. Second, the term “Blacks” or “Africans” is used to refer to other native Africans. They make up a large majority of the population. Third, “Indians” is used to refer to those imported as indentured laborers from India to Natal. Fourth are the “whites” of European descent. These racial classifications would play an important role as segregation and discrimination increased over time, culminating in the apartheid era. Racial divisions
would continue into the post-apartheid era in social and political terms (Thompson, 2001). These racial classifications will be used throughout this article.

The original Dutch settlers, the Boers, were dissatisfied with British rule, in part because of the semblance of equality the British provided to the non-whites. The Boers were drawn to the northeast part of what is now South Africa in the 19th century. Both the British and the Boers considered themselves superior to non-whites and therefore justified in taking land that belonged to indigenous populations in Africa. S. J. du Toit gave voice to such racist attitudes. He was a minister and newspaper editor in the Cape Colony. He was the first to propose that “Afrikaners” were a “chosen people”, endowed by God to rule South Africa and civilize its indigenous population (Thompson, 2001). First, they would have to take control of the country.

The Boers and British immigrants clashed on numerous occasions, ultimately in the Boer War from 1899 – 1902, which some have compared to the United States Civil War. Unlike the United States’ Civil War, the Boer War did not hold out any promise of freedom or equality for non-whites. While the British won the war, they planted the seed for Boer domination by setting up a parliamentary government in 1906-7 in which only whites could meaningfully participate. As a result, the Boer majority won the peace through oligarchic political control. This increased the legal vulnerability of Blacks in South Africa (Cornwell, 1986).

Legislation Before Apartheid

During the early colonial government stage when limited suffrage was available to non-whites, whites still controlled politics through control of the press, voter registration, and elections. Though they would have made up a majority of the overall population, non-whites never made up more than 15% of the voting population. Then, in the first half of the 20th century, key legislation was passed to control non-whites by limiting their civil rights. Movement was severely restricted during this period. The Natives Land Act prevented Africans from owning land in 1913. The act created reserves which made up only 7% of the total land area of the country. Africans could only purchase and farm land in these reserves. Africans made up around two-thirds of the population at the time. The Africans received an increase in land reserves in the late 1930’s to equal a total of 11.7 percent of the entire country. During this pre-apartheid era, pass laws were expanded to further control the movement and opportunities of Africans. Africans could not leave their white farm master without a pass. Pass laws also made it illegal to live in towns except as laborers for whites. The Natives (Urban Areas) Act allowed an urban authority to create an “African” ghetto where all Africans had to live unless they were domestic servants. In 1930 the Act was amended to permit the authority to remove excess female laborers from an area (Thompson, 2001).

Opportunities were also controlled through labor laws. Color bars were used to prevent Africans from competing for skilled jobs in the mining industry. The Apprenticeship Act of 1922 created educational qualifications in numerous trades, qualifications Africans could not meet under the educational system. The Industrial Conciliation Act of 1924 excluded Africans from negotiations with employers.

---

2 The first official census in 1865 showed the Cape Colony to have 180,000 “Europeans” while there were 200,000 Coloureds and 100,000 Africans.
Political rights were further limited. The Natives Representation Act of 1936 took away voting rights that had continued to be held by Cape Province Africans. It gave Africans in all provinces the right to elect a total of seven senators out of 147 representatives. It also set up a Natives Representative Council as an advisory body (Thompson, 2001). With no power, the Council could not stem the tide of race-based discrimination.

**Human Rights Campaign**

Resistance to South Africa’s increasingly repressive laws and society in the first half of the 20th century sprang up, but mostly along segregated lines. Mahatma Gandhi led movements against pass laws and other issues, but his focus was on the plight of Indian South Africans and their inclusion with the privileged sector of society (Fredrickson, 1995). The South African Indian Congress (SAIC) was founded in 1923. The African Political Organization (APO) was founded to advocate for South Africa’s Coloured population. The South African Native National Congress, founded in 1912, was initially founded to advocate for Black Africans in South Africa. It would later become the African National Congress (ANC) (Thompson, 2001). The ANC looked to movements initially in the United States for inspiration. It was founded on Booker T. Washington’s doctrine of “self-help and accommodation to white authority” (Fredrickson, 1997, p. 150). In the 1940’s the ANC looked to the NAACP’s work for inspiration (Fredrickson, 1997). Meanwhile, South Africa moved to an ever, more repressive government.

**The Apartheid Era Begins**

In 1948 the National Party ran on a platform of even stricter controls over the majority of the population. The National Party was a conservative party made up primarily of settlers of Dutch origin who now called themselves “Afrikaners” instead of Boers. Its promise to keep Africans on farms as cheap labor helped it carry rural areas of the Union. The party of Afrikaners won control of the country, though they made up only 12 percent of the population. The irony seemed lost on their leader, D. F. Malan:

> In the past we felt like strangers in our own country, but today South Africa belongs to us once more. For the first time since Union [in 1910], South Africa is our own. May God grant that it always remains our own (Thompson, 2001, p. 186).

**The Apartheid Laws**

The National Party tried to insure it would remain in power by controlling the majority population with its apartheid laws. Control in part took the form of national level segregation similar to what took place in the United States on a state by state level. The Population Registration Act of 1950 required all South African residents to register as a member of one of the four races, African, Coloured, Indian, or White. Racial classification and documentation was useful in enforcing other key apartheid laws. For example, by forcing the registration of racial identity the government had the tools to enforce the Mixed Marriages Act. The Act prohibited the marriage of
whites to non-whites. Families were literally broken up through the government’s enforcement of the Act. Similarly, the Immorality Act criminalized sexual relations between whites and non-whites (Thompson, 2001). Similar miscegenation laws were in effect in most of the United States until 1967, when the United States Supreme Court found such state laws to be unconstitutional in *Loving v. Virginia* (1967).

The Reservation of Separate Amenities Act (1953) is another example of segregation under apartheid. The Act was in response to a South African high court decision that declared separate but unequal public facilities for non-whites were unconstitutional. The Separate Amenities Act was designed to get around this court decision (Thompson, 2001). It established the legal authority for separate facilities from restrooms to drinking fountains to lunch counters. In contrast, in the United States Jim Crow segregation laws had been accepted as constitutional since the late 19th century. The segregation laws were slowly eroded in the 20th century, most notably by the decision in *Brown v. Board of Education* (1954), which came just one year after South Africa had passed its Reservation of Separate Amenities Act to codify such segregation.

Segregation and control was taken to a more insidious level with the Group Areas Act of 1950. The Act gave the government the authority to use what the law in the United States most closely refers to as eminent domain. There were some key differences, however. The Group Areas Act’s government interest was to divide the country up into white and non-white areas to segregate and control the non-white population. Non-whites living in newly designated white areas would be forced to move, but without compensation. This would make it easier for the government to control the movement of cheap, non-white labor. It would also make it possible for the government to destroy integrated neighborhoods that had existed since before the Urban Areas Act of 1923. Sophiatown, four miles west of Johannesburg, and District Six in Cape Town were two such communities. Africans had owned land in these communities since before such ownership had been outlawed in 1923. Under the Group Areas Act the residents of these townships would be forced out of their homes and relocated to less desirable locations (Mandela, 1995; Thompson, 2001).

**Non-Violent Resistance To Apartheid Challenged**

The ANC’s Defiance Campaign to fight apartheid and the relocation effort in Sophiatown in the early 1950’s foreshadowed a move from nonviolent to violent resistance. Mandela describes Sophiatown in glowing terms: “Despite the poverty, Sophiatown had a special character; for Africans, it was the Left Bank in Paris, Greenwich Village in New York, the home of writers, artists, doctors, and lawyers. It was both bohemian and conventional, lively and sedate” (Mandela, 1995, p. 154). In the heat of the ANC’s Defiance Campaign to fight the Sophiatown relocation Mandela gave his first speech rejecting nonviolence as:

>a useless strategy [that] could never overturn a white minority regime bent on retaining its power at any cost. . . . violence was the only weapon that would

---

3 District Six is also fondly remembered by former residents. Sean Field quotes a former resident in Hamilton & Shopes (2008):

[The white people] had everything that a person’s heart yearns for. And we had nothing but we were satisfied. They broke us up. They broke up the community. They took our happiness from us. The day they threw us out of Cape Town that was my whole life tumbling down. (p. 115)
destroy apartheid and we must be prepared, in the near future, to use that weapon. (Mandela, 1995, p. 157)

Mandela was reprimanded by the ANC’s more moderate leadership at the time (Mandela, 1995). The ANC would remain committed to nonviolence through the 1950’s with “[s]chool boycotts, bus boycotts, noncooperation with the program of removing blacks to new townships, and mass protest efforts to force African women to carry passes” (Fredrickson, 1997, p. 174). Although the people ultimately lost the battle to save Sophiatown, it turned out to be a pivotal moment for the anti-apartheid movement and the ANC. The Defiance Campaign would give the ANC legitimacy and credibility as an organization through which whites and non-whites could fight apartheid (Fredrickson, 1995).

Pass laws, which had been around since the 18th century, were an increasingly powerful tool of suppression and control under apartheid. The pass laws helped prevent Africans from moving from rural to urban areas where whites and jobs existed. They also forced Africans from homes in “free” areas where passes were not required into the limited “Homeland” areas where passes had to be on their persons at all times. After being forcefully relocated to a strange township, Sindewe Magona (1994) writes:

I learnt fear . . . a pass raid was new to me. I understood liquor raids, which could include pass raids. But, for the police to go out, in full force, with no other objective than to arrest people whose passes were ‘wrong’ or who had forgotten their passes at home, was something I had not been exposed to. (p. 86 - 87)

The number of arrests for pass law violations increased as the government’s need to control the population grew. Over 100,000 Africans were arrested under pass law violations every year. This number rose to as high as 381,858 in the year spanning 1975 to 1976 (Thompson, 2001). The legal system set up to handle this level of cases sacrificed due process for efficiency. In 1979 Johannesburg had five “pass courts”. White judges asked through an interpreter if the non-white was “guilty” of violating the pass law. This was literally translated into “Were you in Johannesburg.” The answer being yes the defendant received 30 days in jail, unless it was a repeat offense, in which case they received 60 to 90 days in jail. Each defendant took an average of 95 seconds to process. Not surprisingly, South Africa had the highest incarceration rate of any nation in the world (Neier, 2003). The threat of harassment and punishment prevented free movement across borders. For many, their illegal movements left them in an undocumented worker status, which made them economically vulnerable. For example, Magona (1994) relates that:

The only regrets I ever heard come from [Aunt Dathi’s] mouth were about her lack of education and lack of a pass that qualified her for employment in the urban areas of South Africa. As an ‘illegal,’ she, and all like her, were exploited mercilessly by the white women they worked for. All domestic workers are exploited. But those with no passes suffer even worse abuse. (p. 147)
Sharpeville Massacre Is Pivotal Moment

Like Northern Ireland’s Bloody Sunday, a peaceful protest turned government massacre, discussed further below, Sharpeville would become a pivotal moment in South Africa’s movement for equal rights. The Pan-African Congress (PAC), a relatively new group in 1960 that rejected white allies, organized a nationwide protest against pass laws on March 21, 1960. The turnout was generally low across the country. However, in Sharpeville several thousand gathered outside the police station. A scuffle at the front gate caused police to raise their submachine guns and pistols and fire into the crowd. Humphrey Tyler, a reporter at the scene, who also studied photos that were taken there, said the crowd did not appear to be armed (non-whites could not legally carry arms) (Massie, 1997). “When the shooting started it did not stop until there was no living thing on the huge compound in front of the police station,” Tyler stated (Massie, 1997, p. 64). A senior police official told a New York Times reporter “I don’t know how many we’ve shot, but if they do these things, they must learn the hard way” (Massie, 1997, p. 64). Sixty-nine were killed, eighty-six injured, including 40 women and eight children. Most victims were shot in the back. The South African government’s claim the police were attacked with a variety of weapons before firing was not credible; but the international response through the U.N. was merely a slap on the wrist, in part because of opposition to sanctions by the British Government under Margaret Thatcher. The South African economy, however, began to experience a flight of capital.

The ANC responded in several ways. Its leaders publicly burned their passes and called on others to do so, to observe a day of mourning and a stay-at-home protest. Several hundred thousand observed the ANC’s call (Mandela, 1995). The government responded in kind, and amongst other things passed the Unlawful Organizations Act on April 9 and instantly banned the ANC and the PAC. Mandela and others were rounded up for a treason trial (Massie, 1997).

The ANC defense at the treason trial that year claimed nonviolence was a central tenet of the organization. This had been true for nearly 50 years. Just over a year after the Sharpeville Massacre, however, Mandela argued with ANC leaders for a change in policy. Mandela’s argument was based on an old African saying “The attacks of the wild beast cannot be averted with only bare hands” (Mandela, 1995, p. 271). He argued that the ANC was no longer a legal organization which could work within proper legal channels. He said it would be immoral for the ANC to ask the people to be subjected to the state’s violence without some alternative. Since others were likely to take up arms, the ANC should “guide the violence” (Mandela, 1995). The 1955 Freedom Charter would be an important policy statement for the ANC in this situation. African, Indian, Coloured, and white groups had adopted the Freedom Charter, which “proclaimed that ‘South Africa belongs to all who live in it, black and white.’” This rejected a Black Nationalist view of the future for a freed South Africa. Fredrickson (1995) claimed:

[This] meant that the enemy could not be defined as the white race and that liberation would have to be something other than victory in a race war. A commitment to the ultimate reconciliation and democratic coexistence of whites and blacks in South Africa prevented [the ANC] from endorsing terrorism and the indiscriminate killing of whites even after it went underground and began to engage in sabotage. (p. 251-52)
Violent Resistance Begins

In the end the ANC authorized Mandela to create a separate organization, *Umkonto We Sizwe [the Spear of the Nation] or MK*, which would target military government installations, not civilians (Mandela, 1995). Many years later Mandela met with two journalists from the Washington Times while he was in prison at Robben Island. Mandela drew a distinction between South African’s struggle and that of the African-American. Mandela said that Martin Luther King could successfully employ civil disobedience because he was working under a constitution, which guaranteed equal rights and protected nonviolent protest. South Africa, on the other hand, had a constitution that established an inequitable government and an army that responded to peaceful protest with violence (Mandela, 1995). According to Fredrickson (1995):

> What is remarkable is not that the [ANC] turned to a highly selective use of violence in 1961 when it joined with the Communist party to form the clandestine military organization *Umkonto We Sizwe*, but that the violence subsequently perpetrated was so limited and resulted in so few fatalities. (p. 252)

Fredrickson and others have argued that the ANC’s turn toward violence was at best ineffectual, and possibly even prolonged the conflict. Some resistance leaders claim they had no choice. Because of the violent and repressive nature of the government, the oppressed demanded a violent response. Presbey finds conflicting evidence that is not conclusive and is, of course, speculative (Presbey, 2006). But the white minority in South Africa was clearly entrenched for many years under different circumstances than the white majority in the United States. The civil rights movement in the United States was fighting for the inclusion of a minority group into the political system. In South Africa, meaningful political empowerment would mean a shift in control from a small white minority to a large African majority (Franklin, 2003).

In the United States, civil rights leaders identified with the South African struggle and began to call for sanctions against apartheid after the Sharpeville massacre (Grubbs, 2008). For the United States, however, “Nelson Mandela, not [Prime Minister] Hendrik Verwoerd, was the terrorist.” (Grubbs, 2008, p. 431, *quoting* Borstelman). Mandela had criticized American investors in apartheid South Africa for their materialistic greed (Grubbs, 2008). He also called for nationalization of “mines, banks, and monopoly industry” (MacDonald, 2004, p. 633), although not for economic reasons so much as for racial equality. The ANC as an organization seemed to blame apartheid on capitalism (MacDonald, 2004).

The ANC’s willingness to work with the South African Communist Party at the height of the cold war was also cause for concern for the United States (Grubbs, 2008). The South African government’s foreign propaganda played to the U.S. and European cold war fears by portraying the ANC as a communist organization (Thompson, 2001). The U.S. Embassy wrongly concluded that Mandela merely took orders from the communist party when he announced in July 1962 that a new strategy of sabotage had been adopted in response to the post-Sharpeville crackdown, which included the banning of the ANC (Grubbs, 2008). In fact, it was a Communist Party member who directly opposed Mandela’s armed struggle proposal (Mandela, 1995).
Mandela and other key leaders were not communists and South Africa was not a prime target for the Soviet Union (Thompson, 2001; Mandela, 1995).

Refusal To Negotiate

The government would not consider negotiating with the ANC throughout most of the first half of the twentieth century, and for another nearly 40 years of apartheid. “The government asserted over and over that we were a terrorist organization of Communists, and that they would never talk to terrorists or Communists. This was National Party dogma” (Mandela, 1995, p. 525). The government cracked down hard on the opposition in response to its move towards violence. The Sabotage Act of 1962, the General Law Amendment Act of 1966, the Terrorism Act of 1967, and the Internal Security Act of 1976 were added to the Riotous Assemblies Act of 1956 and the Unlawful Organizations Act of 1960 to increase the government’s ability to control non-whites. The government could arrest people under these acts and hold them without trial or access to other people or a lawyer. In addition to banning organizations the government could prevent meetings from being held or funding from being sent in from abroad (Thompson, 2001). MK responded by bombing over 200 government offices, electrical stations, and a railway line in 1963. Because of their inexperience, seven key leaders, including Nelson Mandela, were arrested in Rivonia. The Rivonia trial included ten defendants charged with conspiracy and 193 acts of sabotage by 122 agents of the leaders. These charges were chosen to give the government an easier case, yet be able to impose the death penalty (Joffe, 2007). Mandela testified that over 30 years of non-violent protest and been ineffective and therefore they had resorted to violence. He and other witnesses testified that MK had strived to avoid the loss of life in its sabotage. (Presbey, 2006). The defendants were found guilty and sentenced to life in prison (Joffe, 2007).

Resistance to apartheid grew. Some groups were inclusive of all races, others only non-whites, and yet others of only a specific ethnic group. The South African Student Organization (SASO) under the leadership of Stephen Biko in the late 1960’s “raised the level of political education and ideological diffusion never before achieved by any black [South African] political organization.” (Franklin, 2003, p. 204, quoting Gerhart). Unlike the ANC, SASO and its subsequent Azanian People’s Organization (AZAPO) were a part of the Black Consciousness (BC) movement, which was not inclusive of other races. It would eventually clash with the ANC and its surrogate organization the United Democratic Front (UDF), which were less threatening to outside western interests (Malan, 1990). The UDF had been formed in 1983, representing 575 diverse organizations intent on ending apartheid and forming a true democracy. Bus boycotts, school boycotts, and strikes, many resulting in violence, had followed; but it was not an exclusively black organization (Thompson, 2001). International sanctions and economic divestiture brought pressure from the outside. These interests would turn out to be much more supportive of the more inclusive UDF and ANC.

When a new government headed by the National Party’s P. W. Botha took over there was some attempt to soften some apartheid practices deemed unnecessary for the white minority to remain in power. Several apartheid laws began to be repealed in the 1980’s. Non-whites were given token participation in the political process. In 1986, in part due to the sheer weight of the volume of cases involving violations, the pass laws were repealed. Interracial sex and marriage bans and other
segregation laws were also lifted. However, the government still used banning of organizations, criminal proceedings and violence to try to maintain control (Thompson, 2001).

“For years the government had claimed it was only the ANC’s commitment to violent struggle that had led to its banning, and that if it would renounce that Mandela could go free and talks begin,” wrote a South African journalist (Massie, 1997, p. 605). Mandela admits that “Both sides regarded discussions as a sign of weakness and betrayal. Neither would come to the table until the other made significant concessions” (Mandela, 1995, p. 525). Yet, Mandela reached out to negotiate with the government in 1985. In February, 1986, the “Eminent Persons Group” of British Commonwealth leaders arrived to bring the South African government and ANC to negotiations. The Group negotiated an agreement wherein the ANC would abandon the armed struggle and negotiate in turn for the release of Mandela, the elimination of apartheid, and the allowance of free political activity. The ANC provisionally accepted. The Botha cabinet was split on whether to negotiate. In the end, it chose to bomb purported ANC bases in Lusaka instead of negotiating (Massie, 1997). Mandela continued talks with government officials over the next several years. Botha eventually met with Mandela, but the true negotiations would be left to Botha’s successor, F. W. De Klerk.

**Peace Talks**

“The time for Negotiation has arrived,” said F. W. de Klerk in his traditional opening speech to Parliament on February 2, 1990 (Mandela, 1995, p. 556). De Klerk had taken over the government the previous August. He had already committed to repeal of the Reservation of Separate Amenities Act, which Mandela referred to as petty apartheid. On December 13, 1989, initial negotiations between de Klerk and Mandela began (Mandela, 1995). After Mandela refused to give up the armed struggle without more from the government in terms of concessions, the de Klerk government unconditionally released Mandela on February 11, 1990. The ANC’s position and activities had not changed from when the government referred to it as a terrorist organization with which it would not negotiate. At a press conference the following day Mandela (1995) defended the ongoing armed struggle:

> I told reporters that there was no contradiction between my continuing support for the armed struggle and my advocating negotiations. It was the reality and the threat of the armed struggle that had brought the government to the verge of negotiations. I added that when the state stopped inflicting violence on the ANC, the ANC would reciprocate with peace. (p. 568)

Eventually De Klerk’s government was compelled to put its reform policy and negotiations with the ANC to a vote by white South Africans, still the only people fully enfranchised in South Africa. Whites supported negotiations with the ANC by 69%. The results would likely have been much different if the ANC had adopted a Black Nationalist policy. Fredrickson (1995) points out that:

The multi-racialism or nonracialism of the ANC not only limited and contained its use of violence during thirty years of underground resistance, it
also made it easier, when the time was ripe, to give up violence and return to other methods of struggle. (p. 252)

The negotiations lead to a new constitution, a democracy with universal suffrage, and elections which shifted the political power from the white, Nationalist Party to the African dominated ANC in 1994.4

Northern Ireland

In looking at the impact on human rights caused by the 20th century conflict in Northern Ireland, it is important to first examine the historical events which lead to this conflict. As early as 1170, the British started to settle in Ireland. In the 1600’s, this expanded into the Plantation of Ulster, where the British confiscated land, and gave it to their citizens to settle. In 1690, the Protestant King William III (of Orange) was victorious over the Catholic James II, and Ireland became the possession of the British. The Scottish and British settlers, especially in the north of Ireland, maintained their identity and ties with Britain, which also was expressed in their religion as Protestant. The native Irish were predominantly Catholic (Hancock, 1998).

The Irish felt oppressed by the increasing ties to Britain. In 1801, the Irish Parliament was abolished, and Ireland became part of the United Kingdom. The Irish rebelled, and the Irish Republican Army, a paramilitary group, led the Irish people to a break with Britain after World War I. However, the Protestant majority in the north was afraid to become part of the new Republic of Ireland. Identified as British, they feared repression by the Irish. In addition, the north was a more prosperous region, and they feared losing the lands they had taken throughout the previous centuries. In 1921, the British and Irish governments reached an agreement which would create the Republic of Ireland as the 26 southern counties, and the remaining 6, in the north, would become a constituent country of the United Kingdom called Northern Ireland (Hancock, 1998). It was in this division, which was 2/3 British–Identified Protestant, and 1/3 Irish-Identified Catholic, and thus dominated by the British majority in every aspect of life, that the issues which developed into the “Troubles.”

It is important to note here that this political solution for Ireland, that being the partition of the island, created a natural rift which expanded into the violence of the latter end of the 20th century. To begin with, the Catholic minority still wanted to be part of Ireland. To this extent they became known as Nationalists, wanting a united Ireland. The Protestant majority felt insecure in this new arrangement. They wanted reassurances from Britain that they would still be protected as citizens, and that their lands and way of life would not be altered by the partition. They saw themselves as Unionists, or loyal to Britain (Southern, 2007).

However, it was in this first time of partition that the first developments of paramilitary violence and identity occurred. Those who wanted to become part of the new Republic of Ireland, and believed that they needed to fight for their place, became known as Republicans. The best known of these groups was the Irish Republican Army. Later, growing out of some of the police forces put in place to fight this

4While the Truth and Reconciliation process was an important part of the post-apartheid peace process in South Africa, the focus of this paper is on the struggle to end apartheid. This includes the negotiations leading up to the release of Nelson Mandela and the free elections, not what took place after the negotiations were finalized and power was shifted to the majority.
movement were the paramilitary groups which were Protestant and loyal to Britain. These groups became known as Loyalists.

When Northern Ireland was created, there was to be home-rule. A parliament was built, called Stormont, and a representative government was created. However, from the beginning, the political landscape in Northern Ireland was set up to limit the power of the Catholic minority. While never legally segregating the Irish community, the power structure was set up in such a way as to keep the status quo, that being the Protestant majority in control. In addition, laws were created from the beginning which would fight the emerging Republican paramilitary presence.

Voting Rights

Partition was to lead to proportional voting. While the majority was the British-identified Protestants, if this had occurred it would have given a voice for the Catholic minority. However this was quickly changed by several legislative actions. The proportional representation put in place by the British would have Catholics controlling around 40% of the local Councils. However Stormont passed legislation which gerrymandered voting districts in 1922. While there is some disagreement as to how much this influenced election outcomes (Whyte, 1983), one can compare election results between 1920, where the Catholic Nationalists controlled 25 of eighty local councils, to 1924, where they only controlled 2 after the election (Rawthorn & Wayne, 1988).

Added to this legislative redistricting, was the creation of two categories of voters. The first was the ratepayers, and this was occupiers of a household, as either a tenant or an owner. However, there were limitations on ratepayers that affected Catholics more than Protestants. Only the owner/tenant and his spouse were allowed to vote. All other adult residents were denied the vote. This affected Catholic households because of the limitations of available housing often required more than one family to occupy a residence, and also the larger families often included adult relatives. The second category of voters was owners of commercial property. People in this category could accrue votes for each £10 of value of the property, for up to six votes. Protestants owned 90% of the commercial property in Northern Ireland. As a result, the proportional voting first believed to exist was erased. Thus starting in the 1920’s, the Catholic minority was kept from securing even proportional representation, and was left out of the political process.

The result of this loss of legitimate power, which is obtained through voting in a democracy, is apparent in several areas of the governmental structure (Pilkington, 2003).

Judicial System

With control of the political structure, Protestants controlled the court systems. In 1968, 68 of the judges were Protestant, while only 6 were Catholic. Between 1921 and 1972, fifteen out of twenty-eight appointees to the high court of Northern Ireland were current or former members of the Unionist political party (Darby, 1976).

Jurors were also favored on the side of the Protestant majority, as they made up most of the voting rolls (from which jurors were selected). While the juries appeared fairly even-handed in handing out verdicts to both Protestants and Catholics,
the Catholics were prosecuted more vigorously, and reflected the charges issued by the police. Protestant charges might be dropped or reduced, while that was rare with Catholic defendants (Darby, 1976).

**Police**

It is hard to separate the police from the judicial system. The Royal Ulster Constabulary was a force of over 3000, which were trained in heavy weapons and military tactics. While one third of the force was to be Catholic, it never went beyond twelve percent until recent years. In addition, the government of Northern Ireland created the Ulster Special Constabulary to deal with Catholic paramilitary factions not wanting to partition from Ireland. This group numbered as many as 25,000, and was associated with some of the worst intimidation and violence against the Catholic community. Out of these groups, the beginnings of the Loyalist paramilitaries emerged (Mulcahy, 2006).

**Prison System**

In the late 1960’s, the prison population for Northern Ireland was below 700. However, with the advent of the Troubles, the prison population grew to over 3,000 by the late 1970’s (Northern Ireland Prison Service, 2008). In addition, the administration of the prison system was held by the majority population, and policy was set often by the British. As will be described below, the prison became the site of many political protests, the most notable, the Hunger Strikes in the H-Block of Maze Prison in 1981, which lead to the death of Bobby Sands, and 9 other Republican prisoners (O’Hearn, 2006).

**Legislation**

It was within the legislative sector that some of the greatest deprivations occurred. In 1922, the Special Powers Act was passed to fight against the Republican paramilitaries, fighting to succeed from Britain. This law gave great power to the Police to intern individuals without a trial for unspecified periods of time. This included the broad powers of search and seizure (without a warrant) and broad power of censorship. The law specifically stated that “if any person does any act of such nature as to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the regulations, he shall be deemed to be guilty of an offence against the regulations” (Darby, 1976, p. 56). While most of the secessionist movements were over by 1927, this law was kept in place, and regularly used to imprison suspected Republicans until it was repealed in 1973. In addition, when home rule was lifted (Laws, 1972), similar and more stringent laws were passed by British Parliament in 1973 (Laws,1973) and 1974 (Laws, 1974). In addition, the laws with respect to voting were also part of the Unionist agenda.

**Human Rights Campaign**

As a result of the human rights movements around the globe during the sixties, and particularly the Civil Rights Movement in the United States, the Catholics
of Northern Ireland started to rebel against the confinements that the legal and political system was causing. While there were several demonstrations in other cities, Derry (or Londonderry) was the site of the major demonstrations demanding equal rights in areas of housing, employment and voting (Melaugh, 2008).

Derry was the place of most action as its population was a majority of Catholics, although the power was still maintained by the Protestants as a result of the gerrymandering and rate payer voting laws. In 1967 the Northern Ireland Civil Rights Association (NICRA) was formed dedicated to electoral reform, and the Derry Housing Action Committee (DHAC) began to deal with issues related to the limited housing available to the Catholic majority. It was when these two groups combined forces that the first Civil Rights Marches began. They were met with great resistance from both the Royal Ulster Constabulary (RUC), and also from the Loyalist groups. The first march scheduled by these groups was for October 5, 1968. The RUC tried to stop it before it began, and it ended up using violence which had a great affect on the Catholic community. It was shortly after this that the Provisional Irish Republican Army (IRA) started to organize, and the first Catholic-initiated violence started to occur. However, this was a small minority of the Nationalists who were trying to make change occur through non-violent means (Melaugh, 2008).

Relationships between the Catholic community and the police continued to deteriorate. It was during this time that the Special Powers Act was used regularly to detain those who were suspected of any involvement with these organizations. In 1969, the British sent in their troops as an attempt to quell the troubles that were raging. While there was hope that the British Troops would be more of a neutral party, and that this would help the situation for the Catholics, this was soon replaced by further alienation between the groups. Events such as the Falls Curfew of July 1970, where 3,000 troops imposed martial law on a Catholic area of West Belfast, and ended up in a gun battle where six civilians died, contributed to this lack of belief that the troops would bring a balance to the situation.

As these events continued, the Human Rights campaign struggled to maintain the hope that they could control the rising violent response between the Catholic, Protestant, and British troops. In 1971, the Special Powers Act was utilized by the RUC and the British military, and in a series of raids throughout Northern Ireland, 342 people were arrested. This lead to more violence, where the paramilitary organizations on both the Republican and the Loyalist sides were killed.

Finally on January 30, 1972 in Derry, the Northern Irish Civil Rights Association (NICRA) started a march against the rise of internments. It was here, on the Bogside of Derry that the British troops opened fire on the demonstrators, killing 13 and injuring another 14. Known as Bloody Sunday, it signaled the end of the peaceful means to achieving human rights, and opened the door for the violent years which would go on through the 1990’s. Similar to the Sharpeville Massacre in South Africa, Bloody Sunday marked the failure of civil discourse, and immersed the country into years where paramilitary violence would end up killing over 3,000 people (Melaugh, 2008).

**Terrorism**

During the next 35 years, the paramilitary groups, the Royal Ulster Constabulary and the British troops all did battle. At the same time, the number of prisoners greatly increased, some in prison for violence, some as a result of the
political situation. The Special Powers Act was widely used to lock up those suspected in any terrorist act. An example of such an order read: John Kelly who is suspected of being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland, should be interned (Free Derry Museum, 2007). Neither a specific act, nor a conspiracy for action, needed to be alleged. These internments were for an unspecified period, and became a major weapon used against the Catholic communities.

In the 1970’s the British government increased its ability to deal with the rising violence in Northern Ireland. In 1972, through the Northern Ireland Act, it ended home rule in Northern Ireland, and brought all legislative functions to the British Parliament (Act, 1972). In 1973, British lawmakers passed legislation which made it illegal to belong to or support financially a proscribed organization. These organizations included: The Irish Republican Army, Sinn Fein, and the Ulster Volunteer Force (Act, 1973). Finally in 1974, Parliament passed the 1974 Prevention of Terrorism Act. This stated that the terrorism was criminal and not political. However in this act, only the IRA was specifically identified as a terrorist group. It made it a crime to wear any dress or display any article which aligned one with a particular “proscribed organization” This was the legal beginnings of making it a crime to associate with paramilitary groups. Thus, the British government took the liberty of association, and created a criminal violation based on status (Act, 1974).

The growth in the prison population from 700 in the late 1960’s to 3,000 in 1979 reflects the additions of political prisoners created by the Prevention of Terrorism Act. In addition to their imprisonment, at times on weak charges, the political theatre was acted out within the walls. The most famous is the case of Bobby Sands. Bobby Sands was a young man with ties to the Irish Republican Army. Prior to 1979, most political prisoners were allowed to wear their own clothes, therefore acknowledging their political leanings. However this was no longer allowed as after the British changed the policy on paramilitary groups. As a result, the paramilitary groups within H Block of Maze Prison quit wearing clothes. Eventually this was turned into a hunger strike. In 1981, Bobby Sands died as a result of the hunger strike. He was 27. He brought the situation in Northern Ireland to the world. Prime Minister Maggie Thatcher refused to negotiate with him, stating that she would not negotiate with terrorists. In total, 10 Republican inmates died as a result of their participation in the hunger strike (O’Hearn, 2006).

In addition to Bobby Sands dying and becoming a martyr for the cause of Catholics in Northern Ireland, while in prison he was put up as a candidate as an MP from Northern Ireland. Sinn Fein, a Catholic political party and the identified political wing of the Irish Republican Army campaigned for his election, and he won. However again the Prime Minister refused to seat a terrorist, and Bobby died in his cell at H Block, never being sworn in as an MP. After the death of Sands, the intensity of the violence increased. During this time, Sinn Fein was looking for options outside of violence.

Peace Talks

In 1986, in secret meetings, John Hume, the Catholic MP from Derry, and Gerry Adams, the President of Sinn Fein started to talk. Both had come to realize that the paramilitary violence was never going to give way to a victory. It was at this point that the beginning of the peace process, and the end of “the Troubles” commenced.
Although these talks did not give way to any solutions, the fact that a politician sat face-to-face with someone acknowledged to represent the IRA, was historical. By 1993, the British government, through a representative, Colin Ferguson, was engaging in talks with members of Sinn Fein (Adams, 2003).

Margaret Thatcher never changed her stand about not talking with terrorists, however the Taoiseach (the Prime Minister) of the Republic of Ireland, engaged her in talks about the situation in Northern Ireland. Out of this came the 1985 Anglo-Irish Agreement which acknowledged the legitimacy of a potential united Ireland for the first time (Adams, 2003). However it was her successor, John Majors, who lead the way to find a political solution to the violence occurring as a result of the turmoil in Northern Ireland.

In 1996, a mediation was started between all of the parties in Northern Ireland. The United States played a lead role under President Clinton, and he engaged former Senator George Mitchell to lead the negotiation. The mediation included the Protestant Democratic Unionist Party (DUP), lead by Ian Paisley and the Social Democratic and Labor Party (SDLP), lead by John Hume. The issue became whether or not to seat Sinn Fein. Could Sinn Fein become part of the mediation when violence was still occurring? And the bigger question, could the IRA be represented without decommissioning their weapons? Sinn Fein, needed to stay within the political arena, and also be able to negotiate with the paramilitary group (Mitchell, 1999).

In the end, there were a number of cease-fires during the two years that the mediation occurred. However, a decommissioning plan became part of the agreement. As a result of Sinn Fein remaining in the negotiations, Ian Paisley left the talks, and Protestant David Trimble, of the Ulster Unionist Party (UUP) took his place. In April, 1998, the Good Friday Agreement was reached, and was confirmed by the voters in May, 1998. Both David Trimble and John Hume were awarded the Nobel Peace Prize for their efforts.

Many of the issues which had plagued the parties during these times of trouble were dealt with in the Agreement. There were on-going talks related to decommissioning of all of the paramilitaries, both Loyalist and Republican. In addition, the entire judicial system was examined and attempted to balance out the roles of the Protestant and Catholics. Finally, there was the release of many political prisoners (Mitchell, 1999). Today there are approximately 1200 prisoners in Northern Ireland (Northern Ireland Prison Service, 2008).

The laws against terrorism still exist in Britain. However, today the targets seem to be different. Within Northern Ireland, all is not well, but is trying to get better. Catholics are now an active part of the Police Service of Northern Ireland (no longer called the RUC). The government is lead by a coalition of Sinn Fein and DUP. In fact, Ian Paisley was co-leading with Martin McGuinness, the second in command of Sinn Fein and a participant in the peace negotiations, until Paisley’s recent retirement. The criminal justice system is not focused on the paramilitary groups, and changes are being made. These changes have ranged from how judges are selected, to how decisions about prosecutions are made (Review, 1998). Perhaps the greatest change has been seen within the policing services, which has moved to making human rights central to its mission (Patten, 2001), and has adopted the concept of community-based policing as an attempt to build stronger relationships with both communities (Brogden, 2001). These changes have caused paramilitary groups to be less needed to police their neighborhoods, and many of these organizations have become part of community-based efforts to work in restorative justice (Mika, 2006).
Conclusion

Both Northern Ireland and South Africa have suffered oppression at the hands of governments that initially refused to enter into peace negotiations with a major opposition group on the grounds it was a terrorist organization. In the end, the British and South African governments would capitulate on this stance. In both cases, the governments attempted to control indigenous populations, which represented a majority of the total countries’ population, through oppressive laws and violence. In the case of South Africa, the indigenous population that was disenfranchised made up 75 to 80 percent of the population. In Northern Ireland the northern region was carved out of the rest of the country so that the indigenous population was a minority, but only if it was not considered a part of the rest of Ireland, which was given its independence in 1921.

In both countries the oppositions’ struggle for civil rights looked to the United States’ African-American experience as a model for obtaining civil rights. Peaceful protests turned into violent massacres. In Northern Ireland, Bloody Sunday started out as a peaceful demonstration for civil rights but ended in protestors being killed and injured by government troops. In South Africa the similar Sharpeville massacre occurred. Both were pivotal moments in the freedom struggle. These peaceful turned violent events led to more violence and more repressive legislation, including laws specifically designed to combat terrorism with indefinite detentions imposed without basic due process rights.

Both movements produced charismatic leaders who would lead organizations, previously characterized as terrorists, to a peaceful negotiation. In Northern Ireland the leader was Sinn Fein’s Gerry Adams. In South Africa the leader was the ANC’s Nelson Mandela. In both cases, the governments had for years refused to negotiate with these leaders and their organizations because they were considered terrorist leaders of terrorist groups. While the organizations’ activities may have fit within at least some definitions of terrorism, they did represent a significant, disenfranchised and oppressed group of people. Had the governments turned to creating a freer society with more human rights sooner, power may have shifted sooner and with less bloodshed.

It was only through negotiations that the violence eventually ended. In South Africa and Northern Ireland, both the governments and the terrorists eventually accepted the fact that violence was only bringing more violence. In both cases international pressure supported the cause of the group identified as terrorists by their governments. In South Africa, international boycotts and isolation from the rest of the world forced it to look at its human rights violations imposed by apartheid. And in Northern Ireland, it was through the efforts of the Republic of Ireland and the United States that pushed the peace talks to go forward. It was only through negotiating with terrorists that the peace was won. The laws passed to create a safer society against terrorism, had proven to do the opposite. Can other countries learn from these examples and prevent further bloodshed in the name of human rights?

References


Free Derry Museum Exhibit (2007).

**Statutes:**
The Northern Ireland Act, 1972
Northern Ireland (Emergency Provisions) Act, 1973
Prevention of Terrorism Act, 1974
ABSTRACT
The probability of dying from a terrorist attack is far lower than from other preventable causes but the fear of terrorist attack ranks much higher. The characteristics that distinguish terrorism from other types of conflict are presented and the risk and cost factors compared to other preventable causes are identified. Then the psychological reasons for the high levels of fear of terrorism and the subsequent consequences for civil liberties are examined. Finally, the role of the mass media and of opposition political parties is emphasized in the discussion of the means by which civil liberties may be better protected.

Discussions of terrorism generally contain two important limitations: First, there are different definitions of terrorism and precision is required for meaningful discourse. Secondly, terrorism is isolated from a range of life-threatening risks, both military and non-military, thus hindering perspective.

This paper is organized in four major sections. First the definition of terrorism will be addressed. A set of attributes will be suggested that differentiate types of political-social violence from each other among which terrorism represents one combination of the attributes. Secondly, there will be some attempt to provide perspective to the magnitude of the terrorist threat. Both military and non-military risks will be examined. The third section will examine both the reasons for the high level of perceived threat of terrorism and the consequences for civil liberties. Finally, there will be some attempt to discuss means by which the negative consequences of the threat may be reduced.

Defining Terrorism

Examinations of the word terrorism have yielded over 100 definitions encompassing 22 definitional elements (Schmid & Jongman, 1988, pp. 5-6). Such definitional variability creates problems in both communication about the phenomenon and in the attempt to quantify occurrences and associated variables (White, 2005, p. 86; Primoratz, 2007). Since 1983 the US government has employed a US Department of State definition that "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents" (Navy, 2003, vi). The following analysis is

* Direct correspondence to shelly@umich.edu. © 2008 by the author, published here by permission. The Journal of the Institute of Justice & International Studies Vol. 8

The author would like to express appreciation for the careful review and constructive suggestions of the two anonymous reviewers.
consistent with this definition but provides additional precision and also differentiates terrorism from other forms of violence.

One problem in defining terrorism results from the confusion between terrorism, the act, and terror, the psychological reaction. Government repression induces terror but it is not terrorism since the agent is the state. Because an action is not classified as terrorism does not imply that it represents a different moral order.

Table 1 represents an approach to classifying types of conflict by identifying key characteristics of group violence. Important components include: the nature of the actor(s), state or non-state, the nature of the target, military-government or civilian, the type of organization of both the attacker and the target, army, guerilla group, decentralized, and the goals, political, social, or economic. The locus of the conflict, that is, whether it is internal to a political unit or between two such entities, is also important.

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actor</td>
<td>Organization</td>
<td>Target</td>
<td>Goal</td>
</tr>
<tr>
<td></td>
<td>a) State</td>
<td>a) Army</td>
<td>a) Military-</td>
<td>a) Political</td>
</tr>
<tr>
<td></td>
<td>b) Non-state</td>
<td>b) Guerilla</td>
<td>b) Government</td>
<td>b) Social</td>
</tr>
<tr>
<td></td>
<td></td>
<td>c) Decentralized</td>
<td>c) Civilian</td>
<td>c) Economic</td>
</tr>
</tbody>
</table>

Violence types are distinguishable based on the scheme presented in Table 1. For example, The FBI defines organized crime as a group with some manner of formalized structure and whose primary objective is economic (FBI, 2003). Communal violence (Horowitz, 2001) is distinguished from terrorism primarily in the fact that it is more spontaneous, shorter term, and focuses on ethnicity or social factors rather than political goals.

Whether or not the violence is by suicide bombers is irrelevant to the classification. The attack on the U.S. Marine compound in Lebanon that killed hundreds of military personnel in October 1983 was not a terrorist attack since the target was military. Whether the earlier attack on the Embassy in Beirut in April that killed several dozen people should be classified as terrorist depends upon whether embassy personnel, although government officials, should be considered civilian. The attack on the USS Cole in October 2000 also was not a terrorist attack since the target was military.

Some disagreements over the definition of terrorism may partly result from the confusion between a tactic, such as suicide bombing and the actor-target characteristics. Precise definition is important to reduce classification based upon individual biases and to provide comparability of data from different sources. Research is also aided if the classification scheme includes nonoverlapping variables whose categories are mutually exclusive and exhaustive.
Terrorism in Perspective

The attention devoted to terrorism is far greater than that warranted by objective threat, where objective threat is defined as the likelihood of dying. Although the development in this article will emphasize the United States, the conclusion is appropriate for other areas of the world.

Democide worldwide (including wars, government repression and ethnic conflict) as documented by Rummel (1994a, b), resulted in approximately 200 million deaths in the 20th Century. The majority were civilians. However, the major threat to life is from non-military preventable death -- *wars without soldiers*. Worldwide these deaths total 200 million every 10 or 15 years.

The risk of a terrorist attack upon US citizens may be increased by selecting September 11, 2001 the date of the Twin Towers attack, as the starting date. Terrorist attacks may then be compared to other risk factors for the 7 years to the present.

The actual number killed as a direct result of the 9/11 attack was approximately 3000 (Hirshkorn, 2003; 9-11 Research, 2007a, b). Since the attack, contractors working for the US government in Iraq have been the only other major target of terrorists, the total number of US civilian deaths is listed as 1123 (Ivanovich, 2008). However, many of these perform tasks formerly performed by the US military. Nevertheless, including this number as well as those other areas of the world, the total is approximately 4500 US civilian deaths from terrorist attacks.

However, within that almost seven year period, the number of US civilians who have died from currently preventable causes has been approximates one million per year or a total of 7 million. Some indication of the magnitude may be gained from the following: Approximately 18,000 people per year die from lack of medical insurance (Moore, 2007, 2008). In addition, based on the year 2000, 435,000 per year die from tobacco, 365,000 from poor diet and lack of exercise, 85,000 from alcohol, 20,000 from sexual behaviors and 7,600 from non-steroidal anti-inflammatory drugs such as aspirin (Drug war facts, 2007). A further 225,000 die from various types of medical errors (Starfield, 2000). In addition, 70,000 die each year from pollution (three million world wide, Cornell, 2007). These results omit a number of other categories of preventable non-military death but the number is still more than one million per year. Even the worst-case scenarios for terrorist attacks, many of which involve atomic weapons and are very unlikely, estimate deaths that are a fraction of those attributable to currently preventable causes.

Yet, in terms of both money spent to prevent the destruction as well as the psychological fear, terrorism probably ranks higher as a threat than any of those presented. And this includes military threat even though the US invasion in Iraq alone has resulted in as many US deaths as the terrorist attacks against US civilians starting with 9/11. In fact, for the full period of January 1, 1998 through October 31, 2004, the total number of individuals killed worldwide by terrorist attacks was under 50,000 according to the Global Terrorism Database of the Department of Homeland Security (GTD, 2007). Further, the definition employed by GTD is broader than that specified for terrorism in this paper. An analysis of these data by Burlien (2007), concluded that there were more fatalities for US citizens each day from medical errors than from terrorism in a whole year (based on 120,000 medical-error deaths, which is only about one-half those estimated by Starfield, 2001). The perspective provided by Mueller (2006) is consistent to that presented in this discussion.
The money devoted to protection against a terrorist attack is consistent with a fear rather than a risk analysis. The Department of Defense budget is over one-half of a trillion dollars. In fiscal 2009, this is estimated to be 54% of the total Federal Government discretionary spending. In contrast, only 5.3% of discretionary spending is on health care (OMB, 2008, Shah, 2008).

The relative lack of funding for addressing preventable death is at a great additional cost to the economy. Estimated economic costs of tobacco consumption including health care, increased medical premiums and days lost from work were estimated at $157 billion in 1999 and are reasonably estimated at $225 billion currently (ACS, 2002). Alcohol abuse is estimated at about $250 billion per year based on continuing projections from earlier data (Harwood, 2000), automobile crashes, about a third of which involved at least one impaired driver at $230 billion in 2000 (DOT, 2002), medical errors at approximately $25 billion per year, and obesity and inactivity at $132 billion in 2003 (USDHHS, 2003). Overall for preventable death categories, the cost per year is three-quarters to a trillion dollars. By any objective measure, the emphasis on terrorism is inconsistent with its comparative objective risk.

Factors that Increase Fear of Terrorism

This section will examine some of the psychological reasons for this fear of terrorist attack and develop the political consequences that derive from the fear. The high fear of terrorist attack results from both the information available about it and the characteristics of the phenomenon. However, most of the attributes that characterize a terrorist attack are also present in many other sources of physical risk. Among these are: unpredictability (suddenness), immediacy of death, and number of persons attacked. Many risks, such as from tobacco and pollution, are a result of a slow process that increases the difficulty of precisely identifying the source. Even when the malady encroaches, the likelihood of death is known for some period of time. On the other hand, deaths from transport and non-transport accidents are frequently sudden.

The number involved in an incident is also important. The cigarette and pollution examples, as well as many others such as those from medical errors and drugs such as Vioxx, occur on a person-by-person basis. Although more than one person is frequently involved in a transport incident, most occasions, except for tragedies such as airline disasters and bridge failure, consist of a few people.

In addition to the number involved, the unique factors that increase fear of a terrorist attack include perceived control, which includes the ambiguity of the source, perceived intent of the attacker, anxiety over the social order, and information available. Perceived control is not related directly to objective conditions. Automobile accidents and death from sources such as cigarettes and pollution are frequently viewed as under the control of the individual. Objectively, of course, accidents may be a result of someone else’s negligence and people addicted to nicotine are not capable of control in the ordinary sense of the word. Nevertheless, there is a tendency in most circumstances for individuals to feel that they are in control of their destiny. This perception is forcefully contradicted in the case of airline disasters, bridge failures, and terrorist attacks.

Two other factors however combine with perceived control to escalate the fear level. The first is the ambiguity of the source and the second is the belief about
the intent of the attacker. Terrorists, in contrast to enemy armies, are clandestine. Thus, anyone could be a terrorist. If the risk is elevated, the attempt to protect oneself through suspicion of others increases and the result is a circular escalation of fear. A belief that a manufacturer deliberately produced a defective product, or even in the case of tobacco companies deliberately manipulated ingredients and information to increase addictiveness, usually is judged to result from the motive to increase profitability, not to attack an individual. However, the intent of the terrorist is rarely to destroy a particular person. The personalization of the risk occurs through identification with the larger social group so that intent to attack the larger group is perceived as intent to attack the individual personally.

Thus, fear increases substantially when a threat to the social order is believed to exist. Since many individuals derive their value through identification with the State or some other cultural entity, threats to the social order create high levels of anxiety. The motives of terrorists (as with communists in the cold war era and witches earlier) are related to fundamental values of the society. In addition, the State loses its legitimacy if it cannot protect its citizens and this potential vacuum in political stability enhances the effects.

Finally, the amount and regularity of information about the threat is an important contributor to the perceived level of fear. The role of the mass media cannot be minimized. If the over 1000 people a day who die from tobacco, the 300 or more each day from medical errors, the 200 per day from pollution, and the 100 per day from automobile accidents were reported in detail, citizens' fear would substantially increase and they would likely demand from the State that, “something be done about it.” Among the nations of the world, only the UK, with a concerted effort, has actually witnessed a substantial decrease in tobacco related deaths. In addition to the amount of attention devoted to events, journalistically justified in many instances on the basis of “newsworthiness,” the media have a significant role in the development of the perception of future threat.

Although the number of US citizens who have died from terrorist attacks is relatively very small, the magnitude of future attacks may be perceived to be quite large. The prospect of an atomic explosion (“[W]e cannot wait for the final proof -- the smoking gun -- that could come in the form of a mushroom cloud,” Whitehouse, 2002), poisoned water supplies or repeated suicide bombings cannot be compared to the individuals killed by tobacco or obesity one at a time, even though the risk from these sources is far greater. In addition, and capitalizing on the ambiguity in identifying a potential terrorist, the perceived likelihood of attack is increased immensely by government statements, lack of dissent by major political figures, excessive publicity by the media, exaggerated claims of both the likelihood and extent of worst-case scenarios, and the insistence on the devotion of a large amount of treasure and manpower to defeating “terrorism.” As a result, the fear among the population, although lessened over time by the lack of incidents within the US, is still at high levels. Reuters (2008) reported a survey in which 74 percent of the respondents felt that a terrorist attack was likely in the future and 49 percent believed that some nuclear device would be involved. When compared to other problems, fear was higher for terrorist attack than for any other category among 35 percent of the respondents.

The number of discussions of terrorism through the mass media far outweighs the attention devoted to other serious threats.
Finally, when the citizens of a nation perceive themselves under attack, as from terrorists, group cohesiveness increases unless the government is viewed as mismanaging the problem. Many believe it is their patriotic duty to aid in the defense of the State. Such participation increases the feeling of self-worth, an extremely important psychological benefit. This process is almost automatic and for most not an intentional manipulation of the magnitude of the threat. These combined factors provide some understanding of the disproportionate level of fear of terrorism relative to the objective risk.

The Theory of Reduced Alternatives

This section will examine the effect of high fear levels on support of the government and the subsequent ability of the government to restrict the freedoms of its citizens. The Theory of Reduced Alternatives (Levy, 1970, 1999) represents an attempt to incorporate a large number of empirical results into an overall understanding of the psychological factors that increase reliance on authority including reliance on oppressive government. It is relevant to the understanding of terrorism and civil liberties because it provides some explanation of the effect of a terrorist threat upon a population and the subsequent increase in the power of government. By identifying the relevant factors it also provides some understanding of the means by which government can add to its power if it can successfully increase the perceived threat. The theory posits both individual and societal conditions that influence the process.

At the individual level, a central variable is systemic punishment which is defined as relatively low payoffs in institutional settings such as in employment, education, housing, and medical treatment. Racial discrimination results in the general reduction in payoffs for most members of the target group. Such conditions, which have been shown to increase individual stress, result in cognitive and behavioral restriction. That is, under these conditions, individuals are less able to think of alternatives to solve their problems and this cognitive restriction results in a reduced variety of behavioral endeavors to improve their circumstances. Since stress can arise from societal circumstances such as war or in this instance terrorism, the cognitive and behavioral restrictions are also increased in a society generally through increased threat.

As a result of either the individual’s systemic punishment or the overall increase in external stress, anxiety increases since the cognitive restriction results in greater difficulty in coping with the circumstances. One important psychological mechanism for reducing this anxiety is reliance upon authority. The individual is thus willing to sacrifice personal freedom to attain the increased security. Under such conditions, the reliance upon authority may increase in-group cohesion and increase out-group antagonisms thus creating a greater likelihood that scapegoats will be identified. However, leaders may also increase reliance upon themselves by increasing the perceived level of threat and/or providing scapegoats.

The consequences of this process are opposite to those posited by many theorists. The increased threat provides an increased need for reliance and this results in a more passive population in the face of a restriction of its liberties by its government. Greater display of the symbols of the society such as its flag and increased patriotism and identification with the nation = government are also a part of the process. That is, among those under stress, reliance upon the group is expressed
through increased generalization to societal markers. Of course, the restriction of liberties results in an overall increase in systemic punishment since freedom of action is an important institutional benefit. This further increases cognitive restriction and increases reliance thus providing a circular path for the government to increase its control over the populace.

The theory also identifies the source of revolution or opposition to the oppressive government. It is less likely to arise from the oppressed themselves since reliance upon authority reduces their anxiety. Instead, the systemically rewarded who maintained psychological independence from authority are more likely to oppose those in power when it acts oppressively.

Three exceptions should be noted. Those who are prevented from participating in the society are less likely to fulfill the reduction of anxiety through identification with authority since they are defined as outside of the system. Nevertheless, occasionally in concentration camps of the Nazis, Jews attempted to identify, and identification occurred to a greater extent among blacks who were outside of the political system during slavery. Secondly, the wealthy are obviously rewarded. But they rely on authority to protect their wealth. Because of their independence however, they are prepared, psychologically, to move against authority when it acts against their interests. Finally, a society may be educated to authority. This appears to have been the case in Germany even prior to the rise of Hitler.

The increased reliance upon authority in times of stress is easily illustrated in history. The gunpowder plot of 1603 to dynamite the English Parliament resulted in a great deal of increased power for King James I. It also was counterproductive. James had been more accommodating to the Catholic population than previous rulers but when the plot was traced to a group of Catholic dissidents, the infringement of religious freedoms for all Catholics greatly increased. (Durant & Durant, 1961, pp. 139-141). Hitler created enemies to mobilize support for his dictatorship and was aided by the Reichstag fire. Although historical evidence contradicts the claim that it was a communist plot, accusations against them were believed and believable since there already was a fear among many of communism in Germany (Shirer, 1960, pp. 188-196).

Closer to the present and paralleling the tactics of Hitler was Joseph McCarthy who seized upon the fear of communists to create an enormous domestic threat and the resulting fear in the U.S. allowed destruction of individual rights (Reeves, 1982). McCarthy’s advantage, as well as Hitler’s, was that communists did exist. McCarthy engineered the threat so that citizens were obliged to rely upon him since he knew the facts but could not divulge them because the communists would then know they were being observed. Hitler also claimed that increased power was necessary to meet the threat and engineered the enabling act that provided him with dictatorial powers.

The United States Administration of 2003 argued that there had been a relationship between Saddam Hussein and the attack of September 11, 2001. Many in the country believed that the relationship had existed, and the Congress provided the President with powers that resulted in war against Iraq. Even after the Administration conceded that no such relationship had existed, a majority of the American public continued to believe that there had been (Bush, 2003; Milbank & Deane, 2003). Differentiating actual threat from perceived threat from engineered threat through propaganda and repetition is very difficult. The following facts are, however, relevant to understanding the relationship between threat and reliance on authority.
President Bush’s approval ratings increased about 2.75% after a terror alert and this increase was generalized to his approval on the economy and other areas. The effect lasted about a week (Willer, 2004). During the latter part of the presidential campaign in 2004 a tape of Osama bin Laden was released. The election shortly after resulted in Bush being declared the winner with the popular vote in his favor by approximately 2.4 %. After the election, a reevaluation of the terror alert system was announced by the Department of Homeland Security.

**Breaking the Cycle of Fear Disproportionate to the Level Of Risk**

The relationships among fear, cognitive restriction, and reliance on authority occur consistently if not automatically. Protection of civil liberties is important both when the fear is objectively supported, as during the Second World War, and when it is exaggerated, as was the domestic threat during the post-World War II McCarthy era and, as argued here, the current terrorist threat. It is not that communists did not exist or that terrorists are imaginary but that the fear level was then and is now beyond that supported by objective criteria.

Since reliance on authority is greater for those who are systemically punished, protection of civil liberties and the willingness to resist infringements by leaders is aided by a social order in which the populace is educated and poverty levels as well as the number of working poor are small. These and other systemic factors, however, are only part of the requirements for breaking the cycle.

Solving the problem of exaggerated fear requires that information not be primarily supportive of the point of view of those in authority. However, not only does the government have a substantial influence on the information available to the media, but a high fear level, which increases reliance upon government, also increases the credibility of the political leaders which results in their opinions being even more important than those of others.

There are at least three means through which dissent may be expanded, thus frequently reducing the population’s anxiety and willingness to forego civil liberties to secure safety. These are significant political others, competitive mass media, and the values of the society.

The most obvious significant others are the members of the opposition party. Its position is likely to be considered newsworthy. Unfortunately, there has not been a great deal of disagreement with government policies. Although there was some opposition to the Iraq war in the Congress, it was insufficient to prevent the Senate from relinquishing its war-making powers. The vote in the Senate on H.J. 114 was 77 for and 23 against, while in the House, the vote was 296-133 with 6 not voting (US Senate, 2002; US House, 2002). Similarly, while there has been opposition to the infringement on civil liberties, it also has been insufficient to restrain significant invasion of privacy, the right of free speech, and the right of habeas corpus, among others. The first Patriot Act legislation passed the Senate with only one dissenting vote (US Senate, 2001). The renewal was passed in the Senate 89-10 while in the House the vote was 280-138 (CNN, 2006). Although most of the opposition that did exist was from the Democrats, those Democrats who supported the measures were important for providing the perceived legitimacy of the restrictions.

There are additional significant others who could provide dissenting points of view but they have little access to the media. Not only does the government control much of the information about the government that news distributors will receive, but
the amalgamation of media ownership and the elimination of the fairness doctrine have further reduced the likelihood that individuals will receive dissenting points of view (Hartmann, 2007, pp. 32-33, Kaplan, 2007). The concentration of ownership reduces competition and the absence of the fairness doctrine eliminates the obligation of the media to provide access for points of view that may be unpopular or contrary to their own. Moyers has documented the lack of critical evaluation by the media that resulted in the Iraq war (Moyers, 2007a) and has described the current situation: “Our media and political system have turned into a mutual protection racket” (Moyers, 2007b). Since political parties are obviously reluctant to express positions that expose them to charges of obstructionism and lack of patriotism, a major source of dissent must derive from the people themselves. Wider access to broadcasts from other countries, particularly through satellite television, would aid the process. Although the internet provides international and dissenting points of view, the major source of news for the public is still the network and cable news programs.

The willingness of citizens to question the government is also an important factor. Suspicion of central authority is not unpatriotic. The Constitution was written based upon the belief that such suspicion was necessary to maintain democratic institutions in the face of a tendency for central authority to amalgamate power – thus the system of checks and balances. But citizens are greatly influenced by the information presented to them and the authority of the information giver. Without vigorous dissent from major factions in the society, notably the opposition party or parties, it is asking a great deal of the individual citizen to oppose the authorities and the crowd. In effect, it is necessary to reduce what Milgram labeled as agentic morality, the set of values to which individuals have been socialized as appropriate in institutional settings (Milgram, 1969).

Summary and Conclusions

The likelihood of death for a US citizen from a terrorist attack is extremely small relative to the likelihood of death from other preventable causes. Nevertheless, the fear from the former is far greater than that from the latter. This fear is reflected in the amount of money spent per likely death from terrorist attack compared to the cost of failing to ameliorate other risks. Some psychological factors appear to be important such as perceived size and suddenness or unpredictability or lack of personal control. However, additional factors increase the fear levels, the attention devoted by the media, the ambiguity and perceived intent of the attacker, the perceived risk to the social order, and the enhancement of self-worth that derives from participation in a patriotic effort to combat an enemy. The consequences of the increased levels of fear are to increase the reliance on authority, thus increasing the credibility of authority and its ability to manipulate fear levels to achieve greater governmental control. These factors result in a diminution of civil liberties, frequently with the cooperation of those whose liberties are restricted. To break this cycle, which may lead to an authoritarian political State, it is important for the citizenry to be well-educated, that employment result in reasonable recompense, that poverty and underemployment levels be low, that there to be support for the right of dissent, and for current laws to be altered to limit media amalgamation and reestablish the requirement that alternative points of view be provided access to the public airwaves.
References


Moore, M. (2007). Sicko. (Film documentary)


ABSTRACT

This paper investigates the responsibility national governments incur for the actions of non-State entities, significantly terrorist organizations, to which they bear a nexus, territorial, financial, or other. This question is approached from the perspective of an international lawyer, dwelling upon the tests of imputability developed and applied by the International Law Commission, the International Court of Justice, and the International Criminal Tribunal for the Former Yugoslavia. In international law, the concept of imputability develops upon the universally accepted legal premise that a principal bears responsibility for the acts of its agent committed in its capacity as such. This concept seeks to determine how a national government may confer the responsibility for the performance of certain functions upon non-State actors, for such delegation is not often visible or admitted by the former. It is in recognition of this fact that the concept of an agent de facto was developed. However, international courts and tribunals have been reluctant to accept the proposition that a State bears responsibility for the actions of an organization to which it merely proffers support, financial, technical, or other, unless such support is contingent upon the performance by such organization of certain functions conferred upon it by the patron State. This appears to conflict with the belief of States, for they acknowledged the responsibility of the Taliban Government for the conduct of Al Qaeda, though the actions of the latter were not imputable to it. Since both States and international bodies vested with judicial authority are competent to recognize existing rules of international law and innovate new ones, the paper studies the test of imputability as it presently stands, in view of the conflicting stances adopted by national governments and the International Court of Justice.

Of all the challenges facing international law scholars, the question of state responsibility is certainly a source of concern. In fact, it is described as the “most ambitious and most difficult topic of codification of the work of the International Law Commission.”

Although states as a general rule are not liable for the conduct of non-state actors, it is now well-settled that the acts of de facto state agents are attributable to the state. That is, the conduct of ostensibly private actors may be sufficiently connected with the exercise of public power that otherwise “private acts” may be deemed state action. Of course, the question remains how best to distinguish de facto state action from purely private conduct. The attacks of September 11, and the international political firestorm that followed, underscore the importance of this issue. It cannot be gainsaid that the events surrounding September 11 changed the international law vis-à-vis state responsibility.

* Direct correspondence to kiranmohaan@gmail.com.
© 2008 by the author, published here by permission.
The author wishes to thank Uday Joshi and Arun Krishna Dhan for their helpful comments.

1 Peter Malanczuk, Akehurst’s Modern Introduction to International Law 254 (7th eds., 1997)
It is known that some countries are used as frequent launch pads or training grounds for terrorist organizations. Whether obscured by intrinsic information networks, new technological advances, the sophisticated cellular structure of organisations like Al Qaeda, convoluted political realities or other factors, the level of government involvement in terrorist activities is no longer readily discernible in all circumstances. How can states counter this new threat? If a country is to attack non-state actors what is the appropriate predicate to conduct that attacks on the territory of another state? Is the current state of international law adequately addressing the relatively recent phenomenon of non-state terrorist organisations that have many of the indicia of statehood? In this article, the author attempts to brief the evolution of the principle in case of an armed attack by a non-state actor by stating the judicial pronouncements and state practice in this regard and argues why the rule should be changed given the contemporary threats to global security in the form of terrorism.

For the aforementioned purpose, the 1837 Caroline incident seems to serve as a good starting point. This event involves the attacking of Canada (then a colony of Britain) by a militia group harbored in United States’ territory. This, followed by the Webster-Ashburton Treaty, in effect, declared United States strictly liable for harbouring irregulars in its territory though the state was not directly related to the group. From that point onward, any retaliatory recourse to force would be governed by a standard involving the imminent threat of an attack, and the necessity and proportionality of the retaliation. The incident is still consistently referred by international scholars today as embodying the customary law of self defense.

International Courts on Attribution: From Tehran Hostages to Tadic

International courts formally adopted the concept of attribution of responsibility to the state for the acts of non-state entities much later in the early 1980s. This is first done in the Tehran Hostages case. In 1979, a student militant group took over the United States embassy and its consulates in Iran, leading to serious vandalism, destruction of property, and the capture and detention of fifty American citizens, mostly diplomatic and consulate personnel. The International Court of Justice (ICJ) had to establish that the takeover and ransacking of the embassy was attributable to the Iranian state. Towards this purpose, the ICJ asked whether “the militants acted on behalf of the state, having been charged by some competent organ of Iranian State to carry out a specific operation.” The Court found no such direct involvement on the facts given.

4 As Thomas Franck points out, some scholars contest the modern relevance of the Caroline elements. THOMAS FRANCK, RECURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 67 n.82 (2002); see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 105-06 (2000); Maria Benvenuta Occelli, “Sinking” the Caroline Why the Caroline Doctrine’s Restrictions on Self-Defense Should not be regarded as Customary International Law, 4 SAN DIEGO INT’L. J. 467 (2003).
5 For instance, the United States quoted the Caroline Doctrine when justifying their attack on Afghanistan in 2001; See id.
7 Id. ¶ 8,9
The ICJ then proceeded to analyze whether Iran was indirectly responsible for the attack in that it failed to fulfill its duty to protect foreign diplomatic missions from assault. It held that even though the attack could not be directly attributable to the state, “Iran is not free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations.” By the virtue of several treaty provisions and principles of international law, the ICJ noted that Iran had a “categorical duty” to protect the victims of the attack, along with the embassy.

Curiously enough, the subsequent decisions regarding the attribution of state responsibility in armed attacks hinged on the question of control and direction by the host state over the non-state actor conducting attacks. In 1986, in the *Nicaragua v. U.S.* case, the ICJ crafted its classic formulation with respect to attribution. In this case, the ICJ was confronted with the United States’ involvement in the funding and training of contra rebels in the Nicaragua-El Salvador conflict. Although the evidence adduced by Nicaragua clearly suggested United States assistance to the rebels, the Court refused to pronounce contras as the de facto agents of United States:

> The Court has taken the view….. that United States participation, even if preponderant or decisive in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.”

The ICJ then proceeded to elaborate the test for establishing state responsibility, a standard which was popularly called “effective control test” from then on. In short, the court opined that in order to find the United States legally responsible for the activities of the *contras*, it would have to prove that the state had effective control of the military and paramilitary operations in the course of which the alleged violations were committed.

The rigid formulation of the rule was softened somewhat by the Appeals Chamber of International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadic*. In this case, the Appeals Chamber held that the trial court erred in relying on the ICJ’s effective control test reasoning that the test was contrary to the very logic of “state responsibility” and it was inconsistent with state and judicial practice. The court

---

8 *Id.* ¶ 61
9 *Id.* ¶ 67: “This inaction of the Iranian Government by itself constituted clear and serious violation of Iran’s obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure “the most constant protection and security” to each other’s nationals in their respective territories.”
11 *Id.* ¶ 115.
pointed out that the degree of control might vary according to the circumstances and that the analysis should be guided by a flexible approach. The court then purported to draw a distinction between an individual and organized group. In the latter’s case, it is now necessary to demonstrate that the “host state” exercised “overall control” over the group in question. This is a significant relaxation to the “effective control test.” The Appeals Chamber further stated:

Plainly, an organized group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.13

But the Appeals Chamber pointed out that in the case of groups which are not militarily organized, the threshold should be higher as overall control was deemed to be insufficient and specific instruction flowing from the host state to the group in question were required. This test came to be known as “overall control test” in the post-Nicaragua era, and “governs debates on the question of a state’s involvement in funding and training insurgents or terrorists.”14

Reiterating Nicaragua: Draft Articles on State Responsibility

The adoption of International Law Commission (ILC) Draft Articles in 2001 constituted a conscious international effort to codify the law governing state responsibility. According to Article 1 of the Draft, “Every internationally wrongful act of a State entails the international responsibility of that State.” Under the ILC framework, an act is wrongful if it amounts to a breach of a host-state’s international obligations, whether derived from a treaty law, customary law, general principles of international law or jus cogens.15 This principle, now codified in Article 2 of the Draft Articles has received widespread support in international jurisprudence.16 In tandem, these provisions operate on the premise that if a state has violated a primary rule of international law, whether through an act or omission, the secondary rules of state responsibility contained in Draft Articles will apply.17 As regards the attribution of responsibility for the acts of private actors, Article 8 reads: “The conduct of a person or group of persons shall be considered an act of a State under international law if the

13 *Id.* ¶ 120.
15 See James Crawford, *Revising Draft Articles on State Responsibility*, 10 EUR. J. INT’L L. 449 (2002); *Jus cogens* (or a peremptory or absolute rule of general international law) is, in the words of Article 53 of the Vienna Convention on the Law of Treaties 1969: a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
17 *Id.* at 77-79.
person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

The Peace Treaty of Westphalia more than 350 years ago led to the establishment of the classic system of international law, which centered exclusively on sovereign states that had defined territories and were sovereign. States made international law and were accountable to each other in meeting international legal obligations. The articles on state responsibility of the International Law Commission largely reflect this traditional view of the international legal system. They focus on states and the rules they use to hold each other accountable for the substantive obligations to which they have committed themselves.

The initial International Law Commission (ILC) report in January 1956 observed that it was important to do more than codify the law; it was “necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law. . . . [and] to bring the ‘principles governing State responsibility’ into line with international law at its present stage of development.” During the almost fifty years since the United Nations General Assembly adopted the resolution that authorized the Commission’s work on state responsibility, the international legal system has evolved significantly to reflect the changing nature of international society and the growing role of non-state actors. While the Commission’s almost exclusive concern with states may have been appropriate at the beginning of its work, it does not reflect the international system of the twenty-first century.

Direct and Indirect Responsibility

Vincent Joel Proulx called the attention of international scholars on an overarching dichotomy that guides the law of state responsibility for internationally wrongful acts. He said “On one hand, a state may be held responsible if its direct act or omission leads to harm. Cases, such as Nicaragua and Tadic, and the Draft Articles focus on this sort of state responsibility.” Such responsibility can attach where a terrorist group acts as a state agent or de facto state agent or the state subsequently approves of the terrorist act. “On the other hand, there exists a subtler kind of responsibility, one that hinges on the indirect involvement of the state in a wrongful act.” It is difficult to impute liability for attack to a state when the state has no ties to terrorist activities arising from within its territories. He points out that a breach under indirect responsibility may be an omission, deliberate or innocent, rather than an act. Hence a state’s passiveness or indifference towards terrorist agendas within its own territory may trigger its responsibility, possibly on the same scale as though it had actively participated in the planning. This classification seems to be pertinent in the era of terror, especially post-September 11, since the United States’ justification for its attack on Afghanistan is based on the indirect responsibility of the state.

---

21 *Id.* at 624.
22 *Id.*
23 To some scholars, Proulx’s Indirect Responsibility is a “Harboring or Supporting Doctrine” ; see Derek Jinks, *State Responsibility for the Acts of Private armed groups*, 4 Ctlt. J. Int’l L., (2003); Some
Global Response to Terrorism after September 11: Indication of a Paradigm Shift?

In the aftermath of the September 11 terrorist attacks, the United States formally invoked its right to use force in self defense against another sovereign state. The United States’ self defense claim was predicated on two related propositions. First, the United States characterized the September 11 attacks as an “armed attack” within the meaning of the United Nations Charter. Second, the United States maintained that international law permitted military action against the Taliban regime in Afghanistan because this “armed attack” was:

made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

That is, the United States sought to justify military action against Afghanistan on the grounds that the hostile acts of Al Qaeda should be attributed to the Taliban regime. In an important address following the initiation of air strikes in Afghanistan, President George W. Bush directly implicated that government in the September 11 attacks maintaining that the Taliban regime had itself committed “murder” by supporting and harboring the terrorists. The United States Congress subsequently authorized the President to use force against those responsible for the September 11 attacks, including any states aiding or harboring the primary perpetrators. In short, it was made clear that the United States, in its anti-terror campaign, would equate terrorists and those who support or harbor them.

Moreover, several important international organizations—including the U.N. Security Council, North Atlantic Treaty Organization (NATO), and the Organization of American States (OAS)—endorsed the U.S. approach. The Security Council endorsed both prongs of the United States position.

First, the Security Council implicitly suggested that the events of September 11 constituted an “armed attack.” The Security Council determined that the attacks constituted a threat to international peace and security triggering its Chapter VII

jurists opine that the direct/indirect dichotomy is erroneous. For instance, Judge Ago, in his separate judgment in Nicaragua, equates indirect responsibility with the transfer of responsibility flowing from one state to another, when the latter exercises control over the former. 1986 I.C.J. 4 at 189-90 (June 27) (separate opinion of Judge Ago).

powers; and recognized the right of the United States to act in self-defense consistent with Article 51 of the U.N. Charter. Because the Charter requires an “armed attack” as the factual predicate for the lawful exercise of self-defense, the Security Council’s invocation of Article 51 necessarily implies that it classified the September 11 attacks as such. This approach represented an important shift in Council practice concerning terrorist attacks. The Security Council had made no such finding in the aftermath of the 1998 attacks on U.S. embassies in Africa, even though the United States officially invoked Article 51 as the legal justification for missile strikes against Sudan and Afghanistan. Second, the Security Council impliedly endorsed (without expressly authorizing) the use of force against Afghanistan. Although the Security Council had initially refrained from attributing the terrorist attacks to any state, it would, in the days following the initiation of Operation Enduring Freedom, expressly condemn the Taliban regime “for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaeda network . . . and for providing safe haven to Osama bin Laden, Al-Qaeda and others associated with them . . . .” Although the Security Council did not expressly authorize the use of force against Afghanistan, Article 51 requires no such authorization for states to act in self-defense. Moreover, the reactions of States and the U.N. Secretary General to Operation Enduring Freedom strongly suggest that the resolutions impliedly authorized, or at least condoned, the use of force against the Taliban regime in Afghanistan.

Similar findings by other international bodies triggered collective security commitments. NATO formally interpreted the September 11 attacks as “armed attacks” directed against the United States. Upon determining that the attacks were directed from “abroad,” NATO invoked the collective self-defense provision of the alliance’s founding treaty. Specifically, NATO determined that (1) al Qaeda carried out the attacks; and that (2) the Taliban regime in Afghanistan worked in concert with al Qaeda--by providing protection to Osama bin Laden and his key lieutenants. Similarly, the OAS interpreted the attacks as acts of “armed attacks;” recognized the inherent right of the United States to act in self-defense and invoked the collective self-defense provision of the Inter-American Treaty of Reciprocal Assistance.

Finally, several commentators have noted that the U.S. case for armed invasion of Afghanistan turned, in substantial part, on whether the terrorist attacks could be attributed to the Taliban regime. Examples abound, but consider the exemplary comments of Professor Michael Byers:

In late September 2001, the US found itself in something of a legal dilemma, though not an entirely unhelpful one. In order to maintain the coalition against terrorism, its military response had to be necessary and proportionate. This

meant that the strikes had to be carefully targeted against those believed responsible for the atrocities in New York and Washington. But if the US singled out Bin Laden and Al Qaeda as its targets, it would have run up against the widely held view that terrorist attacks, in and of themselves, do not constitute “armed attacks” justifying military responses against sovereign States.35

Because the U.S. position (regarding the use of force in Afghanistan) has enjoyed broad, general support in the international community (at least in inter-governmental bodies), substantial evidence suggests that the international legal response to the terror attacks signaled a subtle, but important shift in the law of state responsibility.

Various aspects of the collective response to the September 11 attacks strongly suggest that the threshold for attribution has been lowered substantially. Recall that the United States argued that the attacks constituted an “armed attack” within the meaning of the self defense provision of the U.N. Charter. In addition, the United States asserted the right to act in self defense against Afghanistan because the Taliban regime had supported and harbored leaders of the al Qaeda terrorist network. In short, the United States sought to attribute to Afghanistan the hostile acts of a non-state actor—namely, al Qaeda. The United States, however, did not attempt to establish that al Qaeda acted on behalf of the Taliban, or that the Taliban played any direct role in (or had any direct knowledge of) the planning or execution of the attacks. Instead, the United States arguably sought to impute al Qaeda’s conduct to Afghanistan simply because the Taliban had harbored and supported the group—irrespective of whether the state exercised “effective control” (or “overall control”) over the group. Although this line of argument is not new for the United States, the claim enjoyed much broader international support in the wake of September 11. As discussed above, the U.N. Security Council, NATO, and the OAS expressly or tacitly endorsed the United States position. Moreover, many distinguished commentators have expressed some measure of support for this type of claim.

Post-September 11 ICJ Pronouncements on Imputability

However, the ICJ has refused to acknowledge the existence of a more lenient test of attribution despite these developments in State practice. In the Armed Activities case36, the Court was required to determine whether the activities of the ADF, a militia group based on the territory of the Democratic Republic of Congo (DRC), were imputable to the DRC. The Court refused to accept that the DRC afforded Uganda a right of self-defense against it by “harboring” the ADF on its territory. This appears to conflict with the almost universal acceptance of the United States’ claim of self-defense against the Taliban Government of Afghanistan after the events of 11 September 2001. The Taliban and Al Qaeda are two distinct entities, the latter of which was responsible for perpetrating the attacks of 11 September 2001. Moreover, there remains no evidence to indicate that its actions were financed or directed by the Taliban, a requirement even the more lenient test of attribution applied in Tadic stipulates. It did, however, permit Al Qaeda to operate from its territory and refused to

render its members into the custody of the United States despite the latter’s requests. In a 1999 resolution, the Security Council had termed the Taliban’s stance as a “threat to international peace and security.” However, the ICJ ignored all these developments in international law in its judgment in the Armed Activities case. Judge Kooijmans, however, differed from the majority in that he believed that the acts of the ADF need not be attributable to the DRC for them to give Uganda a right to use force on the applicant’s territory in self-defense. Nonetheless, he found Uganda’s military operations to be a disproportionate exercise of that right, thus agreeing with the majority conclusion that said operations were unlawful.

This trend continues, for, in the Genocide Case,37 the Court flatly refused to apply the overall control test innovated by the Appeals Chamber in Tadic. The Court stated that said test may be appropriate to determine whether an armed conflict was of an international character or not, for, in such circumstances, a link of attribution must be drawn between the non-State party to the conflict and a third State. However, it preferred the effective control test to determine whether Serbia could be held responsible for the genocide exemplified in the Srebrenica Massacre and others. This retrogressive trend demonstrates the ICJ’s refusal to simply determine what the law is. Indeed, despite being the principal judicial organ of the United Nations, it has assumed a legislative function, and seems to be proud of having done so. In fact, however, it discredits itself in a legal system where the source of its continuing legal power and influence bears a strong connection to its good offices with States.

Concluding Remarks

The emergent “harboring” or “supporting” rule represents a substantial relaxation of the traditional attribution regime—one that may signal a shift in the very nature of “state action.” To be sure, this development is not without some merit. The events of September 11 discredit many of the conventional assumptions about “national security” and “law enforcement.” Although traditionally addressed as a law enforcement problem, it is now clear that international terrorism will often necessitate some sort of military response. The attacks, after all, illustrate starkly that private armed groups now have the organizational capacity (and the political will) to project catastrophic force globally. Because this “globalization of informal violence” will often overwhelm the capabilities of civilian order-maintenance institutions, the “war on terrorism” will often involve formal military action.

States that support, tolerate, or harbor terrorist organizations (and “networks”) have obstructed and will continue to obstruct efforts to suppress international terrorism. Such states frustrate transnational law enforcement efforts by shielding terrorist leaders from investigation, extradition, and prosecution. In addition, international rules governing the use of force will often preclude anti-terrorism military campaigns when targets are located on the territory of uncooperative states. Perhaps the most salient example of this problem is, of course, the recalcitrance and noncooperation of the Taliban regime in Afghanistan following the September 11 terrorist attacks on the United States. Any effective anti-terrorism regime must therefore necessarily include an effective strategy to deter and to prevent state support

for terrorist groups. With respect to the “war on terror,” the central question is when states should be held accountable for the acts of private armed groups. And because military campaigns will often occur on the territory of non-cooperative, but nevertheless sovereign states, the answer to this question is crucial to the determination of whether military force can be used to suppress international terrorism. Given the current legal climate and lack of consensus on the issue of self defense and attribution of state responsibility, it is difficult to clearly establish a legal regime governing these politically volatile situations. In the meantime, we can only hope that our extant scheme of state responsibility, paired with vigilant law enforcement, will be able to contain the most serious threats.
ASPECTS OF TERRORISM:
THREAT AND USE OF TOXIC CHEMICAL SUBSTANCES

Georgi Popov, University of Central Missouri*
Tsvetan Popov, Organisation for the Prohibition of Chemical Weapons
John Zey, University of Central Missouri

ABSTRACT
This paper describes the toxicological effects of selected chemical substances and their potential threats to humans. Biomonitoring methods and routes of exposure to such substances are also discussed. Cases of alleged use of toxic chemical substances are presented.

Numerous accidents in the chemical and petrochemical industry have resulted in fires, explosions, toxic substance release, and hundreds or thousands of victims. The chemical accidents in Seveso, Italy, and Bhopal, India, led to new government regulations and voluntary standards for the industry. The hazardous-chemical reporting requirements under Superfund Title III, Sections 311 and 312, the emergency-planning and community-right-to-know law (EPCRA) and process safety management standard (PSM) (29 CFR 1910.119) in the USA and the Seveso directive in the European Union (EU) are the direct result of the accidents and concerns of society. Now many U.S. corporations place extensive emphasis on process safety and security of the chemical operations. The goal for the new chemical processes is to minimize the possibilities of chemical accidents starting at the designer’s stage and continue throughout the product life cycle using less toxic chemicals. Advancements in chemistry and synthesis of new groups of compounds have led to the discovery of a variety of substances with high toxicity to humans and other living organisms. Some of these substances, such as pesticides, are widely used in civilian life and for business (e.g., agriculture). While production-related chemical accidents can be minimized, terrorist attempts to disrupt production or disperse chemical and cannot be predicted.

Fears that terrorists might be tempted to acquire and use highly toxic chemicals used in chemical or petrochemical products have always existed. The world received a shocking reminder of the possible impact of terrorist use of chemicals as a weapon in 1994 and 1995. The terrorist acts, organized by the Aum Shinrikyo sect in a Tokyo subway and an earlier accident in Matsumoto, Japan, with isopropyl phosphonofluoridate (sarin) have shown that hazardous substances in improper hands could become a horrible weapon with serious consequences for society. It is fortunate that, very few other incidents of this nature have occurred.

In 2006 the Department of Homeland Security (DHS) announced a risk-based regulatory framework for securing high-risk chemical facilities. The broad-based regulations cover previously unregulated high-risk chemical facilities and provide guidance to reduce vulnerability at high-consequence chemical facilities. The

* Direct correspondence to: gpopov@ucmo.edu
© 2008 by the authors, published here by permission
The Journal of the Institute of Justice & International Studies
regulations established a four-tiered structure for those facilities, with the most dangerous plants covered by the tightest requirements.

**An Overview of Selected Potential Chemicals that Could Be Used as Terrorists’ Chemical Weapons**

Significant improvements have been made for the airline industry following September 11, 2001. However, chemical industry and highly toxic chemicals transportation security are far from optimal. Industrial chemicals provide terrorists with valuable materials that could be used to develop improvised chemical weapons or release of toxic substances. Toxic industrial chemicals are transported in 90-ton railroad cars or 10-ton tank trucks and could become targets for terrorist attacks. In a recent Agency for Toxic Substances and Disease Registry (ATSDR) study it was determined that security around chemical transportation assets ranges from poor to non-existent (Hugart & Bashor, 2006).

In the same study, the authors expressed concern that rail and truck assets had no security beyond staging areas. Rail cars containing cyanide compounds, flammable liquid pesticides, liquified petroleum gases, chlorine, acids, and butadiene were parked alongside residential areas. Selected chemical substances and industrial chemicals that could be potentially used as terrorist agents are presented in Table 1.

In addition, key chemical operators and security personnel in some facilities are not trained to identify combinations of common chemicals that could become extremely toxic once mixed.

<table>
<thead>
<tr>
<th>Table 1. Selected chemical agents and industrial chemicals with potential for terrorist agents</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Selected Chemical Agents</strong></td>
</tr>
<tr>
<td><strong>Type of Agent</strong></td>
</tr>
<tr>
<td>Nerve Agents</td>
</tr>
<tr>
<td>Chemical Agents</td>
</tr>
<tr>
<td>Chemical/Common Name</td>
</tr>
<tr>
<td>Tabun, Sarin, Soman, VX</td>
</tr>
<tr>
<td><strong>Selected Industrial Chemicals with Potential</strong></td>
</tr>
<tr>
<td>for Terrorist Agents</td>
</tr>
<tr>
<td>Tabun, Sarin, Soman, VX</td>
</tr>
<tr>
<td>Organophosphate pesticides, Carbamate pesticides and precursors</td>
</tr>
<tr>
<td>Blood Agents</td>
</tr>
<tr>
<td>Hydrogen cyanide, Cyanogen chloride</td>
</tr>
<tr>
<td>Nitriles, Analines</td>
</tr>
<tr>
<td>Blister Agents</td>
</tr>
<tr>
<td>Lewisite, Nitrogen and Sulfur mustard, Phosgene oxime</td>
</tr>
<tr>
<td>Dimethyl Sulfate</td>
</tr>
<tr>
<td>Choking Agents</td>
</tr>
<tr>
<td>Phosgene, Chlorine, Vinyl Chloride</td>
</tr>
<tr>
<td>Ammonia, Acrylates, Aldehydes, Isocyanates (e.g. MIC), Hydrogen Sulfide</td>
</tr>
<tr>
<td>Pesticides and Herbicides</td>
</tr>
<tr>
<td>Phenoxy herbicides (e.g. Agent Orange)</td>
</tr>
<tr>
<td>Hexachlorocyclohexane (lindane), DDT and related compounds DDE and DDD, Cyclodienes (aldrin, heptachlor), Mirex and clorodecone, Dioxins (trace quantities in herbicides)</td>
</tr>
<tr>
<td>Toxins and Mycotoxins</td>
</tr>
<tr>
<td>T-2, aflatoxins</td>
</tr>
<tr>
<td>Agricultural chemicals and products</td>
</tr>
</tbody>
</table>

Source: United States Center for Disease Control (2000), Biological and Chemical Terrorism: Strategic Plan for Preparedness and Response
Organophosphorus pesticides

Organophosphorus (OP) pesticides are used worldwide for insect control in both agricultural and residential areas. Among the most commonly used OP pesticides are chlorpyrifos (Dursban®), diazinon (Dianon®), and malathion (Carbofos®). The advantages of these pesticides compared to organochlorine pesticides are higher toxicity, lower cost of production, relatively rapid degradation, and low toxicity of the degradation products.

Most of the OP pesticides have the same general structure:

\[
\begin{align*}
S \text{ (or O)} \\
R_1O-P-O \text{ (or S)}-X \\
\text{or R}_2
\end{align*}
\]

The organophosphates (OPs) contain a phosphorus atom with a double bond to sulfur or oxygen, \(R_1\) and \(R_2\) are ethyl or methyl functional groups, and \(X\) is a group, specific for the different pesticides.

Reigart and Roberts (1999) found that the main toxicity in humans of the OPs results from inhibition of the enzyme acetylcholinesterase (AChE), in the nervous system, resulting in respiratory, myocardial and neuromuscular transmission impairment.

The mechanism of human metabolism and environmental degradation of OPs includes desulfuration of compounds, containing double bonds with sulfur, and hydrolysis with detachment of the bond between phosphorus and O (or S) atom, or the latter with the leaving group. An example of human metabolism of chlorpyrifos is presented on Figure 1.

Chlorpyrifos is bioactivated to a more potent inhibitor of cholinesterases by cytochrome P450–dependent desulfuration in the liver to chlorpyrifos-oxon (Needham, 2005). This oxon-form is hydrolyzed to diethylphosphate (DEP) and 3,5,6-trichloro-2-pyridinol (TCP), a specific biomarker, resulting from the leaving group. On the other side, the parent compound is also hydrolyzed with formation of O,O-diethylthiophosphate (DETP) and TCP.
Organophosphorus pesticides are generally acutely toxic. However active ingredients within the group possess varying degrees of toxicity. Minton and Murray (1988) have divided OPs into three groups. The first and most toxic group, (e.g. chlorfenvinphos), has an LD$_{50}$ in the range of 1-30 mg/kg. The LD$_{50}$ range for the second group, (dichlorvos), is 30-50 mg/kg, and the least toxic group, (e.g. malathion), has a range of 60-1,300 mg/kg.

**Routes of Entry:** Exposure to pesticides might occur in occupational or domestic use due to improper handling, or intentionally via poisoning or use by terrorists. Three specific ways pesticides enter the body are dermal (i.e., skin absorption), inhalation, and oral (i.e., ingestion). In cases of dermal intoxication, wet, dry, or gaseous forms of pesticides can be absorbed through the skin. Pesticides in the form of dusts, spray mists, or fumes may enter the body through inhalation. The third route of intoxication is oral, where pesticides can be ingested unintentionally.

**Biomonitoring of intoxications with organophosphorus pesticides:** Different approaches for detection of exposure to OPs have been developed and are currently in use.

**Acetylcholinesterase (AChE) in erythrocytes.** Activity of this enzyme in erythrocytes can be measured in order to assess occupational or accidental exposure to organophosphates. Depression of acetylcholinesterase is not suitable for monitoring
occupational exposure in common ranges or for exposure assessment of the general population.

**Butyrylcholinesterase (BuChE) in blood plasma.** This is another method for monitoring exposure to organophosphates. The method is not sensitive enough to inhibition of the enzyme less than the range of activity in humans and does not provide information on the organophosphate(s), which caused the intoxication.

**Determination of OPs in blood and serum.** Lacasse, E., Dreyfuss, M. F., Gaulier, J. M., Marquet, P., Daguet, J. L., & Lachâtre, G. (2001) described a rapid, specific and sensitive method for the determination of 29 organophosphorus pesticides in blood and serum, involving a rapid solid-phase extraction procedure using Oasis HLB cartridges and gas chromatography, coupled to mass-selective detection.

**Determination of Dialkyl Phosphates in Human Urine.** A different approach for biological monitoring of organophosphates is the determination of dialkyl phosphate metabolites in human urine (Hardt & Angerer, 2000). Most of the organophosphorus pesticides are metabolized to at least one of the following dialkylphosphates: dimethylphosphate (DMP), diethylphosphate (DEP), O,O-dimethylthiophosphate (DMTP), O,O-diethylthiophosphate (DETP), O,O-dimethyldithiophosphate (DMDTP), or O,O-diethyldithiophosphate (DEDTP). These metabolites are generally excreted in the urine within 3-5 days following exposure. This method could be used for biological monitoring of occupational exposure to organophosphates.

![Figure 2. Structures of dialkyl phosphate metabolites](image)

**Organophosphorus nerve agents**

The first organophosphorus nerve agent tabun (GA) was synthesized in Germany during the early 1930s. By the end of World War II, sarin (GB) and soman (GD), were discovered and produced in large quantities. British scientists experimented with a cholinergic organophosphate of their own, called diisopropylfluorophosphate (DFP), during the World War II. The British later produced VX nerve gas, which was many times more potent than the G-agents, in the early 1950s.
Biomonitoring of intoxications with organophosphorus nerve agents

**Acetylcholinesterase (AChE) in erythrocytes and Butyrylcholinesterase (BuChE) in blood plasma.** These methods could also be used for biomonitoring of intoxications with organophosphorus nerve agents, due to the higher toxicity of these compounds. The methods are not sensitive to low doses of intoxication and do not provide evidence for the type of the agent, causing the poisoning.

**Urinary metabolites of the organophosphorus nerve agents.** Driskell, Shih, Needham, & Barr, (2002) found that urinary metabolites of the organophosphorus nerve agents sarin, soman, tabun (GA), VX, and GF can be analyzed and quantified after concentration of urine samples, codistillation with acetonitrile, derivatized by methylation with diazomethane, and analyzed by Gas chromatography-mass spectrometry-tandem (GC–MS–MS).

**Fluoride Reactivation Method.** One of the most appropriate biomarkers for the verification of organophosphorus nerve agent exposure is the conjugate of the nerve agent to butyrylcholinesterase (BuChE). Three studies (Degenhardt et al., 2004; Van der Schans et al., 2004; & Polhuijs, Langenberg, Benschop, 1997) discussed that the phosphyl moiety of the nerve agent can be released from the BuChE enzyme by incubation with fluoride ions in acid media and the resulting organophosphonofluoridate can be analyzed with gas chromatography-phosphorus specific detection (GC-NPD) or gas chromatography–mass spectrometry (GC–MS).

**Analysis of phophylated peptides after enzymatic digestion of modified cholinesterase.** Another approach is isolation of adducted butyrylcholinesterase (BuChE) from plasma, followed by pepsin digestion and LC-MS analysis. The method has an advantage against the fluoride reactivation in detection of dealkylated (aged) phosphorylated BuChE (Fiddler et al., 2002).

**Chlorine**

Chlorine is one of the most commonly manufactured chemicals in the United States. It is widely used chemical in water treatment plants to purify drinking water. Its most important use is as bleach in the manufacture of paper and cloth, but it is also used to make pesticides and solvents. Chlorine is also used in the manufacture of numerous organic chlorine compounds, the most significant of which are 1,2-dichloroethane and vinyl chloride, intermediates in PVC production.

Chlorine was used during World War I as a choking (pulmonary) agent. Chlorine is a toxic gas that seriously irritates the respiratory system. When liquid chlorine is released, it rapidly turns into a gas that stays close to the ground and spreads rapidly. Because it is heavier than air, it tends to settle in low-lying areas. However, chlorine is not a persistent agent. If it is not dispersed in large quantities, the effects are more psychological and irritating.

Recent events in Iraq have elevated the fears that terrorist groups may use toxic chemicals as chemical weapons against vulnerable populations. Brulliar (2007) reported that chlorine gas has been used by the insurgents in Iraq as a chemical weapon to terrorize the civilian population and coalition forces. At the beginning of 2007, at least six gas attacks were reported in Iraq, raising concerns that lax security at U.S. chemical plants could make the USA, vulnerable to similar attacks. The 150-pound chlorine tanks typically used in chlorine bombs are ubiquitously used across the world.
There have been no reports of terrorist acts involving high concentration dioxins to date. However, well-known dioxins exposure incident took place by explosion of an agricultural chemical plant at Seveso, Italy, in 1976. A large number of animals reportedly died and 152 people developed chlor-acne (Mitchnell, 1996).

Dioxin is one of the most toxic and persistent chemicals. The term Dioxin is commonly used to refer to a family of toxic chemicals that all share a comparable chemical structure and a common mechanism of toxic action. Dioxins are introduced to the environment as a consequence of explosions and accidents in chemical facilities, especially where polyvinyl chloride (PVC) is present. Among the most serious dangers that PVC poses to humans and the environment occurs when PVC is burned. The widespread chemical manufacturing and use of PVC presents much potential as terrorist targets.

Dioxins could also be introduced to the food chain. In 1999, the vulnerability of the food supply was illustrated in Belgium, when chickens were unintentionally exposed to dioxin-contaminated fat used to make animal feed (Bernard, 2002). Dioxin does not cause immediate symptoms in humans and the contamination was not discovered for months. The dioxin was probably present in chicken meat and eggs sold in Europe during the first months of 1999. This incident underscores the need for early diagnoses of unusual or suspicious health problems in animals as well as humans.

Mycotoxins

Toxins are poisons produced by bacteria, fungi, and animals. They are classified in a gray area between chemical and biological agents. Naturally occurring toxic compounds used to be difficult to produce but many now can be synthesized and produced in large quantities. Many of these substances greatly exceed the toxicity of nerve agents.

Mycotoxins are secondary metabolites of fungi. In other words, the mycotoxins are not required for the growth and survival of the fungal species. The amount and type of mycotoxin produced depends on a complex and not well-understood interaction of factors that include, but are not limited to, nutrition, growth, substrate, moisture, temperature, maturity of the fungal colony, and competition among fungi and other microorganisms. Additionally, even under the same conditions of growth, the profile and quantity of mycotoxins produced by toxigenic species can vary widely among fungal species.

When produced, mycotoxins are found in all parts of the fungal colony, including the hyphae, mycelia, spores, and the substrate on which the colony grows. Mycotoxins are relatively large molecules that are not significantly volatile. Therefore, an inhalation exposure to mycotoxins requires generation of an aerosol of substrate, fungal fragments, or spores. Spores and fungal fragments do not pass through the skin, but may cause irritation if there is contact with large amounts of fungi or contaminated substrate material.

Some of the toxins produced by fungi are considered biological weapons (BW). However, trichothecenes are different from most other toxins that could be used as weapons because they can act through the skin. Trichothecenes could be
compared to blister agents (one of the deadliest chemical warfare agents-CWA). The minimal dose of T-2 toxin required to produce skin injury is about 400-fold lower than it is for mustard (Organization for the Prohibition of Chemical Weapons). Inhalation toxicity is similar to that of the blister agents mustard or lewisite.

A terrorist organization may be able to produce trichothecene by storing grain improperly. The producer organisms are easy to acquire and can be grown in large fermentation vessels. The fusarium species that make trichothecenes can grow on wheat and barley. Aflatoxin-producing fungi prefer oil-rich seed such as corn and peanuts.

Filamentous fungi not only from the genus fusarium produce the trichothecene mycotoxins. Other species like myrotecium, trichoderma, and stachybotrys also produce trichothecene mycotoxins. The structures of approximately 150 trichothecene derivatives have been described in the literature (Ciegler & Bennett, 1980; Forgcs & Carll, 1962; & United States Army Medical Research Institute for Infectious Diseases [USAMRID]).

The trichothecenes are extremely stable to heat and ultraviolet light inactivation. Heating to 350°C for 30 minutes is required for inactivation, while brief exposure to NaOH or Ca(OCl)2 solutions destroys trichothecene toxic activity.

T-2 was discovered as a weapon by Soviet scientists after a spring harvest delayed by World War II produced flour contaminated with fusarium and was unknowingly baked into bread, which was unknowingly ingested by civilians. Some civilians developed a protracted lethal illness called alimentary toxic aleukia (ATA) characterized by initial symptoms of abdominal pain, diarrhea, vomiting, prostration, and, within days, fever, chills, myalgias, and bone marrow depression with granulocytopenia and secondary sepsis (USAMRID).

In a terrorist attack trichothecene mycotoxins could be inhaled, ingested, or acquired through contact with the skin and eyes. In an airborne form, trichothecene mycotoxins can be dispersed through the air or mixed in food or beverages. Once released, the toxin could be dispersed quickly into the air and will most likely appear in the form of an oily liquid with a peppery smell that resembles yellow rain.

Conclusions

Currently, many experts consider the probability of a large-scale chemical attack with a military-grade agent (such as VX, sarin, nitrogen or sulfur mustards) to be very unlikely, considering the current limits on terrorists' ability to manufacture and deliver such agents. However, the ability to conduct small-scale attacks with other toxic substances exists. The possibility of inflicting mass casualties through attacks on, or sabotage of, chemical manufacturing plants cannot be ruled out. Therefore, national governments should be more proactive in minimizing the risks of such attacks and be prepared to reduce the severity of the consequences. Local emergency planning committees and HAZMAT teams should be properly funded, trained, and equipped to improve their capabilities for mass decontamination, medical triage, and treatment of large numbers of casualties. In addition, the security of chemical plants and the transportation infrastructure will be the key to the prevention of terrorist acts.
References


RIGHTS OUTSIDE THE CONTRACT AND CONVENTION

Jasdev Singh Rai*
Sikh Human Rights Group, United Kingdom

ABSTRACT
The normative state-citizen relationship expounded in western state theory assumes a contract between the relatively disarmed individual protected by rights and the coercive state entrusted with responsibilities for security and liberty. Terrorism changes this relationship. A distinction needs to be made between territorial conflicts, often labelled terrorism which uphold the social contract and the new Al Qaeda international terrorism, which intends to destroy it. It raises questions whether current international norms are applicable to the internationalist terrorists and given derogations by state parties, whether a new international convention with some dilution of rights and oversight is needed.

Terrorism is an emotive term with the consequent effect of demoting the status of an alleged terrorist from that of the ordinary human being to a sub-human level in the minds of many. It influences the process of justice and rights at several stages and counter-terrorism measures have increasingly ignored international human rights norms. There are numerous definitions, descriptions, and categories of ‘terrorism’ advanced by different authorities. The UN has not been able to agree on one.¹ Here two categories and patterns are proposed for the sake of discussing civil and human rights. The first is territorial with some variants that arise out of intra-state dissent seeking to change power relations within the state. The second is a broader ideologically driven new form of terrorism that is not restricted to a state or a territory but has global ambitions. It is amorphous and ambiguous, as well as contrary to the nature of state theory and international order.

Fundamental human and civil rights and derogations in relation to the procedures of intelligence gathering, the process of pre-trial incarcerations as suspects, detention periods, treatment of ‘suspects’, the standards of justice, and the eventual sentence, have to be considered in context of the nature of the two different forms of ‘terrorisms’ and their implications to the conventional world of Westphalian nation states as well as the social contract upon which the state-citizen relationship is based.

Differentiating The Two Forms Of Terrorism And Its Impact

The first type is mainly intra-state struggles often employing insurgency but labelled terrorism by states. It arises largely in reaction to perceived or real political, social, and cultural injustices by the state against a ‘people,’ group or even ‘the people.’ It is also one of the debris from the decolonisation process where previously

⁠

* Direct correspondence to jasdev@shrg.net
© 2008 by author, published here by permission
The Journal of the Institute of Justice & International Studies Vol. 8

¹ Ad Hoc Committee report dated 29 Feb 2008. A/AC.252/2008/L.1 Para 5 ‘Some other delegations stressed the need for the comprehensive convention to provide for a clear legal definition of terrorism.’
distinct nations have been denied their own self-determined territories\(^2\) or where occupations have affected the independence of an otherwise sovereign people.\(^3\) In some cases, secularisation of politics has been challenged by indigenous cultural movements, for instance Islamic revivalism in countries such as Egypt and Algeria. Often these have wanted to replace a secular authoritarian system with a theocratic authoritarian system before the Al Qaeda phenomenon. While most of these conflicts remain confined within the territorial limits of their target,\(^4\) some variants, such as the Palestinians, take their struggle internationally to achieve recognition of the ‘cause’ and attack the state where its own security and legal systems could not be enforced.

These proponents of terrorism act within contemporary Westphalian nation-state systems and political theories. Their intention is to replace the State with another administration or political system, democratic or authoritarian, secular or theocratic, impose a greater autonomy for a group within the state or create another secession state out of the existing one. They intend to retain the normative state-citizen relationship system and engage with the international community as well as restore some form of human rights and the principle of social contract (Rousseau) that upholds the state as a just sovereign representing the will of the people.\(^5\)

Regardless of being labelled ‘terrorist’ by states and even tacitly by the United Nations,\(^6\) many of these struggles and insurgencies can be better denominated other labels such as liberation struggles, revolutions, or anti-oppression conflicts. Some notable examples are the Kashmir struggle, the Myanmar regional dissent, the Tibetan independence struggle, the Palestinian struggle, the Baluchistan struggle (Pakistan), and Basque separatism. A common justification of these struggles is that they are denied normal recourse to political and judicial remedies for their grievances. The theories of Hobbes and Locke and even Burke would largely agree with these struggles as reactions to bad government.\(^7\) In fact, it could be argued that these struggles are consistent with international conventions notably the preamble\(^8\) to the Universal Declaration of Human Rights (UDHR) and the 1977 Additional Protocol I to the 1949 Geneva Conventions, Part I Art 1.4.\(^9\)

---

\(^2\) For instance, Kashmir and Punjab in India, Baluchistan in Pakistan.

\(^3\) Kurdish areas in Turkey and Iraq, Palestinian in Israel and Palestine.

\(^4\) Baluchistan struggle in Pakistan.

\(^5\) In secular authoritarian regimes the will of the people is often interpreted creatively and even distorted as ‘good of the people’.

\(^6\) The UN World Summit in 2005 14-16 September meeting at the United Nations HQ New York failed to make distinctions of forms of ‘terrorisms’ Para 81. ‘We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security’.

\(^7\) Hobbes, Thomas. Leviathan, first published 1651. Quoted from Penguin Classics, London 1985 reprint. Chapter 21, pp 269 Of Commonwealth:

If the Sovereign command a man (though justly condemned) to kill, or mayme himself; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live; yet hath that man the liberty to disobey. Further Hobbes goes on to say p272. If a Monarch, or Sovereign Assembly, grant a Liberty to all, or say any of his Subjects; which Grant standing, he is disabled to provide for their safety, the Grant is void. Both can be interpreted as failure of government in the eyes of the group of subjects or citizens.

\(^8\) Universal Declaration of Human Right (adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December, 1948), reads: “Whereas it is essential if man is not compelled as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

\(^9\) Additional Protocol I to the Geneva Convention of 1949, (Act 1 C4), passed in 1977, declared that armed struggle can be used, as a last resort, as a method of exercising the right of self-determination.
In these conflicts, the states should, as expected, comply with international human rights norms when dealing with the challenges and only justify derogations in extreme cases by formally declaring states of emergency. International norms anticipate such struggles and clearly delineate the rights of the accused or alleged ‘terrorists’ and the obligatory conduct of the state in the broader framework of the UDHR (particularly Article 2\textsuperscript{10} but also assumed throughout) and further in the International Covenant on Civil and Political Rights (ICCPR) which lists non-derogable rights in any emergency.\textsuperscript{11}

The new form of terrorism however is entirely different and has emerged mostly in the last two decades. It is ideologically driven, challenges the state-citizen relationship, and seeks to destroy and replace international plurality and the order of states with an entirely different one. It is not restricted to reform within one territory or even one region, but incorporates several disparate territorially-based insurgencies with a global terrorism. Al Qaeda’s ambitions range from forcing out Western presence from holy lands (Saudi Arabia),\textsuperscript{12} displacing the current Saudi Government with a more visionary (evangelic) Islamic government,\textsuperscript{13} changing the regime in Pakistan, reinstating the Caliphate\textsuperscript{14} and to a more dangerous global ambition of creating Dur il Islam (land of Islam). In other words establishing a world of Islam everywhere.\textsuperscript{15} Fouad Hussein, a Jordanian journalist with access to Al Qaeda’s leadership in Iraq claims in his Arabic language book, ‘Al Zarqawi, The second generation of Al Qaeda (2005)’ that Al Qaeda has a seven phase plan culminating in a global Islam. Whether this is mere rhetoric or not, it has inspired many a young imagination to believe in a vision of an alternative Islamic world order. Sayyed Qutb, the Egyptian Islamic ideologue who influenced the Egyptian Brotherhood and inspired Al Qaeda leaders such as Aymen Al Zawahari (Al Qaeda’s second in command), was imprisoned and latter executed in 1966 by the Egyptian Government, writes in his book, Milestones, of the obligation of bringing Islam to the entire world.\textsuperscript{16}

The new form of terrorism is not directed only against the interventions of the United State’s in the Middle East, although this may have provided it a core cause. It seeks to destroy the very order of the Westphalia state system, the sovereignties of the

\textsuperscript{10} UDI; article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind….. political or other opinion.\textellipsis

\textsuperscript{11} Article 4 of the ICCPR lists Articles 6,7,8 (Para 1,2) 11, 15, 16 and 18 as nonderogable.

\textsuperscript{12} Laden, bin Osama, Fatwa in Al Quds, Al Arabi August 1995. "Declaration of War against the Americans Occupying the Land of the Two Holy Places"

\textsuperscript{13} ibid

\textsuperscript{14} Interview Oct 21, 2001, from bin Laden Message to the World, Verso, 2005, p.121

\textsuperscript{15} Statement released by the World Islamic Front on 23 Feb 1998 in the name of Osama bin Laden and Ayman al- Zawaheri in which they start with references to the Prophet’s words in the ‘Book’. But when the forbidden months are past, then fight and slay the pagans wherever ye find them, seize them, beleaguer them, and lie in wait for them in every stratagem (of war).” They go on to justify killings of Americans and their allies.

\textsuperscript{16} Qutb, Milestones written from the prison between 1955 and 1964. Chapter 4 Jihad in the cause of God Of course, in that case the defence of the ‘homeland of Islam’ is the defence of the Islamic beliefs, the Islamic way of life, and the Islamic community. However, its defence is not the ultimate objective of the Islamic movement of Jihad but is a means of establishing the Divine authority within it so that it becomes the headquarters for the movement of Islam, which is then to be carried throughout the earth to the whole of mankind, as the object of this religion is all humanity and its sphere of action is the whole earth. (The book is available complimentary at http://www.youngmuslims.ca/online_library/books/milestones/hold/index_2.asp last visited on 10th August 2008)
states and the self determination of people to pursue their own political and cultural systems. It seeks to transfer governance from the territorially-based state system to governance of people across lands under a ‘global’ Caliphate. The new terrorism has incorporated territorially-based struggles as part of its broader strategy to create Islamic states from which to launch its even greater war to pursue a Universalistic agenda. Al Qaeda’s ambition cannot be resolved by a localised dispute resolution, by conceding a territorial claim, by agreeing to a better treatment of a particular people or even by the West leaving the Middle East. Al Qaeda sees its current struggle as the first stage to impose a new world view.

This terrorism has also proved to be resistant to counter-terrorist actions to date. It has grown in size, reach, and popularity. It is considered that it will last for a long time and some estimate it could continue as long as 30 years.  

**Counter-Insurgency and International Norms**

Counter-insurgency measures, however, have failed to discriminate between the two forms of ‘terrorisms’ and been reactive without considering their impact on society and the nature of the state itself. Asserting sovereignty and claiming threats to national and international security and fighting anti-terrorism, many states are increasingly disregarding international norms. For instance there have been incommunicado detentions, prolonged detentions without trials, torture, degrading treatment, extrajudicial executions, lack of fair trials, and interference with privacy of both suspects and ordinary people.

The lack of distinction between intra-state conflicts and the new international ‘terrorism’ has been taken advantage of by some countries who have put their domestic insurgencies or victims of their own excesses on par with this new type of international terrorism. Consequently these states have absolved themselves from observing normal human rights standards. The ‘Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism’ expressed concern about this trend stating in his report to the Commission on Human Rights 2005:

‘Besides situations where some states resort to the deliberate misuse of the term, the Special Rapporteur is also concerned about the more frequent adoption in domestic anti-terrorism legislation of terminology that is not properly confined to the countering of terrorism. Furthermore, there is a risk that the international community’s use of the notion of “terrorism,” without defining the term, results in the unintentional international legitimization of conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against “terrorism” however defined.’

---

18 2006 Quadrennial Defence Review by the Pentagon and summarised by the then Secretary of Defence, Donald Rumsfeld. (last visted on 10th August 2008 http://www.defenselink.mil/pubs/pdfs/QDR20060203.pdf)
There are some principle issues that need to be considered in counter-terrorism campaigns.

- In disregarding human rights norms, is the state as a sovereign entity overplaying sovereignty and going beyond its remit?
- Can ‘terrorists’ and suspected ‘terrorists’ expect the same standards of civil and human rights as ordinary citizens?
- Do these distortions and derogations affect the lives and attitudes of ordinary law abiding citizens?
- What are the safeguards for the innocents caught in this net of suspects?
- Will these policies affect the state citizen relationship in the long term?

The state is sovereign, but its sovereignty cannot override or exceed the limits imposed by the positivist (Bentham) or natural rights (Locke) of its subjects which are part of the compact between state and citizens. Ideally the modern state cannot be sovereign without the consent of the citizens. However limited the concepts of the original Hobbesian compact or social contract (Leviathan) were, it is a fundamental model upon which the state and understanding of its sovereignty has evolved with substantive developments in favour of citizens (Rousseau) in the last four centuries in the West as a liberal secular state. The United Nations’ conceptual basis of state, its power and the rights and protections of citizens from its coercive power are also based on the ideas of a compact. It is this assumed compact which legitimises the state to disarm all non-state militia and claim sole legitimacy to violence\(^\text{20}\). As states around the world have voluntarily joined the United Nations, it becomes implicit in their membership of this body that they submit to the principles of the compact and the Charter of the UN. Moreover states are part of what Held calls globalised multicentric governance\(^\text{21}\) and international interdependence.

Among the state’s primary duties are to protect life and liberty, respecting the dignity of human beings, protecting freedom of conscience and honour the rights of the individual against its own coercive power. In situations such as international terrorism, the state has to balance between these primary responsibilities of protecting life and liberty of its citizens and abiding by international norms. Therefore, the state’s sovereignty is not absolute in itself but subject to the consent of the people and its primary responsibilities and further limited by non-derogable rights as well as international interdependency.

The non-derogable rights that states are obligated to respect include (ICCPR):

- The right to life
- Freedom from torture
- Protection against retrospective criminal penalties
- Right to recognition as a person before law
- Right to freedom of thought, conscience, and religion
- Right not to be imprisoned merely for failure to fulfil a contractual obligation.

\(^{20}\) The US however has allowed the right to bear arms to its citizens.

Some of these rights, such as the right not to be tortured, give rise to other implied rights such as right of habeas corpus as an incommunicado detention could lead to opportunity for torture.

Anti-terrorism measures often target minority communities or political interests. The state with the weight of majority public opinion which Mill called ‘tyranny of the majority,’ whether nurtured or in reaction to an event, can claim that its actions against alleged ‘terrorists’ are in exercise of its duty, the protection of the people and consistent with the ‘harm principle.’ Virtually anything can be justified in this primary duty. But as Russell says, ‘most men have no liberty of choice as to the state to which they belong and none have liberty, nowadays, to belong to no state.’ Therefore individuals and minorities need protection against the will of the majority too. In July 2001, the UN Human Rights Committee (HRC) in General Comment 29 on Article 4 of the ICCPR indicated that some other rights should be upheld during a state of emergency partly to give effect to obligations of non-discrimination. These include:

- The rights of minorities
- The right of all detained people to be treated in a way which respects their dignity
- Fundamental aspects of the right to fair trial, such as the presumption of innocence, especially if the death penalty is available
- Prohibition of arbitrarily deprivation of liberty

**Violating Norms**

When faced by insurgency, states however do deviate from norms, even the non-derogable ones. The US (US) established Guantanamo prison camp for prolonged detentions without charges. Its security agencies and forces have engaged in torture and the US has renditioned ‘interrogation’ to other countries knowing that extreme forms of torture would be used. It has kept prisoners incommunicado around the world. It has lowered the standard of evidence needed in prosecution by introducing military courts to try alleged terrorists. Warrantless arrests are common in the US. Border controls have been extended indiscriminately to apply to anyone considered to have had any association with any organization of any type arbitrarily deemed ‘terrorist’ by the state administration without recourse to challenge. Similar practices have been routine in many countries such as China, Turkey and India.

It seems many countries have tacitly decided that international norms interfere with their efforts to deal with ‘terrorism’ and consequently disregard them in practice. And irrespective of the non-discrimination aspect of international norms it appears that there are different levels of rights applicable to ordinary citizens and alleged terrorists in many countries. In 1989 the Indian state passed an amendment to its constitution which absolved it from protecting life and liberty of its citizens in some...
regions. It is to be noted that the allegation of ‘terrorist’ is used loosely by many states to include people who challenge the state’s unity and in some cases even those who politically challenge state policies.

States have also abused their prerogative licentiously to disregard Article 17 of ICCPR dealing with right to privacy by invading the privacy of ordinary citizens and going beyond reasonable international derogations. For instance in the United Kingdom, the state surveillance system now picks up emails, telephone calls, and faxes of almost everyone. A scandal that broke out involved the infringement of lawyer-client privilege and listening into MP- constituent discussions. Under the Patriot Act of 2001, US security agencies have been given wide powers to gather intelligence and consequently interfere in the otherwise protected normal privacy and rights of ordinary citizens.

Generally majority opinion, as a form of tyranny, takes ownership of fundamental rights and deprives the individual his/her fundamental right of consent. The current terrorism is predicted to last over 30 years, which means that at least two generations of British people and indeed people in some other countries such as the US could lose their right to privacy. Under new legislative powers being introduced by states, the autonomy of the individual is becoming an abstract notion and a feature of the past.

In violating these rights the state is interpreting the ‘compact’ unilaterally in its earlier Hobbesian form in spite of substantive changes and developments that have taken place over the last four centuries. It is exploiting a climate of fear and the ‘excited’ opinion of the ‘majority’ in depriving a minority of ‘suspects’ of the rights against the power of the state that are entrenched in later developments of the social contract. Clearly the mechanisms to check the current set of international norms are not effective and there is tension between expectations laid upon the state by international norms and its practices in dealing with terrorism. There is also abuse of the current emotions attached to the term ‘terrorism’ as states derogate with impunity from international norms to address their domestic conflicts as all forms of alleged terrorism are being treated without distinction.

Differentiating Standards

However while criticising the state and defending human rights, it is appropriate to ask whether the terrorist can expect the same standard of human rights
protection that is accorded to the ordinary citizen and if the new terrorist is even part of this compact.

Current human rights practice is to treat all alleged terrorists the same as ordinary people breaking the law. The various bodies of the United Nations and other regional bodies stress that while derogations may be permissible in circumstances of ‘emergency’ or extreme challenges, no violations of non-derogable rights can be permitted. Following attacks on the twin towers in New York on the 11th September 2001, the UN Security Council, while condemning the attacks and then endorsing a series of actions, nevertheless called upon states to conform to international human rights standards and reaffirmed resolution 1269 of 1999 in which conformity to international human rights was emphasised. This was further reiterated in the General Assembly Resolution, ‘UN Global Counter-Terrorism Strategy’, adopted on 8th September 2006. The preamble, page 1 confirms respect for human rights and emphasises that states comply with their obligations under human rights law. In April 2005 the then Commission on Human Rights (subsequently changed to Council on Human Rights) decided to appoint, through Resolution 2005/80, a Special Rapporteur on promotion and protection of human rights while countering terrorism. These and other various measures have shown that the international community remains committed to human rights and the inviolability of non-derogable rights under any circumstances. Although termed as fundamental rights most rights are intrinsically based on the concept of the social contract (Rousseau) despite the ongoing debate between ‘natural rights’ (Hobbes, Locke) and ‘positivist’ rights (Bentham).

The Social Contract And New Terrorism

A more nuanced and detached response to the question whether the compact and consequently all the human rights apply to ‘terrorists’ needs to take note of the two broad categories of terrorism as described before and their approach to the contract. The territorially orientated terrorism that threatens a particular state is recognised and understood by international institutions within the current frameworks of international norms. The state’s prerogative to protect itself and meet its obligations are ceded by accommodating states of emergency with derogations but packaged with non-derogable rights. It can be argued that as this form of terrorism mostly concerns a single state, territorially confined and is associated with issues of governance, the expectations upon the state to adhere to non-derogable rights with periodic review of

33 Id. 3.(f).
34 Security Council Resolution 1269 (1999) preamble, p 1. ‘Emphasizing the necessity to intensify the fight against terrorism at the national level and to strengthen, under the auspices of the United Nations, effective international cooperation in this field on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for international humanitarian law and human rights.’
35 UN General Assembly Resolution A/RES/60/288 8 September 2006.
36 Resolution . UN Global Counter-Terrorism Strategy section IV Para 2.
37 Concept of fundamental rights inherent in the nature of living beings and beyond the authority of any Government or international authority to dismiss. This was the position of Hobbes and Locke.
38 Bentham, dismissed natural rights s nonsense and held that rights were part of a utilitarian legal compact which he proposed should be based on the ‘happiness’ principle, i.e. that which led to the ‘greatest happiness of the greatest number.’
derogable rights is high and consistent with the conventional relationships among citizen, state, and international institutions.

As explained above, the second form of terrorism does not respect the Westphalia state system or the premise on which the entire international order is established and international conventions are based. It does not affect a single particular state but the entire community of states as it can strike anywhere and anytime if it suits its purpose and strategy. Its goal is not to restore the social contract in some form with a different authority or political system or within a secession state but to create an ideological (theological) transworld regime.

Seen in ideological contexts there are two Universalistic agendas pitched against each other in this conflict. On the one hand is the familiar and well-established nation-state with the reformed social contract theory which evolved in the West and now considered to be almost the only form of rational and functionable system. It is based on Grotius’ separation of rights from theology. Its aspiring ideology is European liberal secular political philosophy with individual human rights, freedom of conscience, and democratic Government. This is the ideal nation-state assumed in the many international instruments that have been agreed at the United Nations irrespective of the authoritarian character of some states. The ambition to create a world of democratic liberal states is at the heart of western universalism which dominates international institutions and informs its political discourse and intellectual pursuits. However its strategy is to persuade non-democratic states through example and gradual but apparently inevitable progression as they integrate deeper into international institutions.

Challenging it is a revisionist Universalistic theocratic neo-Islamic ideology which emerged in countries like Egypt from organisations such as the Muslim Brotherhood under the leadership of ideologues such as Al Banna\(^{39}\) and Sayyed Qutb. It has an ambitious vision to create a particular form of Islamic hegemony in the contemporary world. This new interpretation makes Islam comfortable with science and technological advancements but promotes an authoritarian theocratic political order with a system of justice with reference to theology (Islam) as a norm across the world. It has engaged and incorporated several different strands of Islamic movements, such as the Salafi (Wahabi)\(^{40}\) interpretation and the Indian Deobandi school\(^{41}\) This neo-Islamic vision intends to destroy the modern social contract state system and replace UN institutions with a powerful world Caliphate negating the entire enlightenment discourse that has shaped the world, the nation-state, democratic politics, and the human rights theory in the last three centuries. Its ideologues and strategists have chosen international insurgency as a way of gaining popularity in the Muslim masses, rise in membership, and challenging western liberal secularism. The threat of the new terrorist is therefore systemic and global. In this conflict the entire world cannot be put in a state of emergency in response to this global insurgency. Nor can a few countries which may have had one or more incidents declare states of

\(^{39}\) Hassan Al Banna started the Muslim Brotherhood and considered western secularisation as the biggest threat to Islam.

\(^{40}\) Salafism which is sometimes also known as Wahabism, arose form Arabia and is the creed of Saudi Arabian monarchy. It believes in the interpretation and form of Islam lived by the first three generations of Muslims.

\(^{41}\) Deobandi interpretation was started in British India from the Deobandi region following the ‘fiqh’ (interpretation) of Abu Hanifa and has influenced Sunni Muslims in India, Pakistan, and Afghanistan. It is followed by the Taliban.
emergency or state of war with differing levels of derogations. Some do not even declare a state of emergency and hence avoid international accountability. The US announced a ‘war’.

Since the actors of the new globalised form of terrorism have chosen to discard the social contract and put themselves outside it by choice and further embarked on a campaign to destroy its principles it can be argued that they cannot expect to enjoy the same degree of protection of civil rights as people within the contract or its variants. There is even a rationale for a different level of rights for terrorists and suspected terrorists engaged in this new form of terrorism. Moreover, if the liberty and life of the citizen is a basic legal or natural right (depending on which philosophical concept the state uses) then there is, as Pufendorf would state, a concomitant duty upon the state to protect the citizen not only from its own power but from other threats and in this case from the terrorist who essentially creates a state of insecurity within the state’s apparent secure environment.

Currently derogations are meant to be temporary with some scrutiny by United Nations bodies such as the Council for Human Rights until the situation is restored to a manageable level. But since there is no clear negotiable end game with the new form of global terrorism, the state of insecurity can theoretically last forever until one side is completely defeated in the struggle of two conflicting universalistic agendas.

But what is an acceptable lowering of standard? Given that the people engaged in this form of global terrorism are intent on destroying the very international order which guarantees non-derogable rights, it is right to ask if all or any of the inalienable rights are applicable in their case and furthermore which derogable rights can be diluted. Moreover in a prolonged, almost permanent, state of conflict can permissible derogations end up becoming de facto norms for a particular form of threat?

Impact of Derogations

These issues need to take into context two subsequent questions that arise: Whether derogations and particularly suspension of inalienable rights can have a detrimental effect on the very society that it is intended to protect? Moreover what about the innocents who are detained but finally released with considerable impact on their health, life, and integrity?

Many liberal societies resist prolonged derogations particularly for fear that society may develop tolerance for a form of human rights violation and the state may develop a tendency towards authoritarianism. An argument presented by many academics, commentators, politicians, and human rights activists is that derogations reflect equally on the society that engages in them and can affect derogations as much as they affects the victim. These derogations often ends up brutalising the very society that human rights protections attempt to protect and society develops a higher tolerance for violence. Jurgen Habermas, in an interview dialogue with Giovanna Borradori in New York expressed this concern strongly.42 There are many anecdotal rather than empirical references to this. Nazi Germany stands out as one of the most striking examples of a society that engaged directly or tacitly in the genocide of a

minority (Jews) once it ventured on that path. In India a survey of police attitudes in 1997 revealed that a majority of police officers considered it useful to act extrajudicially.\textsuperscript{43} The violations of human rights are so endemic in India that apart from some civil rights groups, civil society rarely raises concerns about the plight of minorities such as the Naga, Hill tribe people, Dalits, and others. Similarly in China, civil society seems quite oblivious and even supportive of government measures in Tibet to civil uprisings.

The United Kingdom has a long history of abuses in Northern Ireland and notably during the colonial period against colonised people. It is to be noted that the UK has the highest crime rates\textsuperscript{44} and incarceration rates in Europe.\textsuperscript{45}

While torture is apparently not used within the US although the administration has justified it,\textsuperscript{46} US security agencies are often implicated in torture in other countries or theatres of war or encouraging torture through ‘rendition’. In its history the US has been accused of several human rights violations both within the country and abroad particularly by sponsoring insurgencies across the world\textsuperscript{47} or actions by its armed forces. It has been accused of state terrorism by some.\textsuperscript{48} It is however a reflection of US society that most people carry guns not to protect themselves from the possibility of an oppressive state but to protect themselves from other individuals. Moreover, the US has the highest incarceration rate in the world.\textsuperscript{49} While no empirical association can be drawn on the impact of the state’s use of torture and other degrading treatments upon the attitudes of the general public, a speculative point can be made inversely that United State’s tolerance for torture and other extra-judicial methods may reflect a society that has a different standard of ethics than other western democratic countries.

A further concern among people is that once the state starts to go down the road of ‘special circumstances’ to engage in derogations, it would be tempted to adopt similar policies in other less warranted situations thus compromising the standards of liberties and rights of ordinary people. States can easily make a special case for many circumstances. Although authoritarian states such as Myanmar (Burma), Pakistan and Egypt among others are more likely to do this. Even the US has a long history of such cumulative derogations, such as the incarceration of Japanese-Americans during the World War II, the prohibition era, the McCarthy trials and now numerous detentions of many people as terrorist suspects held without charge.\textsuperscript{50} Many innocents get caught in the net.

\textsuperscript{43} India Today (fortnightly newsmagazine) March 31 1997. Titled Wrong Arm of the Law, ‘A survey in 1997 of officers within the Indian Police Service reports that 53% believe that in difficult situations the police are justified in adopting extra judicial methods.’\textsuperscript{43} It suggests that 20% believe that the police should not allow the expression of anti-government opinion, 20% feel that informing the family of the grounds of arrest will ‘invite trouble’, 22% believe that the force is justified in liquidating insurgents and 17% suggest torture is a valid mechanism for obtaining the truth from individuals.

\textsuperscript{44} UN crime prevention Agency survey carried out by Gallup Europe 2007.

\textsuperscript{45} International Centre for Prison Studies, Kings College, London 2007.

\textsuperscript{46} In August 2002, David Addington, Chief of Staff for US Vice President Dick Cheney, as legal Counsel helped form legal opinion that torture might be justified in some cases.

\textsuperscript{47} Chomsky, Noam interview. Monthly Review No 53, No 6 November 2001. The United States is a leading Terrorist State.

\textsuperscript{48} George, Alex. Western State Terrorism Rutledge 1991.

\textsuperscript{49} International Centre for Prison Studies, Kings College, London 2007, 738 prisoners per 100000 population.

Limiting Abuses

States always claim they act responsibly and selectively with derogations and that their independent judicial systems are well placed to ensure checks on abuses. However in the emotional circumstances that surround terrorist incidents, state institutions, the media, and even the independent judiciary often tends to be biased against the victim. A blatant example is that of the Supreme Court of India which passed a death sentence on an alleged terrorist by a 2-1 majority verdict of guilt in August 2002.\textsuperscript{51} Despite lack of any evidence it qualified its decisions with the statement, 'proof beyond reasonable doubt should not be a fetish.' In a long conflict legal opinions are likely to get even more entrenched, extreme, and subjective.

When the state itself embarks on unethical practices, civil society loses a guardian and yardstick of standards. It is therefore incumbent the state consider the impact of its own actions and derogations on the very people who constitute it and give it meaning. Therefore dilutions of human rights have to be undertaken responsibly and the non-derogable rights are best left intact.

While most states would agree not to derogate from norms once a person is convicted, it is in the pursuit of getting information, of gaining evidence and of determining guilt before charges that extrajudicial practices such as torture, incommunicado detentions, and sometimes even executions take place. The state often justifies using methods derogating from norms as a necessity to acquire information to prevent attacks, to incarcerate prospective terrorists from carrying out intended attacks, and for deterring others. Many people would sympathise with prolonged pre-trial detention but have reservations about torture.

The Innocent ‘Suspect’

The second issue concerns those who are innocent but get detained as suspects for prolonged periods. The pro-state argument is that in order to preserve security for the greater many, a few ‘collateral’ mistakes should be tolerated. This indeed may be acceptable where the margin of error is small. But the empirical evidence in three countries is not encouraging. In the United Kingdom, out of almost 1228 people detained under various times under Terrorism Act 2000 and Terrorism Act 2006 only 41 convictions have been obtained under the Act\textsuperscript{52}. In the US the number of detainees is much higher, (80000 according to Reprieve a NGO\textsuperscript{53}), In India, during the insurgency in Punjab India, 15276 people were detained under the Terrorist Act (TADA) but only 124 (0.8%) were convicted\textsuperscript{54}. In Gujrut 19000 were detained under Terrorist Act, TADA, although no terrorism was taking place nor was the area declared to be experiencing terrorism. Virtually no convictions took place\textsuperscript{55}. In all three countries judicial oversight is provided for but remained ineffective in

---

\textsuperscript{51} Davinderpal Singh Bhuller vs State of Delhi August 2002.
\textsuperscript{52} UK Home Office Records on its website as of 18\textsuperscript{th} September 2008. http://www.homeoffice.gov.uk/security/terrorism-and-the-law/
\textsuperscript{53} http://www.reprieve.org.uk/press_us_govt_must_reveal_information_about_prison_ships_02.06.08.htm, last visted on 19 September 2008.
preventing the detentions in the first place and in US and India the judiciary failed to end prolonged detentions.

Clearly the margin of error is more than significant despite judicial oversight. Therefore there is a need for a balance to be struck between the state’s need to lower the standard of civil and human rights of terrorist suspects and the rights of the innocents caught in this net.

A New Set Of Rights

To protect the credibility of the state and maintain respect for international norms a more realistic approach to the current terrorist challenge and the non-compliance by states to international norms needs to be taken at the international level. Given that the new terrorist is outside the social contract by will and seeking to destroy it, there is justification to create another set of reduced rights in the special circumstances of global terrorism. They would not be classified as derogations from norms. They will simply be a different and reduced set of rights under exceptional international circumstances with international scrutiny which would prohibit torture, unnecessary detentions, and false charges.

Karel Vasek categorised three generations of human rights. Namely the rights concerning liberty and political participation, secondly the rights concerning equality in social, economic and cultural rights and thirdly a broad spectrum of rights relating to group rights, environment, cultural heritage and so on.

An increasing number of conflicts are between cultures, there is a need for a fourth generation of rights which are less rigid, sensitive to the different civilisations of the world and also have inherent flexibility to address different forms of threats.

It is within this fourth set of flexible rights that a convention could be evolved which accepts the notion of some dilution of rights limited to special international circumstances that are neither part of the current Geneva war conventions nor of the more extensive rights articulated in Universal Declaration. They would consist of inalienable rights with some dilution of some derogable rights, international oversight mechanisms, limitations on indiscriminate intelligence gathering and regular review of the need for this fourth set to be applied in special circumstances.

This fourth generation of a reduced set of rights will allow states and international bodies to work together and avoid the return of the licentious Leviathan state that Leo Strauss proposed for the US domestically and in an international role.

If some dilution of human rights is made acceptable and since domestic mechanisms for safeguards are generally irregular or even ineffective, there is an argument to have oversight by an impartial body, preferably a UN body, which does not belong to the state nor originates from the affected state. The objection from states would firstly concern sovereignty. However absolute state sovereignty does not exist as explained above and according to Held there is growing international cosmopolitanism with co-operation among states. Moreover there is much inter-state co-operation in fields such as peace keeping, joint armed actions as in Iraq, and joint intelligence gathering. The UN too has undertaken action in coordinating information

and expertise against terrorism.\(^{57}\) States have already endorsed a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, albeit with limited powers.

The enactment of an international oversight body in anti-terrorist measures will dissuade states to extend the terminology of ‘international terror’ to issues that are essentially domestic and introduce some degree of transparency and confidence in the system. Important questions are who will draft such a convention, what will be covered, and who will supervise state compliance.

**The Mechanism For Drafting Instruments**

The United Nations set up a Counter-Terrorism Implementation Task Force (CTITF)\(^ {58}\) in July 2005. It has representatives from at least 25 different organs and agencies of the UN and goes beyond the UN system to include other international organisations such as Interpol. It is assisted by the Global Counter-terrorism Strategy enacted by General Assembly Resolution in 2006.\(^ {59}\)

The task force could be given the responsibility to propose a set of realistic instruments by consulting with different agencies, countries, and experts and ensure a balance between the states’ desire for dilution of some rights and the need to uphold some fundamental rights without compromise. The Office of Legal Affairs is part of the task force and could easily be given the lead to undertake such an exercise.

A task force could establish a working group\(^ {60}\) for protecting human rights while countering terrorism, which could examine the length of detention without trial, methods of interrogation, specialised courts systems, channels and forms of communications to detainees, compensation to suspects detained wrongly, reinstating released ‘suspects’ without stigmata, imposing restraints on the media to prevent prejudicing trials or marginalising communities, and ensuring access to detainees or limitations on it. It should also remove intra-state conflicts labelled ‘terrorist’ out of its purview or at least differentiate between territorially-based insurgency and the new global terrorism.

**The Supervision**

What mechanisms would be emplaced to supervise compliance to a new set of instruments and who would be entrusted with such supervision are important concerns. The working group could be given the responsibility to come up with an agreeable mechanism of monitoring compliance to a new set of human rights instruments while countering international terrorism. For instance it could take the idea of a best practices section\(^ {61}\) from a department for peace keeping operations. A possible procedure would be for a state to provide information regarding a detention to a best practices office or a rapporteur, depending on which monitoring process is agreeable to the state. A representative of the office would visit the detainee and monitor subsequent progress with periodic review examining the necessity of

---

\(^{57}\) CTITF, Counter-Terrorism Implementation Task Force set up in July 2005 which has a Counter-Terrorism Executive Directorate and representatives from several other UN organs.


detention, interrogation techniques, legal representation, and contact with relatives, among other issues.

Like all other processes at the international level, the decision to agree to the monitoring mechanism would be voluntary. But once ratified, the country would have to co-operate without objection, although compliance could still be unenforced.

The Incentive To Co-opt

An important question is why would powerful states such as the US, Russia, or China even agree to such a proposal at the United Nations let alone ratify it? Given the dismissal by the US of the UN as an ineffective organ and the usual insistence of the US to opt out of international supervisory mechanisms, for instance the International Criminal Court, the proposal could remain an academic suggestion.

The US, like the United Kingdom, appears to be caught between striving for moral leadership of the world in human rights and its perception that anti-terrorist strategies are less effective when they operate within the wide range of human rights instruments. Consequently the US bypasses normal due process of law by concealing evidence, misleading the press and public, and renditioning to other countries.

This has repeatedly led to distrust between the US and its own people, and demoralised their own citizens who have championed western human rights. The US has also paid considerable price internationally by losing its claim to moral leadership. This loss of confidence in the US has demoralised the western world.

There is also documentary evidence that human rights abuses unacceptable to the international community have a demoralising effect on the armed forces. In a few UK documentaries on its forces in Iraq and Afghanistan, service personnel have questioned the need for the wars when they become aware of human rights violations by their side. They felt they had gone to war to restore human rights.

Studies in many insurgent conflicts have shown that human rights excesses merely increase the ferocity and frequency of insurgent attacks. This has been repeatedly shown in the Israel–Palestinian conflict as well as in Iraq.

One of the reasons for hesitation with scrutiny arrangements is the issue of sensitive intelligence. It is not difficult to develop mechanisms and set up a team of experts at the UN who command the confidence of the countries they scrutinise.

The proposals made in this paper enable some derogations to be normalised with independent international scrutiny when addressing the new form of terrorism. It offers a compromise between current de facto but unpopular state practices and the need to retain international norms. The state is armed with some dilution of norms and the international community gets commitment to multilateral cosmopolitanism from the state. 

The dividends to countries like the US, such as regaining moral leadership and trust of its citizens by being a little more transparent and letting scrutiny of its practices within a lowered standard of human rights are higher than the disadvantages or obsession with absolute sovereignty.

Like other treaties, compliance depends on the will of the country. Seeing advantages, the US is increasingly coming out of its unilateralist approach to a multilateralist one. Accepting supervision of its counter-terrorist practices will be an asset to its new multilateral quest. Even if the US continues to evade agreement, there

---

is a need for the rest of the international community to take a realistic and nuanced approach without undermining the nature of the state–citizen relationship and the rights of ordinary people.

**Conclusion**

A crucial aspect about terrorism is to differentiate and set apart the two forms of terrorism. The traditional form of insurgency often labelled as terrorism is essentially territorially orientated and seeks to change power in the state, restructure and redistribute political power and decision making or secede from it. Its ambitions remain within the ambit of the social contract that determines the post-enlightenment state system.

The new form of global terrorism is non-specific, non-territorial and ideological. It seeks to disintegrate the Westphalia state system and destroy the principle of the social contract to replace it with a transworld theological dominion. Consequently the new ‘terrorist’ has placed him/herself outside the contract and should not expect the same degree of rights as everyone else. But by states derogating there is also the danger of endemically affecting the very society that the state is seeking to save from this elusive terrorism.

The traditional form of insurgency usually affects one state and needs to be scrutinised within current systems and removed from the ambit of a global strategy against terrorism. The second and new form of Global terrorism that Al Qaeda has embarked upon is too overwhelming for the state to address on its own or for the state to be entrusted to deal with it without fatally compromising the liberal and human rights principles upon which the democratic state is established. It needs to be addressed with international co-operation and by assisting states with some dilution of some international norms in the form of a new convention but with international oversight and scrutiny over state practices.
WHY DO THEY HATE U.S.? EXPLORING THE ROLE OF MEDIA IN CULTURAL COMMUNICATION

Divya Sharma*
Utica College

ABSTRACT
The September 11, 2001 attacks on the U.S. jolted the social psyche of an average American, and brought the question of why do they hate us into the mainstream media. Since then, there has been a barrage of violent images from other parts of the world that is shaping public perceptions about Islam and Muslims in the U.S. This article begins with a discussion on the need of differentiating between Islam as being interpreted and applied in one cultural context from the other, instead of relating every Islamic act around the world to American Muslims. The tendency to look at American Muslims as outsiders reflects ignorance about Muslim presence in the United States for over two centuries, and more problematically, it adds to attitudes of hostility and negativity towards American Muslims. In the larger context of the global war on terrorism, the paper discusses the problems of a lack of moral clarity in the war on terrorism, a limited understanding of causes of terrorism, fear, hatred, and indifference. Further, the notion propagated through the media of it being a clash of civilizations, puts policymakers and the media itself, repeatedly on the defensive to explain that it is not a war against Islam, while terrorist organizations use such rhetoric as a recruiting tool. The article also argues that part of the solution may be to provide more media space to the moderate Islamic voice, but it cannot take place in a social vacuum.

The September 11, 2001 attacks on the U.S. jolted the social psyche of an average American, and brought the question of why do they hate us into the mainstream media. It reflected, at one level a sense of naiveté about the reach of global crimes prior to 9/11, and on the other hand, it was a symbol of a collective sense of helplessness and anger in the face of an act of extreme psychotic violence. It also started a political discourse that quickly swept the socio-cultural discourse of good versus evil, while Islamic terrorism became staple for the news and even entertainment media. Since September 11, 2001, references to Islam and Muslims in the news media have increased many-fold. The very tendency of the news media to cover stories on crimes and criminals means that most stories on Islam and Muslims are about extremism and fundamentalism. Table 1 carries data on Islam and Muslim references in the media before and after 9/11.1.

* Direct correspondence to dsharma@utica.edu
© 2008 by the author, published here by permission
The Journal of the Institute of Justice & International Studies

1 Source: Nacos, Brigitte L. Terrorism as Breaking News. In Annual editions: Violence and Terrorism. Pg. 117
Table I: Islam and Muslim media references before and after 9/11

<table>
<thead>
<tr>
<th></th>
<th>Muslim (Period I)</th>
<th>Muslim (Period II)</th>
<th>Arab (Period I)</th>
<th>Arab (Period II)</th>
<th>Islam (Period I)</th>
<th>Islam (Period II)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>ABC News</td>
<td>31</td>
<td>163</td>
<td>11</td>
<td>99</td>
<td>1</td>
<td>31</td>
</tr>
<tr>
<td>CBS News</td>
<td>32</td>
<td>144</td>
<td>27</td>
<td>117</td>
<td>1</td>
<td>27</td>
</tr>
<tr>
<td>NBC News</td>
<td>9</td>
<td>98</td>
<td>5</td>
<td>90</td>
<td>--</td>
<td>18</td>
</tr>
<tr>
<td>CNN</td>
<td>23</td>
<td>203</td>
<td>43</td>
<td>200</td>
<td>1</td>
<td>31</td>
</tr>
<tr>
<td>FOX News</td>
<td>1</td>
<td>100</td>
<td>2</td>
<td>64</td>
<td>1</td>
<td>46</td>
</tr>
<tr>
<td>NY Times</td>
<td>349</td>
<td>1,468</td>
<td>345</td>
<td>1,272</td>
<td>216</td>
<td>1,190</td>
</tr>
<tr>
<td>NPR</td>
<td>54</td>
<td>217</td>
<td>53</td>
<td>182</td>
<td>10</td>
<td>84</td>
</tr>
</tbody>
</table>

N- Number of news segments/articles mentioning the search words Muslim(s), Arab(s) and Islam
Period I- Six months before the 9/11 attacks
Period II- Six months after the 9/11 attacks

Jackson (2007) referred to Carey who noted that after 9/11 attacks “endless interviews with the same cast of experts and commentators were repeated across the television dial, each adding little more than uninformed speculation, heightening national fears without providing a coherent account of the past, present, and future” (Jackson, 2007, para. 2). This is expected of news agencies to cover stories that highlight violence and fundamentalism, but with limited or no prior exposure and familiarity to other cultures and religions, it is also critical to note that these references shape public perception of Islam in the U.S., and have contributed to stereotypes and hate crimes. This paper does not attempt to answer the question, “why do they hate us?”, but contends that issue of non-Americans hating Americans, soon got mixed with questions about American Muslims and put them in a constantly defensive position about their religious and ethnic identity. Media has not been proactive in explaining the cultural context while reporting on behaviors related to Islam in other parts of the world. Figure 1 carries data on hate crimes by religion and focuses on anti-Islamic incidents from 1998-2006. It reflects that the hate crimes against Muslims increased immediately after 9/11, and though the numbers have declined since then, they are higher than the pre-9/11 incidents.
Media Images of Islam and Muslims: Veil, Death by Stoning, and Women as Second-Rate Citizens

Exploring Socio-Cultural Context

One common perception about Islam through media remains that women are treated as second-rate citizens. It is also backed by reports of stoning deaths and flogging of rape victims (“Saudi court ups,” 2007). Though it is imperative to cover these stories of basic human rights violations, it is also important to note that a majority of Muslim population in the U.S. is not the same as the Muslim population in Sudan, Saudi Arabia, Pakistan, or elsewhere. Religion is largely interpreted and practiced within the larger socio-cultural context. Therefore, these incidents represent culture or subculture rooted in a specific geo-political framework, rather than being reflective of all Muslims across the board. Such a broad brush approach pushes members of minority groups away from the mainstream and may create apathy. Though immigrant communities carry forward their religious and cultural identities, those who have lived in this country for generations have accumulated their social capital in this society. It is their social capital, social and cultural networks, that keeps them grounded and belonging to this country. But when the larger society devalues that social capital, by imposing linear labels, more and more people may actually start relating to that label. That is, religious identity may become the most important marker for one’s identity, if that is the only way that the society perceives and reflects one’s self-image. It creates a risk of further alienation and compromises the process of acculturation and integration.

It also sends a socio-cultural and legal message that Muslims in this country carry a one-dimensional identity, that is, no matter how long they have lived in this
country and made what contributions, or achieved the “American Dream,” the system—social and legal—would still see one aspect of their identity as most dominant and relevant over everything else. This creates cultural segregation, and some may be pushed to develop an ethnocentric religious identity, and seek cultural refuge within ethnic neighborhoods instead of integrating with the mainstream.

It is equally important to note the difference between actual and perceived oppression. For instance, Hingorani (2004) notes that though many American Muslims stopped wearing religious symbols due to fear of repercussions, for many others it also became important to identify themselves as American Muslims, and convey that not all Muslims are violent extremists or oppressed (Hingorani, 2004; Carpenter, 2001). Many American Muslim women started wearing a veil to also negate the notion of exploitation based on the symbol of the veil as a universal one, rather than a cultural reality that varies from one context to another. Carpenter (2001) notes that this “assumption has been fed by television images of women in Afghanistan, shrouded in the burqa, being beaten for showing an ankle or part of their face” (Carpenter, 2001, para. 11). Carpenter (2001) further notes that for most Muslims “wearing the veil was a personal decision, a far cry from the coercion experienced by women in Afghanistan” (para. 16). These factors again necessitate the importance of not treating media images about anything Islamic anywhere in the world, as what is applicable to every American Muslim.

The paradox, however, may be that many Muslim scholars, especially feminists themselves, talk about the veil as the mark of subjugation. It may be argued that it sends mixed messages to anyone unfamiliar with what is Islam. But then which religion does not carry inherent contradictions or conflicting interpretations varying from one culture to another? The bottom line remains that the willingness of many Muslim women in western and European countries to publicly convey their religious identity is an important part of social and cultural processes of identity and integration. It would be exploitative to force anyone to wear a veil, just as it would be if anyone is forced to not wear it. In the latter instance, to associate regressive and stereotypical images despite different cultural environments, is a symbol of the lack of understanding of the Muslims in the U.S. itself. Audi (2006) referred to a 25 year-old American Muslim law student Denise Hazime, who chose to wear a traditional head scarf and feels that “an average American would never think of the image of a covered girl singing our national anthem” (para. 2).

Most references to Muslim women especially in the media are about exploitation and their status of being a second-class citizen. In countries such as Saudi Arabia, Islam serves as a basis of most aspects of the legal and socio-cultural environment. Legal and social systems are, therefore, rooted in a dogmatic philosophy rather than a utilitarian one. To apply the same standards and perceptions to American Muslims leads to socio-cultural segregation that may result in a lack of social interaction, essentially polarizing groups as us and them. Dirks (2006), a fourth generation American Muslim narrates his experience that reflects this sentiment of us and them. Though the incident took place about a year prior to 9/11, it reflects a mindset that the Muslims in the U.S. cannot be American per se. A man looking at Dirks’ untrimmed beard and his wife’s scarf at the airport asked him what country he came from. Dirks (2006) noted that:

We Muslims have been here for over two centuries before this country was even founded. Muslims fought for American
independence in the Revolutionary War, helped maintain that independence during the War of 1812, fought to hold the Union together during the Civil War, and helped tame the American Wild West in the latter half of the 19th century (para. 9).

Muslims have been part of the long American tradition, yet the group has mostly remained invisible. Such little public presence partially indicates that there was more or less a comfortable integration at socio-cultural and religious levels, that it did not necessitate any sort of assertion of religious identity. Since 9/11, however, the sentiment that Muslims must be from some other part of the world and not from America, is also manifested through hate crimes and the changing social discourse. According to Ibish and Stewart (2003) media and public figures such as Jerry Falwell, Pat Robertson, and Franklin Graham “carried a campaign of vilification against Islam and the Prophet Mohammed (p. 8). In their report on hate crimes and discrimination against Arab-Americans, Ibish and Stewart (2003) argued that there was a pervasive “acceptance of hostile commentary against Arabs, Arab culture and Islam in mainstream media and publication” (p. 8). The report also noted that the mainstream media’s use of commentators such as Steven Emerson and Daniel Pipes, promoted fear and hatred. The crux of the argument is that though Islam has been part of American society for over two hundred years, its analysis is built around violent acts by terrorism experts. That does not serve the larger goal of understanding religion within a specific cultural context. That is why, the question of why do they hate us, initially may have been aimed at understanding non-Americans’ hatred of Americans. But with skewed media discourse, and lack of general understanding about Islam in the U.S. to begin with, it is a question that is being put to American Muslims, making no distinction between American Muslims and Muslims in other countries.

The Glimpse Foundation conducted a survey in 2006 to gather opinions from 130 Muslim students (both, American born and foreign born). A vast majority of respondents (87%) felt that Americans do not understand Islam. But it does not mean that they (Americans) have attitudes of hostility. In fact, 72% of respondents believed that Islamic values are compatible with Western values. The results, however, showed that Muslim students had a growing distrust of the U.S. media, while their opinion of Americans and the U.S. was positive overall. One of the students in the survey remarked that the media is distorted and “likes to jumble everything under one umbrella” (“Muslim Students Say,” 2006, para. 2). Another respondent remarked that the education system is also at fault in that it does not educate about the religion that is followed by 20% of the world’s population. Therefore, despite this country’s religious diversity, it was after the 9/11 attacks that media has started discussing Islam and brought it to the mainstream.

After the 9/11 attacks, if on one hand some Muslims decided not to exhibit symbols of their religious identity in public, many Muslims also decided to assert their religious identity to send a message that they are Muslims, but they are Americans as well. Culturally and socially, it is an unfamiliar territory, and as a result there is a reaction as though some outsiders are changing the American culture. It may not be the intent, but if this is the cultural message that is conveyed, then it certainly creates a perception of an unjust societal and legal system. Public perception since 9/11 about Islam in general may explain the need for American Muslims to become more vocal and visible. This is covered in detail later in the paper with reference to moderate Muslims. The current attitudes and perceptions towards American Muslims since 9/11
in many ways, nonetheless, reflect an important gap in the collective social understanding of the country’s religious diversity itself.

Another incident that challenged the collective perception of American tradition involved U.S. Congress member Keith Ellison, whose decision to take the oath of office on the Quran, as per his religious beliefs, stayed in news headlines for days. The controversy was first stirred by Prager’s (2006) assertion that Ellison’s decision somehow challenged the American culture. His argument was based on the assumption that the U.S. has had a linear religious entity; that is, the notion that U.S. has only one religion, that of Christianity. The dominant religious identity is not the same as linear religious identity. It also surprised many around the world, not because Ellison wanted to take the oath on the Quran, but because it was such a controversy. The common understanding was that the purpose of taking an oath of office on a religious text is because one’s religion serves as a moral compass, not because it is their favorite book as Prager put it. For a non-Christian, the Bible may very well be a book of philosophy rather than a source of moral duty (and accountability) of right and wrong when compared to his/her own book of religious faith. If media outlets decide to accord space to people who object to other religions being brought into the public view in any way, shape, or form, then it is also imperative that the media provide space to those who challenge these assertions about a one-dimensional view of religion in America. Rizvi (2005), Said (1997), and Ahmed (n.d.) contend that Western media either presents Islam and Muslims in a stereotypical manner or does not provide enough space to moderate Muslims who have been part of the Western world for generations.

Essentially, to American Muslims this is the only country that they have known in their lives. To build a socio-cultural dialogue that if people want to follow their Islamic beliefs then they are somehow challenging the American tradition, or that they must return to the country of their ancestors, reflects the attitude as though American Muslims have not been part of what defines this country.

In 2004, Cornell University published “key findings from the 2004 national omnibus survey of public opinion and media use” (Nisbet and Shanahan, 2004, para. 1). It was conducted from October 25 to November 23, 2004. According to the survey, though 48% of respondents opposed the idea of restricting civil liberties of Muslim-Americans in any way, another 44% of respondents favored at least some restrictions on their civil liberties. It puts people in a second tier of society based on religious belief systems. According to this poll, religious identities also play a major role in shaping attitudes towards Muslims. For instance, “Republicans and people who described themselves as highly religious were more apt to support curtailing Muslims’ civil liberties than Democrats or people who are less religious” (“Poll shows U.S. views,” para. 2). The survey also found that people who “paid more attention to television news were more likely to fear terrorist attacks and support limiting the rights of Muslim-Americans” (“Poll shows U.S. views,” para. 3). Similarly, 27% of respondents supported that all American Muslims should register with the federal government about where they lived. One in 5 respondents favored racial profiling and nearly 1 in 3 favored that undercover agents should infiltrate Muslim organizations (“Poll shows U.S. views,” para. 6). This may not represent an overt ethnocentric view, but these surveys portray the U.S. rather narrowly. This country is arguably the most diverse and multicultural in the world, and to defeat the very meaning of it undermines its own potential and place in the global community.
Another popular media image is that of madrassas\(^2\) and their role in breeding terrorism. But more and more studies (Bergen and Pandey, 2006; Reuter, 2004) show that the acts of terrorism against western countries may not be the result of madrassas in south Asia or the Middle East, rather these involved young Muslim men, many of whom have grown up in alienating cultures in the West (Bergen and Pandey, 2006; Reuter, 2004). Said (1997) argued that most Muslims and Arabs are portrayed as oil suppliers or political terrorists in the media. Rizvi (2005) also raises a similar concern that after 9/11 the stereotypical images of Islam are being used to explain the 9/11 attacks. The madrassas are part of that imagery. The assertion that many madrassas are a breeding ground for hatred and extremism is not always wrong, but to have a one-dimensional view of these places, serves U.S. safety concerns only partially.

Additionally, media and public perceptions have a symbiotic relationship. In their Agenda Setting Theory, McCoombs and Shaw (1972) contend that public opinion is largely shaped by media. Khalema and Wannas-Jones (2003) also found that media representations are frequently taken as facts, and since 9/11 attacks these representations have influenced public perception of Muslims in general. Even more critically, therefore, once the media decide for the public what is important and high in priority, then that public attitude and perception plays role in shaping public policy. In essence, media images not only shape public perception, but also reflect public perceptions that it has helped take shape.

**War on Terrorism:**

**What We Understand and What We Need to Understand Further**

**Why do they hate us?**

As an immigrant, I have been asked every random question on India especially about anything unusual covered in the 60-seconds-around-the-world sort of news. There are two issues in such line of thinking, a) the presumption that I must know everything about India, and, b) it is the unusual news on India that the media in this part of the world selects, and that is what my social counterparts want me to explain. Similarly, if I do not find humor in sexist, homophobic or anti-immigrant remarks, the reaction is that it must be because of the cultural differences. Interestingly, once in an academic setting I refused to ignore an anti-Muslim remark. As a result, the person who had made that remark wanted to find out if I were a Muslim. Why else I would get offended. Such social etiquette reflects the ease with which Muslims have been pushed to the periphery of American social identity. It also reflects the tendency to have the expectation that a person from another culture should explain everything about that culture. By diluting the boundaries between American Muslims and Muslims in other countries, the same expectation has been made of American Muslims about anything Islamic anywhere in the world.

It is not difficult to imagine that once media experts, and analysts started asking why do they hate us, people in general also started asking the same. Manheim and Albritton (1984) note that, “manipulation of projected media images of reality has

\(^2\) Madrassa refers to Islamic school. Though many madrassas only teach Quran, many others have detailed curricula on subjects like Mathematics, social science and languages. In some parts of the world, it is the only means of education available to children. In terms of policymaking, therefore, it is important to identify madrassas that are creating and facilitating radicals, while also invest in larger educational infrastructure.
the potential to influence public opinion and the policy process” (p. 656). Similarly, according to Erbring, Goldenberg, and Miller (1980) “attention and perception operate selectively” (p. 28), whereby, people seek and pay attention to information that they think would be relevant. Erbring et al opine that “[t]he underlying substantive principle is one of interaction between issue sensitivity among the audience” (p. 28). After 9/11 there was nothing more important than to find the reasons behind the attacks. Therefore, whatever explanations media served up shaped and influenced audiences’ cognitive processes, sidelining the fact that many Muslims have lived in the U.S. for generations. So, after 9/11, to answer why do they hate us, some relied on political answers that will be discussed later in the paper, while many presumed that any Muslim anywhere should have the answer. Hamid3 (2007) wrote that he was taken aback when in Dallas he was asked this question, because, as he explains:

I learned to sing "The Star-Spangled Banner" years before I could sing the Pakistani national anthem, played baseball before I could play cricket and wrote in English before I could write in Urdu. My earliest memories are of watching "Star Trek" and "MASH" while my parents barbecued chicken in the back yard. I was an American kid, through and through. Part of me still is. (para. 3)

Both Hamid (2007) and Ahmad (1998) argued that to understand the basis of hatred (though much may not be hatred, just indifference) towards the West, the U.S. must think long and hard about the long-term impact of its foreign policies, especially in countries like Pakistan and Afghanistan. Armstrong (2002) also notes that one key ingredient missing in the western foreign policy is the ability to have a long-term perspective.

The current age of global communications media is at the crux of all communications, and miscommunications. Ahmed (n.d.) contended that it is a truism that media is used as a weapon. Referring to the media coverage of the Gulf war in the early 1990s, he argued that it was completely one-sided in its initial days, where the experts were all Westerners. He noted that eventually “it became the war of white man against the brown one, the European and American against the Arab. By further extension it soon became the war of the West against Muslims” (para. 22). Ahmed also noted that the media has been limited, if not ineffective, in communicating not just about the Muslim world, but also with the Muslim world, where anyone associating with the West has come to be seen as an agent of the CIA (para. 2). The discourse in the media must be independent of illogical reasoning, and balanced in terms of political agendas. Manheim and Albritton (1984) noted that “the literature on agenda setting has established a series of linkages that tie projected images in the media to perceived images among the public, and, in turn, perceived images among the public to the policy agenda and its products” (p. 656). While discussing the role of the media Gerges (1997) lamented that among other factors, “the media’s overwhelming dependence on government sources for their new stories; the lack of public contestation of government propaganda campaigns; and the government’s use of ideological weapons like anticommunism, a demonized enemy, or potential

---

3 Hamid came to United States at the age of 3, from Pakistan with his parents in 1974. He moved back to Pakistan at the age 9.
national security threats” (p. 73) contribute to the skewed public perception. It also adds to fear, alienation, and suspicion.

Politico-Religious Discourse through Media: Notion of Cosmic War

Jackson (2007) notes that after 9/11 though President Bush emphasized that Islam is “a religion of peace, others in the media largely followed those taking responsibility for 9/11 in tying terrorism to Islam” (para. 2). After the 9/11 attacks, both policymakers and ordinary citizens started asking a basic question, “why do they hate us?” The answer to this question is more multi-layered than the assumption that they hate us for our freedoms. Part of the problem remains the subjective understanding of what freedom means in different cultures, and what people value. For instance, the veil may be a symbol of oppression in parts of Saudi Arabia, Iran, and Afghanistan, but if an American Muslim woman chooses to wear it, then it is a symbol of her religious identity. Hamid (2007) noted that indeed part of the problem may be economic disparities between countries and that those in the lowest tier have developed jealousy towards those in the highest tier. Pakes (2004) also referred to rapid globalization and criminogenic asymmetries among countries as a root cause of growing incidents of transnational crimes.

Hamid (2007), Ahmad (1998), and Armstrong (2002) argued that one needs to also understand the historical context in order to develop effective policies. For instance, Hamid (2007) noted that the Reagan Administration provided billions of dollars to Pakistan’s military dictator who supported the mujahideen and the Afghan warlords during the Soviet invasion. This money essentially went into developing sophisticated weaponry and in organizing jihadists training camps in Pakistan. Socially and culturally, the heart of Hamid’s argument is that, Zia was in favor of Islamizing Pakistan. So, the hatred towards the policies of the U.S., and largely the indifference (relates to need of moderates to speak up against terrorist attacks) lay in the socio-cultural environments, rather than strictly political or economic equations. Jackson (2007) opined that after 9/11 as adults dealt with uncertainty and confusion, it is the younger generation that struggled more as it lacked the historical context where it could place these events. She further contended that this is why the role of adults, especially teachers, was critical as they knew that media representations played a large role in shaping young people’s discomfort, attitudes, and anger.

It is important, therefore, for adults to have or develop the ability or willingness, or both, to understand the larger forces at play, the absence of which would otherwise lead to an easy temptation of relying on the notion of good versus evil. It makes the war on terror look like a cosmic war. Juergensmeyer (2004) argued that secular governments are a target for one or the other religious group. He cited examples of Timothy McVeigh, Yigal Amir, and Shoko Asahara, to name a few, and guarded against the use of Islamic terrorism to refer to any act of political violence by Muslims. Instead, it would be beneficial to understand why religion is being cited as a basis for all the terroristic violence, now more than ever. Juergensmeyer noted that the assumption about cosmic war is that it may take generations to end and that only one of the two warring civilizations (in this instance, either Christian or Islamic) will survive. Implicitly, when fighting Islamic terrorism, without a clear definition, except “absolute evil,” it would be difficult to then end this war or define success. Such media and political rhetoric has further distanced people based not on their perception about the issues related to terrorism, but based on their faith. In short, socially,
politically, and culturally these attitudes position Islam against U.S., and that cannot be an effective tactic in fighting the war on terrorism.

Additionally, it is also critical for the news media to cover stories of oppression across the board, even when there is nothing at stake for the U.S.. It would also sensitize an average American about violence in general. More proactively, it also necessitates providing visibility to smaller religious groups in the U.S., instead of defining this country as a one-dimensional religious entity. For instance, there are a number of channels and programs that preach Christianity in the U.S., while in countries like India, public and cable channels have programs on all religions. It is not to suggest that one is better than the other, but it requires a self- and social analysis of what constitutes America. If it is a multicultural, multi-religious country then, it is useful to study how it manifests that diversity in its social, political, and cultural scene through the media. As noted earlier, secularism may be interpreted as extending equal importance to all religions or no importance to any religion. And if the U.S. is a Judeo-Christian country, then considering this ethical basis, there is all the more reason for it to protect members of minority religions. So, the debate here is not what the U.S. is on paper, but what the U.S. is in its character as a nation. The assumption is that whatever religion one may practice s/he has certain rights and freedoms as an American citizen, and these must be protected. The failure to do so is in part compromising the core American values of equality and liberty.

Moral Clarity

Kristof (2002) questioned whether it is “fair to present war on terrorism as a parable of good (us) versus evil (them)”? (p. 8). Many scholars have argued about moral clarity and who has it, and when. Kristof (2002) cited the example when “President Regan declared the African National Congress a terrorist group not long before its leader, Nelson Mandela, won the Nobel Peace Prize” (p. 8). The U.S.’ view of groups in Chechnya engaged in violent conflict with Moscow has also ranged from rebels to terrorists. Kristof refers to Pakistan’s involvement in terrorism in Kashmir, and Bush administration’s support or Pakistan’s President, who essentially came to power by overthrowing a democratically elected government. As noted earlier, Ahmad (1998) also recommends avoiding double standards as the first step in fighting the war on terrorism. The global war on terrorism requires global cooperation, and media needs to cover stories of victims of terrorism in other parts of the world with the same vigor as it covers the attacks against the American interests.

If the media begins to understand the larger socio-cultural and politico-economic framework, it would also start giving due importance to stories about rebuilding the Iraqi education system (that does not always make the headlines) as an important step in the war on terrorism, instead of just focusing on stories of violence. Similarly, the U.S. needs to work more to tie financial aid to social programs in other countries that it partners with, rather than financial support for the military/arms and ammunition development. It may pose many more challenges for diplomacy, but in the long run, it would be more beneficial.

Terrorist acts are the most heinous and horrendous acts of violence, and it is an issue that the global community needs to deal with. But to make it a war between good and evil, reflects an operational problem of defining terrorism. The lack of a clear and tangible definition would only translate into policy that may or may not work. The media, by referring to a war on terror repeatedly in the Islamic context
creates an automatic need to defend and say that it is not a war on Islam. One common claim in this regard has been that all Muslims may not be terrorists, but all or most terrorists are Muslims. Hasan Qazwini’s remarks highlight this challenge when he contends that “he is confounded when Islam as a whole is blamed for actions of individuals, while other religions are not” (Audi, 2006, para. 14). Khalema and Wannas-Jones (2003) observed that media’s use of anti-Islam terminology contributed to more misconceptions about Islam and furthered the notion that all Muslims are terrorists. Though a few experts argue that these terrorists are not Muslims, rather they have hijacked the religious terms, more or less the statement has stayed popular in the media and academia. But then looking at the sex scandals involving Catholic priests, and sex offenders in general, does not mean that all or most pedophiles or sex offenders are Catholics or Christians. Criminals, across the board, can use any religion to rationalize their behaviors. But for media, academics and politicians to jump to the same conclusion, especially when it is about a minority religion in this country, is the most illogical way of attempting to understand why they hate us.

Gerges (1997) discusses the long history of fear and distrust between the Middle East and the West, that got worse after the Iran’s Islamic Revolution, and came full circle after the Oklahoma City bombings, in the immediate aftermath of which, there were reports that it could have been an act of terrorists from the Middle East. Fuchs (1995) also refers to Jeff Cohen, executive director of Fairness and Accuracy in Reporting (FAIR), who contends that “No matter what law enforcement said behind the scenes, the press went overboard on the Middle East angle and underplayed other scenarios” (para. 4). And despite it being an act of domestic terrorism, it whipped up enough public sentiment (as in case of any national tragedy) that gave “a new lease of life to the 1995 Omnibus Counterterrorism Act” (p. 73). This Act, despite the Clinton Administration’s arguments, soon came to be targeted against Mideast terrorism that became synonymous with Islamic terrorism. The public perception of violent acts of terrorism as being accorded to outside forces, thus, plays an integral role in putting together measures that compromise rights and liberties of minorities, while strengthening the notion of us and them and differential implementation of law. Gerges (1997) adds that the mainstream news media’s negative coverage of Islam has played a key role in public perceptions towards Muslim societies. Since 9/11 many of those perceptions are not limited to other Muslim countries only, and are being applied to American Muslims as well.

Media Images of Terror and Madrassas

Reuter (2004) discussed media coverage of war on terrorism, especially suicide bombings. He noted that media presents the notion that suicide bombings are a result of radicalized Islam, but it does not explain why these attacks have gained momentum in the past two decades in particular. The media coverage of terrorism has shaped peoples’ perception about terrorism, but it is an incomplete picture. Reuter (2004) referred to Horgan, an expert on terrorism, who argued that Western understanding is rather limited because of its focus on the 9/11 attackers, and emphasizes that the 9/11 attacks were the end point. In order to truly understand, and effectively fight terrorism, it is imperative to understand the long process preceding the attacks. That is, look at more tangible causes instead of abstract ideologies. The media images of terrorists are that of a typical madrassa-educated youth coming from a socially disorganized environment. Reuter (2004) noted that the 9/11 attackers were
not poor and were not trained in madrassas. Bergen and Pandey (2006) also made a similar argument that the masterminds of 1993 World Trade Center bombing, 1998 Africa Embassy bombings, 9/11 terrorist attacks, 2002 Bali nightclub bombings, and July 2005 London bombings, had not attended any madrassa. Bergen and Pandey argue that madrassas in Afghanistan and Pakistan do not have the skills and resources to carry out such organized attacks on Western targets. The focus for the U.S. should be to ensure that it does not alienate the religious minority that has been a part of this country for generations. They also suggest that though the U.S. should remain vigilant about madrassas in south Asia, these madrassas have regional and local targets. Yet, the 9-11 Commission describes madrassas “as incubators of violent extremism” (Bergen and Pandey, 2006, p. 148) and many U.S. “publications continue to claim that madrassas produce terrorists” (p. 148).

Reuter (2004) argued that the Hollywood portrayal of these actions is different from actual social reality, and yet that seems to have influenced news media (that in turn legitimizes these factors as portrayed in films), and political discourse in the U.S.. The major policy problem that it presents is that of spending more resources at places that may not be targeting western interests, while overlooking some of the homegrown terrorism, including non-Muslim anti-establishment groups that pose a more real threat, as well as, leading to disintegration, hate crimes, and stereotypes.

According to Ahmed (n.d.) another problem with the overdose of media images of crowds yelling anti-western slogans, and terrorists blowing up planes and capturing embassies, is that it gives extremists a sense of identity. The coverage by western media is seen as an acknowledgement (Ahmed, para. 34). So, it is a tricky balance that is required of the media to cover all important stories, while resisting the need to sell what sells best, that is, terrorism.

**Moderate Muslims**

There seems to be an expectation, and media conveys it in no uncertain terms, that moderate Muslims should speak against terrorist attacks. The following is an excerpt from Glen Beck, CNN Headline News Program:

I don't know if the Muslim community will ever step to the plate like the Japanese-American community did during World War II. You know, it was absolutely disgraceful how we rounded innocent people up then and, sadly, history has a way of repeating itself no matter how grotesque that history might be. The Muslim community can prevent this if they act now (“Beck again warned that,” 2006, para. 21).

Though the general understanding is that all clear-thinking people would be against all acts of terrorism, but to put the burden squarely on American Muslims reflects the attitude that all of them are somehow under the scanner, unless they can repeatedly distance themselves from psychotic religious terrorism.

Such attitudes, socially and culturally, do more harm than good. For instance, it is encouraging to see the increased interest in the mainstream America to know more about the Islamic culture, and traditions, despite Islam’s presence in this country for over 250 years. But if the opening remark remains, “why do your people hate our people?” or “why are your people against women’s rights in Afghanistan?”, the social discourse cannot get very far.
First, for an American living in this country for a generation or more, it is the Americans that are his/her people. Second, cultural application of any religion would differ from one country to another, as well as, within a country. If some polygamist groups interpret the Bible in a way that leads to abuse against women and children, it does not imply that every Christian needs to defend his/her religion. As discussed earlier, wearing a veil may be an expression of religious identity, or part of exercising religious freedom for many women; while, it may be forced on others. To overgeneralize these behaviors, especially, based on media images of what is going on in countries like Afghanistan is a disservice to fellow citizens in this country. It is an unrealistic expectation that an American Muslim should, or would be willing to explain every cultural-religious behavior in any part of the world, and even more unrealistic, that s/he should explain every act of terrorism. If law enforcement officials and policymakers around the world are still struggling to explain these actions, how can an average American citizen succeed at explaining it. As noted earlier, such attitudes further distance minorities from the mainstream, and defeat the larger goal of multiculturalism that this country has come to symbolize.

All may not be lost though. As noted earlier, the expectation itself to denounce terrorism is a reasonable one, but if it is expected of American Muslims only, then it reflects a presumption of doubt and guilt. Despite all the obvious problems, it also appears that people’s perceptions are gradually changing. Huda (2006) refers to the Pew Research Center for the People survey that was conducted between July 7th-17, 2005. It reports “that the number of Americans who believe Islam is more likely than other religions to encourage violence fell noticeably, from 44 percent in 2003 to 36 percent in 2005. A majority of Americans (55 percent) said they have a favorable opinion of American Muslims. That figure is significantly higher than the 45 percent holding favorable views in March 2001, prior to the 9/11 terrorist attacks” (Huda, 2006, p. 4). But Audi (2006) added that “a Washington Post/ABC News Poll released in March [2006] showed that a majority of Americans have a negative view of Islam” (Audi, 2006, para. 7). It would be important, therefore, for media outlets to clarify if the polls are about American Muslims, Muslims in Afghanistan or Saudi Arabia or any other part of the world. Similarly, the views about Islam cannot be taken in the abstract especially when it is media outlets that present a skewed view of minority religions and cultures. In other words, media, based on their influence on public perception, could start presenting larger contexts, if these poll numbers truly affect the collective conscience. Audi also adds that some Muslims believe that it is more difficult to convey a peaceful image of Islam “now that it was after the Sept. 11 attacks, and they blame a daily barrage of negative media images” (Audi, 2006, para. 4).

Meanwhile, there have been growing attempts by Muslim organizations to become more vocal and visible. In 2005, “the Fiqh Council of North America, an American Muslim group concerned with Islamic jurisprudence, issued an historic fatwa, a nonbinding legal opinion, that condemned terrorism and religious extremism” (Huda, 2006, p. 4). Though it met with veiled criticism that the language of condemnation was not strong enough, it also necessitates that the visibility to moderate Islam is not limited to condemning acts of terrorism only. Ahmed (n.d.), while referring to media coverage of the Gulf war in the 1990s, notes that initially, in television discussion programs there were a few speakers who represented the Muslim

---

4 July 7, 2005 was the day of terrorist attacks in London.
perspective, but they were rarely allowed to speak. He adds that “those that did appear sympathetic to Muslims were dismissed as loony left or romantics who knew nothing of political reality” (Ahmed, n.d. para. 24).

As noted earlier, it is logical if anyone speaks against any act of terrorism, but to have this expectation, specifically from American Muslims creates a perception that they may be condoning it, if they do not condemn it. It is not to suggest that American Muslims cannot be more visible, but if the visibility arises always in the context of defending one’s faith, it may not serve any constructive purpose.

Part of the problem is also the extreme nature of political and media rhetoric. The language of everyday media divides the society into groups creating an impression that if one does not pick a group, s/he would not belong anywhere. It does not leave many choices for the moderate voice. According to Elizabeth Noelle-Newman (1974), with reference to the public opinion theory, public attitudes are influenced by what social actors see as a socially desirable view. It is similar to Ahmed’s (n.d.) contention that media would present a partial view if they accord no visibility to a genuine Muslim voice, or dismisses it as being extremist or insane. So, it is not to say that there is no moderate voice. It is there, but the extreme stance that left-preferring and right-preferring media outlets take, creates a general distance for the moderates that may not want to identify with either group. Yes, there are bigots and unreasonable people in every profession and every society, but to accord them such power and visibility over moderate voices is the main flaw of the media today.

This social discourse can be extended to the political dialogue as well. For instance, after the 9/11 attacks the administration declared war on terrorism, and that countries were either with us or against us. It did not erode the middle, neutral voices that may not see themselves as part of the U.S.-led coalition, nonetheless are against terrorism, but it created a problem in developing effective partnerships. It is not far fetched to see this approach filter down at the domestic level here within the U.S., and explain the lack of a moderate Muslim voice in the news and other media outlets. It is a rather daunting task for an individual to say anything when the sides are so clearly divided. It is both a symptom and an outcome of the socio-cultural divide in the country today.

However, one definite positive result to come to the fore due to the current focus on American Muslims is that it has further reinforced the notion of multiculturalism in the U.S.. The country has long moved away from the romanticism of the melting pot, and faces the issues of socio-cultural plurality in terms of language, religion, and ethnicity. That is, though there is a constant dialogue that the country is becoming visibly more and more multicultural, the challenge of assimilation and acculturation, while maintaining one’s ethnic identity, remains.

**Concluding Comments**

As an academic I often hear the argument about the politically correct and incorrect views of the world in the media. Political correctness is defined as “adhering to a typically progressive orthodoxy on issues involving esp[ecially] race, gender, sexual affinity, or ecology” (Dictionary.com). The political incorrectness is “the use of expressions or actions that can be perceived to exclude or marginalize or insult groups who are socially disadvantaged or discriminated against” (Answers.com). The politically incorrect see the politically correct view as the extreme perspective that would take the most marginal viewpoint and present it as a mainstream argument. On
the flip side, the politically incorrect seem to believe that lack of social etiquette is acceptable, because everyone is free and can say anything about anyone without any logic. For instance, in a typical classroom setting, all students should have the intellectual freedom to speak their minds, but it would also be easier for a teacher to extend the freedom of speech to the majority group. On everything from economic biases in the criminal justice system, legal and illegal immigration, outsourcing, or terrorism, given the often skewed worldview based on media as a means of socialization, it is not hard to imagine that students in the numerical majority could make uninformed comments, while those in the minority would prefer to remain silent. That is, there will be a concern that saying anything against the majority view would be seen as socially undesirable (Noelle-Neumann, 1974) in the context of the general public opinion. Not everyone would be willing to argue about every statement based on ignorance or illogical reasoning. For a teacher, it is one thing to allow all comments, but also a matter of responsibility to intellectually challenge comments that may be based on prejudice, fear, ignorance, or just limited understanding of various issues. This is why Jackson (2007) sees the role of teachers to educate the young generation as a critical one. It is a similar process at the social level, where not every member of a minority group would be willing to defend his/her cultural and religious values. In part, therefore, the responsibility to learn about other cultures and religions lies with the majority group, instead of reacting towards it only during crisis.

It is a similar responsibility that lies with the media today. Everything from a social networking site to a late night comedy show, news reports to entertainment shows, is shaping people’s perceptions. Just as an academic, media cannot, and should not, control what opinions one may develop, but just as an academic, media can help its audience in developing informed opinions. With information, answers to questions like “why do they hate us?” would become clear, or may even force us to rephrase the question to ‘why are they indifferent?’ “Why they are not integrated?” “Since how long have they been part of this country?” “How come I did not know all this earlier?”

Essentially, with reference to language, color, religion, and ethnicity, the American identity has changed (and is always evolving), and Muslims are an integral part of that identity. They have been a part of America for generations, but it is just now that they are being accorded visibility, and the expectation is that the next stage to follow is that of understanding and acceptance. In that regard, as Cullen notes (1994), the perception of social justice and social support is as important as the actual support that people get from the society of which they are a part. The skewed view of American Muslims in the media filters into the social psyche as seen in the case of hate crimes, not just against Arabs and Muslims, but also against Sikhs, who look like an Arab to an uninformed person. There have also been incidents of efforts to prevent Sikhs from wearing certain religious symbols, including the turban (Barron, 2004). The social psyche that reflects easy compromises of liberties of any minority group is a sign of society that may be multicultural, but still lacks integration. The answer does not lie in censorship by external forces, rather, in for media to develop internal controls towards a balanced coverage of the larger, diverse world that the U.S. is a part. It would also benefit from controlling the religious rhetoric, especially emanating from public officials, while strengthening the secular national identity as the most important part of one’s identity rather than a religion or ethnic origin. As Juergensmeyer (2004) argued that the world today is more multicultural and smaller, and in terms of identity and control, therefore, traditional norms of social identity based on ethnocentric features like religion and ethnicity may not work in the abstract;
but they would go well with national identity. It does not take away other markers of one’s identity, but only puts secular national identity above all. But to make this principle work, there must not be concessions to any one religion over the other; and there must be no discrimination, systemic and social, based on one’s religious identity. Media, therefore, has their work cut out, and they could start bridging the gap among various groups within this country, through cultural communication, instead of just projecting the images of cultural violence, that are abused by terrorist groups as a recruitment tool and fear mongering and that complicates the religious-cultural discourse even at the domestic level.

References


Beck again warned that if Muslims don't "act now" by "step[ping] to the plate" to condemn terrorism, they "will be looking through a razor wire fence at the West. September 7, 2006. Retrieved February 14, 2008, from http://mediamatters.org/items/200609070002.


THE PHENOMENON OF XENOPHOBIC VIOLENCE: A HISTORICAL AND SOCIAL PSYCHOLOGICAL REVIEW OF AMERICA IN THE WAKE OF TERROR

Victoria Springer
Grant Sawyer Center for Justice Studies, University of Nevada, Reno
Barbara Larsen
University of Nevada, Reno*

ABSTRACT
Our paper reviews terrorist acts on U.S. soil within the past 17 years from a social psychological perspective, focusing on the resulting phenomenon of xenophobic violence – even though acts of terrorism have been executed by both foreign and domestic perpetrators. This violence may be rooted in psychological reactance, which posits that threats to or losses of a freedom motivate the individual to restore that freedom or sense thereof (Brehm & Brehm, 1981). Additionally, such violence may be indicative of a syndrome perspective, which holds that individuals are able to identify terrorists from non-terrorists by specific, easily recognizable characteristics and traits (Kruglanski & Fishman, 2006). Foreigners are singled out because they fit the perceived “profile” of what a terrorist “looks like.” The events discussed include the bombing of the World Trade Center (1993), Oklahoma City (1995), and the September 11th attacks on the World Trade Center and Pentagon (2001).

There are many definitions of terrorism and yet no single characterization is universally accepted. Each definition of terrorism carries with it a unique connotation that differentially emphasizes the motivations, material or ideological goals, or victims of perpetrators of terror. Scholars have reported that there are over one-hundred definitions of terrorism (Record, 2003), which despite its many descriptions is not legally defined in all jurisdictions. In the Code of Federal Regulations, the Federal Bureau of Investigation (F.B.I.) identifies terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives” (28 C.F.R.Section 0.85). Perhaps the most sinister element of terrorism is the fact that it is not an insular act of violence. Beyond the bricks and mortar of toppled towers, the twisted steel of charred roadside wreckage, and the incalculable human carnage lay shattered ideologies and fractured worldviews. The social, psychological, and political tremors caused by these heinous acts reverberate for a lifetime through each successive generation that faces, confronts, and survives terror.

Over the past 17 years, the phenomenon of xenophobic violence has followed each of the three major terrorist acts that have occurred on American soil; the 1993 World Trade Center Bombing (Caram, 2001), the 1995 Oklahoma City Bombing (Linenthal, 2001), and the 2001 attacks on the World Trade Center and the Pentagon (Ahmad, 2002). People that appeared to be members of specific ethnic or cultural

* Direct correspondence to spring20@unr.nevada.edu or larsenb6@unr.nevada.edu.
© 2008 by the authors, published here by permission.
The Journal of the Institute of Justice & International Studies
groups were singled out and subjected to acts of aggression, intimidation, verbal and physical violence. In some instances members of these targeted communities lost their lives in the wake of terrorist activity in the United States. This paper reviews the concept of psychological reactance, which posits that threats to or losses of a freedom motivate the individual to restore that freedom or sense thereof (Brehm & Brehm, 1981). This theoretical perspective provides insight regarding the question of why terrorist attacks in America have, in turn, provoked further violence. Additionally, xenophobic hostility may be indicative of a syndrome perspective understanding of terrorism. The syndrome perspective contends that individuals are able to identify terrorists from non-terrorists by specific, easily recognizable characteristics and traits (Kruglanski & Fishman, 2005). In essence, foreigners are singled out because they fit the perceived “profile” of what a terrorist “looks like.” The syndrome perspective offers a perspective that addresses the question of who become the victims of xenophobic behavior and why they have been singled out from the rest of the American population. By combining these two theoretical perspectives, this paper will present one explanation of the underlying causes for xenophobic violence and the groups that are targeted following acts of terrorism.

**Three Events that Brought Terrorism into the American Consciousness**

Terrorism is a complex phenomenon that challenges both the policymakers who are charged with deriving countermeasures to protect the public and the social scientists who are called upon to explain it (Friedland & Merari, 1985). Terrorism has been characterized as a kind of psychological warfare (Friedland & Merari, 1985) because of its far-reaching impact beyond the immediate victims into the "public mind" (p. 592). Since 1990, there have been scores of terrorist acts against Americans within the U.S. and abroad (see Figure 1 for a non-comprehensive timeline). Despite the preponderance of violent acts that have occurred abroad, is perhaps the events that occur on U.S. soil that most directly and dramatically impact the American psyche.
Figure 1.
The 1993 World Trade Center Bombing

The World Trade Center (WTC) opened in 1973, occupying sixteen acres in downtown Manhattan and changing the skyline at some 1,350 feet at its tallest point. The World Trade Center is estimated to have housed approximately 100,000 employees with thousands more visiting and traveling to other Manhattan destinations (Caram, 2001). The World Trade Center contained more than 13 million square feet of office space, 30,000 windows, and 104 elevators; it was an American landmark and an international destination. According to a retired member of New York Port Authority Police Department:

There is little doubt that the devastating blast of February 26, 1993, at the Port Authority-owned World Trade Center in the heart of the financial district of New York City was a blow to the security and serenity of the American public (Caram, p. viii).

The ammonium-nitrate car bomb that damaged the World Trade Center was located in an area used for parking on the B-2 level in Tower One below the police and fire communications control center, which rendered them useless and created a crater of approximately 11,500 square feet. The bomb was detonated at 12:17 p.m. (EST) by Radical Islamic terrorists with the intention to topple Tower One into Tower Two, which had the potential to kill an estimated 250,000 people (Childers & DePippo, 1998). In a report on terrorism in America, released in 1999, the Counterterrorism Threat Assessment and Warning Unit Counterterrorism Division indicated that 1,042 people were injured during the 1993 event and six were killed (see Figure 2 for terrorism-related casualties in the United States since 1990). The Senate Judiciary Committee Hearings (Childers & DePippo, 1998) that followed indicated that the attack was planned by Ramzi Yousef, Mahmud Abouhalima, Mohammad Salameh, Nidal Ayyad, Abdul Rahman Yasin, and Ahmad Ajaj, who received financing from al-Qaeda member Khaled Shaikh Mohammed. Abouhalima, Ajaj, Ayyad and Salameh were convicted of the bombing in March 1994, and in 1997 Yousef, the mastermind behind the bombings, and Eyad Ismoil were also convicted (Caram, 2001; McCann, 2006). At the conclusion of the Senate Judiciary Committee report on the bombing (Childers & DePippo, 1998), the authors remark that the bombing was a watershed event and taught the American public in a painful but unmistakable way that international terrorism can and does occur in the United States.
Figure 2.
The 1995 Oklahoma City Bombing

Opening March 2, 1977, the Alfred P. Murrah Federal Building was designed by architect Wendell Locke of Locke, Wright, and Associates and was constructed using reinforced concrete (Linenthal, 2001). Less than 20 years later, the building housed regional offices for the United States Social Security Administration, the FBI, the Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). It is estimated that the federal building contained approximately 550 employees (NPR, 1995). One feature of the building that was relatively unremarkable before April 19, 1995, was the America's Kids Day Care Center for the children of the federal employees located on the second floor. On the fourth floor of the building, Raymond Washburn ran the snack bar that was sometimes frequented by the children. Washburn, blind since childhood, considered himself lucky to have survived that April morning, stating: "I knew just about everyone in the building... I heard people screaming below me in the building... That's one day I was glad I couldn't see" (Linenthal, 2001, p. 12).

At 9:02 a.m. (CST), a 4,800 pound ammonium nitrate fuel oil bomb carried in a truck that was parked at the north entrance of the Alfred P. Murrah Federal Building detonated, destroying the federal building and severely damaging the surrounding buildings (City of Oklahoma, 1996). The bomb left a 240 square foot crater where the rented Ryder moving truck had been parked, and the force of the explosion set fire to nearby cars and shattered windows in a ten-block radius. In the 1999 Report on Terrorism in America, the Counterterrorism Threat Assessment and Warning Unit Counterterrorism Division indicated that 754 people were injured during the 1995 event and 169 were killed, 19 of which were children.

On April 20, 1995, the sketches of two white men were released to the press as suspects in the bombing and within days Timothy McVeigh and Terry Nichols were arrested. McVeigh and Nichols were found to be sympathizers with an anti-government militia (McCann, 2006) and the Oklahoma City bombing was executed as an act of vengeance for the government's involvement in the Waco (1993) and Ruby Ridge (1992) incidents. The nation began to distance itself from McVeigh and Nichols almost immediately after their apprehension, unwilling or perhaps unable to accept that Americans could have perpetrated such violence against other Americans (Linenthal, 2001). McVeigh was executed by means of lethal injection on June 11, 2001, and despite the fact that he had received a Bronze Star in the Gulf War, he was denied his military burial benefits by legislation signed by President Clinton on November 21, 1997. Tom Blackburn, commander of a Veteran of Foreign Wars Post in Oklahoma City, is quoted as saying that the only military thing McVeigh deserved was a firing squad (Linenthal). Nichols was sentenced to life in prison and a third conspirator, Michael Fortier, was sentenced to 12 years in prison, though he testified against Nichols and McVeigh, for failing to warn the U.S. government of the impending attack.

One of the most damaging and enduring aspects of the Oklahoma City Bombing was the sense of astonishment at the violation of the nation's interior. The disbelief was widespread and profound, unable to come to terms with "how evil could strike down innocents, and, within several days of the bombing, by the stunning news that Americans were responsible" (Linenthal, 2001, p. 15).
The 2001 Attacks on the World Trade Center and the Pentagon

The Pentagon building in Arlington, Virginia was completed on January 15, 1943 (The Pentagon Facts & Figures, n.d.). Built during the early years of World War II, the Pentagon is still considered one of the world's most efficient office buildings. The Pentagon is one of the largest office buildings on earth, occupying 3,705,793 square feet and housing some 23,000 military and civilian employees who contribute to the planning and execution of national defense. The World Trade Center, described above, was repaired after the terrorist bombings in 1993 with the addition of a reflecting pool. The granite memorial was designed by Elyn Zimmerman and dedicated in 1995 on the Austin J. Tobin Plaza, directly above the site of the explosion. It contained the names of the six people who perished in the attack as well as an inscription that read: "On February 26, 1993, a bomb set by terrorists exploded below this site. This horrible act of violence killed innocent people, injured thousands, and made victims of us all" (Zimmerman, 2002).

On the morning of September 11, 2001, Americans across the country awoke to scenes of terror on an unprecedented scale in their national history. As detailed by In the Wake of 9/11: The Psychology of Terror (Pyszczynski, Solomon, & Greenberg, 2003), at 8:46 a.m. (EST), 92 people on hijacked American Airlines Flight 11 were flown into the North Tower (Tower One) of the World Trade Center, and at 9:03 a.m. 65 people on the hijacked United Airlines Flight 175 were flown into the South Tower (Tower Two). At 9:40 a.m. a third, hijacked airliner, American Airlines Flight 77, with its 64 passengers crashed into the northwest wall of the Pentagon, killing 125 people in the building.

Though it was struck second, at approximately 9:59 a.m., almost one hour after its initial plane strike, the South Tower imploded. Just under half an hour later, at 10:28 a.m., after burning for some 102 minutes, the North Tower fell as well. A fourth plane, for which the ultimate destination is still speculative (the U.S. Capitol is the most substantiated suspected target), United Airlines Flight 93 crashed in a field in Pennsylvania at 10:10 a.m., killing the 45 passengers who had learned of the terrible events that were unfolding and struck back against their hijackers. Within less than two hours, a series of strategic symbolic American targets had been compromised and the ultimate toll of these harrowing events is still unraveling to this day.

The RAND Corporation (Dixon & Kaganoff Stern, 2004), states 2,551 people lost their lives on September 11, 2001, and another 215 have been reported as injured. However, the number of deceased individuals is still a matter of some debate. One reason for the debate is that not all of the mortal remains recovered from Ground Zero have been identified. Further, there is still an ongoing investigation into possible duplicate entries on the list of casualties, as well as investigating instances of fraud. Some of the estimates of fatalities range as high as 2,974. The National Commission on Terrorist Attacks upon the United States (i.e., the 9/11 Commission), estimate some 16,000 people were in the World Trade Center below the impact points, a significant portion of which were successfully evacuated before the towers fell.

McCann (2006) states it has been firmly established that the 19 hijackers involved in the 9/11 attacks were members of the terrorist group known as al-Qaeda. It has also been determined that the hijackers received training, funding, and other support from the terrorist network headed by Osama bin Laden and his second-in-command, Ayman al-Zawahiri. Due to the suicidal nature of the attacks, prosecution of the perpetrators of the 9/11 attacks has been an arduous task. Although many of the
senior leaders of al-Qaeda have been captured or killed due to the counter-terrorism measures that have arisen since September 11, 2001, the organization itself is still believed to pose a substantial risk to the security of the United States and its allies around the world (McCann, 2006).

**Psychological Reactance**

As devastating as the bombs and attacks described above have been, still more destructive is the political, social, and psychological aftermath that extended beyond the immediate victims and into the psyche of the American people. Following the 1993 bombing of the World Trade Center, the 1995 Oklahoma City bombing, and the 2001 attacks on the World Trade Center and the Pentagon, Americans lashed out against other Americans that were in no way involved with the planning or execution of the terrorist acts. One possible cognitive mechanism that may have contributed to these xenophobic instances is psychological reactance, which may have been triggered by the nature of the attacks and the long-held American value of personal freedom.

**Psychological Reactance and Free Behaviors**

In psychological reactance theory, limitations of or threats to personal freedoms draws attention to the need to retain them (Brehm, 1966). According to the theory, the threat will cause the individual to be motivationally aroused, and this arousal will be focused on preventing any further loss of freedom and the re-establishment of the freedom that had already been lost or threatened (Brehm, 1966). This theory has one basic assumption: For a given person at a given time, there is a set of behaviors any one of which he could engage in either at the moment or at some time in the future. This set of behaviors constitutes one's "free behaviors" (i.e., freedom of choice, freedom to act, freedom to refrain from acting, etc.) and consist of anything that one believes is *reasonably* possible (e.g., freedom to smoke a cigarette is potentially possible, freedom to land a space ship on the sun is not). It is important to note that there is no way to quantify or predict the origin of an individual's perception of what constitutes his or her own free behavior (Brehm & Brehm, 1981). That is, each person will have a specific and subjective set of behaviors that he or she believes he or she is free to do at any particular point in time. What can be predicted, however, is the *magnitude* of the psychological reactance that can occur when one's freedom is threatened.

According to reactance theory, "Given that a person has a set of free behaviors, he will experience reactance whenever any of those behaviors is eliminated or threatened with elimination" (Brehm, 1966, p. 4). Scholars contend that the magnitude of reactance is a direct function of the importance of the free behaviors that are eliminated or threatened, the proportion of free behaviors eliminated or threatened, and the magnitude of the threat itself (Brehm, 1966; Wicklund, 1976; Brehm & Brehm, 1981). Simply put, the more important the freedom is to an individual, the more freedoms that are compromised, and / or the stronger the threat to those freedoms, the greater the psychological reactance will be. It is also important to highlight the potential effect that a threat may have on other contemporaneous or future behaviors; that is, the loss of a single free behavior may be construed as an implied threat to other free behaviors either in the present or in the future. Additionally, just as a free behavior may be threatened vicariously through the
elimination of or threat to another free behavior, a threat to another person’s free behaviors may elicit psychological reactance as well. If the loss of freedom that has occurred to someone else could just as easily happen to oneself, then one's own free behavior will be perceived as threatened (Brehm, 1966).

**America and Freedom from Fear**

As aforementioned, the definition of the "free behaviors" that are addressed in the theory of psychological reactance requires that the freedom itself be reasonably possible for the individual. Brehm and Brehm (1981) are careful to specify that the general desire for man to be free cannot be addressed by the theory and insist that it be grounded in tangible freedoms. On this note, one might argue that terrorist attacks against the United States may have been perceived as attacking the American way of life and the American belief in freedom, but that philosophy of freedom is not comparable to the free behaviors as delimited in the theory of psychological reactance. However, the American ethos of freedom carries with it behavioral expectations that can -- and have been -- threatened through terror.

Pyszczynski, Solomon, and Greenberg (2003) have commented that perhaps some of the most tragic victims of terrorist attacks are the various freedoms that can no longer be taken for granted by Americans in their daily lives. The authors contend that Americans believe that they have a good life and enjoy the freedom to come and go as they please with minimal restrictions on their life, liberty, and pursuit of happiness. The most direct presentation of these freedoms and their behavioral counterparts that form the foundation of the American value of freedom is President Franklin Delano Roosevelt's Annual Message to the Congress on January 6, 1941 (Roosevelt, 1941). Roosevelt listed the "four freedoms": 1) freedom of speech, 2) freedom of worship, 3) freedom from want, and 4) freedom from fear. It is the freedom from fear that rings most true in the American nation that has experienced profound acts of terror. Roosevelt clearly outlined his behavioral expectations that would allow for his vision of freedom from fear to be realized, including a world-wide reduction of armaments to such a point that no nation would be in a position to commit an act of physical aggression against any other country. This particular freedom was not seen as a "distant dream of some future millennium", but rather something attainable as the antithesis of a violent world-order that "dictators seek to create with the crash of a bomb" (Roosevelt, 1941).

Terrorist acts that are committed on U.S. soil strike at the heart of America's belief in the right to live a life free from fear. Unfortunately, however, the very freedoms that individuals in the United States expect in their society are also what may have made them vulnerable to terrorist attacks (Pyszczynski, Solomon, & Greenberg, 2003). Though there is no extant research supporting the empirical existence of behavioral correlates for the "freedom from fear" concept among the American populace, this paper argues that it nevertheless may be acting as a theoretical stimulus for psychological reactance. In support of this argument, the following sections will discuss how psychological reactance can impact people's actions and how xenophobic violence can be viewed as a manifestation of reactance.
Psychological Reactance and Xenophobic Violence

Because psychological reactance is described as a motivational state that is geared toward the reestablishment of the freedom that has been compromised, a person who experiences reactance will be motivated to regain the lost or threatened freedom by whatever methods are available and perceived as appropriate (Brehm, 1966). Some of the avenues for the reestablishment of freedom are the direct reassertion of freedom through behavior (e.g., performing the behavior that was threatened), greater liking for threatened behaviors, indirect reassertion of freedom (e.g., performing a behavior that ordinarily implies the freedom to perform the behavior that has been eliminated or threatened), and aggression toward the source of the threat (Wicklund, 1976). The indirect reassertion of freedom is the most conceptually challenging, but is also the most telling psychological reaction.

When individuals indirectly reassert freedom, they perform behaviors that go beyond the original behavior by being more costly, dangerous, or taboo than the behavior that was threatened (Wicklund, 1976). This indirect assertion has been characterized as an "over-reaction" and dramatic display on the part of the individual because the behavior does not replace or supplant the loss of freedom, but rather seems intended to prove something about the worth or power of the individual. Coupling this indirect manner of manifesting psychological reactance with aggression directed toward the source of the threat may forge the recipe that leads to xenophobic violence after terrorist attacks.

New York City: February 26, 1993. In the months following the World Trade Center bombing, FBI agents and police detained, questioned, or arrested a dozen Muslim immigrants (Serrano, 1993). Acts of violence were reported at local mosques -- including the throwing of rocks of shattering of windows. Additionally, notable members of the community faced the possibility of deportation as the U.S. government continued its search for the guilty parties. Details are limited regarding the types and severity of violence that occurred, but anecdotal reports exist of mosque members having to struggle to make their way to religious services because of their concern with heightened American anger toward them as a group. At one site, it was reported that before the bombing, approximately 500 worshipers attended a local mosque; after the attack, the number first dropped to 300, and within months had dwindled to only two dozen (Serrano, 1993).

The actions taken against the Muslim community in response to the bombing of the World Trade Center may be related to psychological reactance, which may have been instigated by the losses of freedom and other changes that took place after the attack. After the World Trade Center bombing, the towers were closed to the public except for the rooftop observation deck and the restaurants located just below (Lacayo & Davidson, 1995). In addition, some 350 private security officers were put on patrol on the main concourse and only employees with photo identification cards and special passes were allowed admission to the building. Surveillance of the building was expanded by adding dozens of security cameras, and safety both inside and outside the structure was augmented by restring parking in the subterranean garage. This restriction allowed only law enforcement officials and tenants of the building. Additionally 6,000-lb. concrete planters were put in place that were designed to act as barriers to speeding vehicles (Lacayo & Davidson, 1995). Though these restrictions are of varying immediacy and severity, they reiterated the grim reality that Americans were now living in a country that was no longer free from fear.
Oklahoma City: April 19, 1995. The rush to target the Muslim community after the Oklahoma City bombing at least partially resulted from faulty news reports beginning on the evening of the attacks that two Middle Eastern men were believed to be involved in the event (Linenthal, 2001). Prominent officials, politicians, and self-proclaimed terrorist experts began decrying the bombing as an act of Islamic terrorism. Despite the fact that a sketch was released on April 20 of two white men who were believed to be the perpetrators of the attack, accusations against and stereotyping of Muslims continued, even as Muslim groups in Oklahoma City and throughout the United States condemned the bombing (Linenthal, 2001). The arrest of Timothy McVeigh and Terry Nichols within a few days of the bombing, coupled with the mounting evidence against them, abruptly ended the anti-Muslim dialogue and discrimination.

Many meaningful changes occurred that altered everyday life for a number of Americans. Some of these changes limited freedoms (i.e., access to buildings or public officials) that may have been previously taken for granted. The most immediate changes in daily behaviors occurred in federal buildings, including the posting of uniformed guards at daycare centers and the prohibition of curbside parking at facilities in Denver, Colorado (Lacayo & Davidson, 1995). Restrictions and fear rippled through the country, effecting the forestry service in Nevada, which began patrolling out of concern over potential attacks from radical anti-environmentalists, and Washington, D.C. where the Gutenberg Bible was removed from public display in the Library of Congress and police distributed flyers to office workers regarding how to respond with callers phoning in bomb threats (Lacayo & Davidson, 1995). Though the loss of life at Oklahoma City would become vastly overshadowed by future acts of terror, the loss of American innocence in the heartland was unmistakable.

New York City: September 11, 2001. On September 11, 2001, terrorist attacks impacted more than two towers and a government facility; a foreign entity successfully struck a highly symbolic series of targets on mainland American soil. In the minds of the public, the American way of life came under fire, and with it, the value of freedom was violently threatened and elicited an equally vicious response. The string of assaults on "non-Americans" that took place immediately following the attacks on the World Trade Center evidenced a violent reaction of the American public that seems (at least contemporarily) unprecedented in American history. In all, at least five people were killed, and "close to 1,000 separate bias incidents were reported in a period of eight weeks, and though the rate of new incidents has slowed, it continues today" (Ahmad, 2002, p. 103).

Because of the devastation caused by the attack on the World Trade Center in 2001, it is impossible to speak of the restrictions to American freedom regarding physical and cultural landmark. It could be argued that the complete destruction of this site is an ultimate, incalculable, and intractable loss. It appears that in the aftermath of the September 11th attacks Americans began limiting their freedoms themselves, potentially out of the fear that the events evoked. According to McCauley (2004), in early 2002 air travel and hotel bookings remained significantly below the average rates that were reported before the attacks. Supporting the idea that fear was a contributing factor to these self-imposed travel restrictions, some law firms that specialized in the preparation of wills and trusts reported increased business after the attacks and guns sales increased in certain locations in the wake of the attacks (McCauley, 2004). As any air traveler can testify, travel restrictions changed after the
September 11th attacks and have remained at heightened levels for the past seven years.

With each of the terrorist acts detailed above, the literal changes to everyday life can be interpreted as challenges to American freedom from fear and freedom to engage in commonplace liberties. This singular discussion, however, cannot begin to capture the complexity and profundity of how a nation reacts in the wake of terrorist activity. The theory of psychological reactance is but one tool from one theoretical perspective. Reactance is a powerful phenomenon that has the potential to turn neighbor against neighbor in the name of preserving or restoring an individual's personal freedom. The most dangerous aspect of this behavior is the seeming unawareness (or worse, ambivalence) of the offending individual to his or her own reactance. This theory can help social scientists, policymakers, and independent citizens alike understand their own powerful feelings in the aftermath of terror and tragedy. From this perspective, it is possible to begin to theoretically speculate as to why xenophobic violence occurs, but it does not fully explain whom this violence is enacted against. This paper now turns to a perspective that empirically addresses this very question through an exploration of the American construal of who and what a terrorist really is.

**The Syndrome vs. Tool Perspective**

A terrorist act is violent, heinous, and unthinkable. It is a form of violence that is contrary to any accepted standards of society (Kruglanski, 2006; Silke, 1998). Hearing about and witnessing terrorist acts engenders questions about the type of individual capable of committing them as well as about their motivations (Silke). In response to such questions raised by the American public, terrorists are most often presented as violent criminals, with shared pathologies and clearly identifiable characteristics (Kruglanski, 2006; Silke, 1998). Through the lens of a syndrome perspective, this means that assumptions are formed about the identifying characteristics of those thought likely to participate in terrorism. Assumptions based on a syndrome perspective have proved to be surprisingly persistent (Larsen & Wirtz, 2007; Ruby, 2002; Silke, 1998).

The belief that terrorists possess some mutually shared, easily identifiable psychological characteristics is known as the syndrome perspective (Kruglanski & Fishman, 2006). Although the consensus of research to date is that there is no definable set of psychological characteristics that adequately captures the heterogeneity of the perpetrators of terrorism (Horgan, 2005; Hronick, 2006) the syndrome perspective continues to be prevalent in the public mind (Silke, 1998). Investigations into the background of perpetrators demonstrate their similarity to the general populace (Kressel, 1996) and the incidence of psychopathology among terrorists mirrors that of the general population.

Miller (2006) points out the conditions that result in mental impairment or psychopathology are actually counterproductive to the successful navigation of terrorist activities. Further, the vast majority of terrorists do not originate from abusive or deprived backgrounds; rather, they typically appear to be law-abiding citizens who originate from every walk of life (Kressel, 1996). As a group, perpetrators of terrorism defy easy demographic or psychological categorization. They are found among the educated and ignorant, the wealthy and the destitute, the ideologue and the uncommitted. No simple categorization or profile of a terrorist has yet to be defined.
Perpetrators of terrorism, like perpetrators of other forms of mass violence, are typically active members of the communities in which they commit their acts (Alvarez, 2001; Waller, 2002). They are frequently intricately involved in the everyday business of life within their communities. Their neighbors, and in some instances their friends, become their victims. Yet, the general perception in the western world is that of the syndrome perspective. That is, there is a persistent belief that terrorists are easily identifiable and there is a demonstrated propensity for specifically connecting Islam and the Middle East with terrorist events (Abdallah, 2005; Gibbon, 2005; Jandali, 1998).

Much of the current research in terrorism is targeted toward understanding and identifying the perpetrators (Miller, 2006; Silke, 1998). Few studies to date have examined the psychological underpinnings that underlie the adoption of the syndrome, relative to terrorists, by the general public. Yet, the persistent view of perpetrators from a syndrome perspective is significant in its implications. Along with the violence it possibly engenders, public policy and laws may be written and social guidelines may be established by individuals who maintain this perspective. Therefore understanding the underlying influences and possible results are imperative. The following sections discuss how the theory of social identity may offer a partial explanation for the continuing adoption of a syndrome perspective despite supporting evidence.

**Social Identity and Identifying Terrorists**

The Theory of Social Identity explains the mechanisms by which people process, encode, and store social information as well as how the information is applied to situations within the social world through the formation of schemata. Schemata are developed and internalized through experience and by the culture in which an individual lives (DiMaggio, 1997; Hogg, 2006; Owens, 2003). They are mental constructs, which enable an individual to exert a perceived degree of control over the structure of their world by acting as a sort of mental heuristic or shortcut. A schema can be defined as a cognitive structure used to organize knowledge and guide the processing of information (Hogg, 2006; Owens, 2003). Thus, schemata are tools that enable the quick organization of information. The two schemata most significant to the syndrome perspective are the self-schema and the social-schema.

Social schemata are complex social representations, which include both group stereotypes and social roles (DiMaggio, 1997). Social schemata enable the categorization of individuals based on the traits and behaviors of the groups to which they belong. Self-schemata are the traits and behaviors attributed to the self, separate from social schemata. Self-schemata results from how each individual organizes information, makes generalizations, and defines specific characteristics about themselves, and others (Hogg, 2006; Owens, 2003) and delineates the relationship between the individual and the social schemata.

Schemata tend to be static and incoming information not consistent with already constructed schemata is dismissed (DiMaggio, 1997; Owens, 2003). Information is filtered through already existing schemata and influence opinions of all phenomena in the social world. In current western society, acts of terrorism violate western cultural and social norms and, therefore, they are viewed by the majority as a heinous criminal act; the perpetrators as criminals. As such, the characteristics terrorists are perceived to share collectively, their social schema, are not
characteristics the majority of individuals wish to exhibit. Thus, the self schema identifies terrorists as a group as separate, discrete, and identifiably different from the groups to which they belong (Ellard, Miller, Baumle, & Olsen, 2002).

The characteristics selected to define the identity of perpetrators of terrorism are arbitrary and subjective (DiMaggio, 1997; Hogg, 2006; Zerubavel, 1996). They are important, however, in that they represent discrete groupings and divisions by which individual and cultural perceptions of reality are defined. The self has a vested interest in defining the two sets of characteristics or schemas as polar opposites in order to protect the socially constructed worldview (Solomon, Greenberg, & Pyszczynski, 1991). The schema for a terrorist must be fundamentally different from the schema for the self with no chance of overlap for the individual identity to maintain its orientation to the specific social and cultural groups in which it claims membership. Currently, for many in the United States, the definition of terrorist is synonymous with being Muslim, Middle Eastern or Arab (Human Rights Watch, 2002; Jandali, 1998; Office of the Coordinator for Counterterrorism, 2001; Perry, 2003).

This offers one explanatory model for the persistent tendency to view perpetrators from the syndrome perspective. Utilizing this model, perpetrators are grouped into a discrete social cluster, separate from those who are not participants. The difference between social groups is exacerbated as individuals define the actions of terrorists as being very different from actions they themselves would be capable of committing. The result is that all individuals defined as terrorists are placed into a mental aggregate with a stereotypical definition, identified by a set of specific characteristics.

The labels and definitions applied to these clusters are maintained by culturally perceived portrayals (Fuller, 1995). The definitions become part of the cultural language of how terrorists are then, generally perceived, for example, dark skinned – Middle Eastern, depraved, and psychopathic. The label defining the ‘us – them’ mental gap further enhances the generally perceived view of terrorists as being separate, distinct, and with definable characteristics when compared to those of one’s own social grouping.

Through the structuring of the self and the defining of societal and cultural roles, individuals create their worldview. Adopting the syndrome perspective allows the defense of that worldview. It allows for discrimination between two sets of identifiable characteristics, creating a psychological distance from the perpetrators and their acts (Miller, 2006). Placing individuals into divergent clusters by constructing schemata to organize and define the self and reality imposes structure and predictability. This in turn offers the perception of a safe world. Maintaining the syndrome perspective maintains the structure, predictability, and perceived safety of the social world (Landau, 2004).

As has already been discussed, the violent public response to three different terrorist attacks on American soil was strikingly similar. While past events appear to have forged an understandable link between the Middle East and terrorism in the minds of the American public, it is important to note the xenophobic violence decreased only marginally when the announcement was made that the perpetrators of the 1995 Oklahoma City bombing was a non-Muslim white American (Linenthal, 2001; Perry, 2003). This supports the contention that the schema for terrorism is inextricably connected to Islam and the Middle East in the American psyche. The theory of social identity, and the construction of existing schemata, culturally and
socially defines terrorists as identifiable entities. This offers support for one explanation of why the individuals targeted for xenophobic violence were selected. Additionally, it also explains and lends support to how schemata construction maintains the tenacity of the syndrome perspective.

Suggestions for Future Research

These theories do not adequately or completely address all of the psychological and sociological intricacies behind xenophobic violence or the persistent adoption of a syndrome perspective. Continued research into the influence of psychological reactance behavior is needed to fully understand whether a connection exists between the violence witnessed following the terrorist attacks and the idea that the perpetrators of horrendous acts have clearly defined and identifiable characteristics offering targets for reactive violence. Further, additional research may help demonstrate that the persistence of the syndrome perspective is connected to the psychological need to impose structure, establish predictability, and maintain the perception of safety in one’s cultural and social worldview. Finally, research may point out a direction useful in addressing and altering the effects of xenophobic violence.

Conclusion

The psychological propensity for reactance and the social psychological cognitive drive to categorize and impose stability on even the most terrible and unpredictable acts of violence may underlie the phenomenon of xenophobic violence. Awareness of these cognitive reactions is critical to the development of anti-violence measures that may help prevent the perpetuation of violence in the wake of a terrorist attack. Though unpredictable events forever changed the way a nation views itself and others, there do exist predictable elements of the strong national response. Removing the acts of terrorists from the larger political, social, and cultural context in which they exist prevents the issues surrounding terrorism and terrorist violence from being adequately addressed. Focusing attention on the characteristics of terrorists rather than on the political “tool” of terrorism (Kruglanski, 2006) is misleading and removes any potential for changing the social and cultural structure that allows terrorism to flourish. As victims, Americans have engaged in acts of violence against individuals that they associated with a foreign enemy that became an aggressor because of their reactance and their tainted perception of innocent others. Though it is likely that the effects of the syndrome perspective and psychological reactance may occur unwittingly, to perpetuate the cycle of terror is to be complicit in a cannon of behavior that is inhumane, misanthropic, and never justified.

The solution to the problem of xenophobic violence will not be simple. However, by fitting theoretical perspectives to the phenomenon, we can begin to understand the underlying cause, which in turn can be addressed through progressive social policy. One example, the media coverage following the bombing of the Murrah building fueled the reactive violence toward a group not affiliated with the bombing. This group was singled out because they fit the publicly held schema for a terrorist. Proactive social policy designed to address such issues may prevent such violence in the future. Although we may have reactance and cognitive schemas ‘hard-wired’ into
our human behavior, knowledge of these mechanisms will allow us to choose to break the cycle of violence.

References


THE WAR ON TERROR’S IMPACT ON HABEAS CORPUS:  
THE CONSTITUTIONALITY OF THE MILITARY COMMISSIONS ACT OF 2006

James B. Staab*
University of Central Missouri

ABSTRACT
One of the most controversial Bush administration policies since 9/11 has been the executive order to use military commissions to try enemy combatants, which includes a provision denying habeas corpus rights to those subject to the order in federal court. The latter provision has precipitated a wide-ranging debate among the three branches of the U.S. government over whether the U.S. can deny habeas corpus rights to foreign nationals held at Guantanamo Bay, Cuba whom the government seeks to prosecute during the war on terror. This term the Supreme Court will have another opportunity to weigh in on this controversy when it reviews the constitutionality of the Military Commissions Act (MCA) of 2006. This article argues that the foreign nationals who have been held at Guantanamo Bay for six years without meaningful due process protections cannot be deprived of habeas corpus rights by either the president or Congress.

Author’s Note: After the completion of this article, the Supreme Court handed down its decision in Boumediene v. Bush, 128 S. Ct. 2229 (2008), ruling that the detainees at Guantanamo Bay have a constitutional right to habeas review in U.S. federal courts. While the Court’s decision is not extensively discussed here, it does substantially support the thesis of this article and is referred to in several places.

One of the most controversial Bush administration policies since 9/11 has been the executive order to use military commissions to try enemy combatants, which includes a provision denying in federal court habeas corpus rights to those subject to the order.1 The latter provision has precipitated a wide-ranging debate among the three branches of U.S. government over whether the United States can deny habeas corpus rights to foreign nationals held at the Guantanamo Bay Naval Base in Cuba, whom the government seeks to prosecute during the war on terror. This article argues that the foreign nationals who have been held at Guantanamo Bay for six and a half years without meaningful due process protections cannot be deprived of habeas corpus rights by either the president or Congress. The article begins with a description of the 9/11 attacks and the U.S. military response in Afghanistan. It then provides a broad overview of the extensive litigation brought on behalf of the detainees held at Guantanamo since January 2002, and explores the Bush administration’s evolving and amorphous definition of “enemy combatants.” The Supreme Court’s precedents involving the Bush administration’s military detention policy are then examined more closely. Finally, the article offers reasons why the

* Direct correspondence to staab@ucmo.edu.
© 2008 by the author, published here by permission.
The Journal of the Institute of Justice & International Studies

detention of non-U.S. citizens at Guantanamo Bay without due process safeguards violates Article 1, section 9 of the U.S. Constitution.

The Road to Guantanamo

In the early morning hours of September 11, 2001, four commercial airliners were hijacked by armed terrorists and used as weapons of mass destruction. Two of the planes were flown into the World Trade Center in New York City, a third plane was plunged into the Pentagon in Arlington, Virginia, and the last plane (which missed its target due to the heroic efforts of the passengers on board) crashed into an open field in rural Pennsylvania. In all, approximately 3,000 people were killed and hundreds of millions of dollars of property was destroyed. Reacting to the most devastating terrorist attack in U.S. history, Congress passed an Authorization for Use of Military Force (AUMF) allowing President Bush to use all necessary and proper force to combat the armed enemy.\(^2\) Relying upon this statutory grant of power, as well as his authority as commander in chief, President Bush sent U.S. armed forces into Afghanistan to commence a military campaign against al Qaeda and the Taliban regime that supported it. Over the next several months, the administration rounded up some 773 men from 40 different countries. Many of the detainees have been periodically released, but the ones remaining have been held at Guantanamo since as early as January of 2002. Currently, the center houses about 270 prisoners.\(^3\) Despite reports that several senior level Bush administration officials want to close the base, it remains open.

Prior Proceedings

Litigation involving the United States’ detention of so-called “enemy combatants” at Guantanamo Bay has been extensive and protracted. The initial litigation, styled Rasul v. Bush, was filed on February 19, 2002 by relatives on behalf of one Australian and two British nationals as their next friends, seeking, among other forms of relief, a writ of habeas corpus, release from unlawful custody, access to counsel, and an end to interrogation. Two-and-a-half months later, a second case was filed bearing the name Al Odah v. Bush. This case, brought by fathers and brothers of twelve Kuwaiti detainees, sought a declaratory judgment and an injunction ordering that they be informed of any charges against their relatives, have the assistance of counsel, and have “access to the courts or some other impartial tribunal.” These two cases were heard by the D.C. District Court and subsequently dismissed for want of jurisdiction.\(^4\) On June 10, 2002, the wife of Mamdouh Habib, an Australian, filed suit, seeking the same sort of relief as that requested in the Rasul case. Based on the decision in Rasul and Al Odah, the Habib case was also dismissed by the D.C. District Court, and all three cases were appealed. On appeal, the D.C. Court of Appeals

\(^2\) Pub. L. No. 107-40, 115 Stat. 224 (2001). The Joint Resolution authorizes the president to: “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

\(^3\) Carol J. Williams, “Guantanamo dangles new incentive for detainees,” Los Angeles Times (August 3, 2008).

affirmed.\textsuperscript{5} The Supreme Court, however, reversed.\textsuperscript{6} The justices ruled that the D.C. District Court had jurisdiction over the foreign nationals at Guantanamo Bay, because the federal habeas statute was interpreted to cover the custodians of the persons who claim to be held unlawfully, not the prisoners themselves.

The government then sought a motion to dismiss as a matter of law because the detainees were aliens and detained outside of U.S. sovereign territory and therefore could not claim any substantive constitutional rights. In two consolidated cases, D.C. District Court Judge Richard J. Leon granted the government’s motion and dismissed the cases.\textsuperscript{7} However, in eleven other consolidated cases, D.C. District Court Judge Joyce Hens Green denied in part the government’s motion to dismiss, ruling that the Combatant Status Review Tribunals (CSRTs), which were established by the Department of Defense to determine if a prisoner was an enemy combatant, did not adequately protect the detainees’ due process rights.\textsuperscript{8} Following these decisions, Congress passed the Detention Treatment Act (DTA),\textsuperscript{9} which amended the federal habeas statute to deny habeas corpus rights to the detainees and allowed for a special review process of CSRT determinations by the D.C. Court of Appeals. In \textit{Hamdan v. Rumsfeld} (2006)\textsuperscript{10} the Supreme Court ruled that the DTA did not apply retroactively and held that the defendant in that case could not be tried by military commission because the structure and procedures of the military commissions violated domestic and international law.

Congress then passed the Military Commissions Act of 2006,\textsuperscript{11} which attempted to overrule \textit{Hamdan} by denying habeas relief to the Guantanamo detainees in \textit{pending} cases. In a 2-1 decision, the D.C. Court of Appeals upheld the MCA.\textsuperscript{12} The court reasoned that the clear language of the MCA denied non-U.S. citizens of habeas corpus rights in pending federal cases, and the court rejected the argument that the detainees had a common law or constitutional right to habeas corpus since they were not U.S. citizens and were captured and held outside of U.S. sovereign territory.

In a rare reversal of a previous denial of certiorari, the Supreme Court granted review in the detainees’ case on June 29, 2007,\textsuperscript{13} and its decision was handed down one year later. In \textit{Boumediene v. Bush},\textsuperscript{14} the justices held (consistent with the thesis of this article) that the prisoners at Guantanamo Bay have the constitutional privilege of habeas corpus and that the DTA’s procedures for reviewing the detainees’ status are not an adequate and effective substitute for the habeas writ.

\begin{footnotes}
\end{footnotes}
Enemy Combatants

The rationale for the U.S. detention policy derives from the Bush administration’s comprehensive military order issued on November 13, 2001, which is intended to govern the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” Purportedly modeled after a proclamation and military order issued by President Franklin Delano Roosevelt during World War II, President Bush’s military order limits the use of military commissions to any non-citizen for whom the president determines: (1) is or was a member of al Qaeda, (2) has committed, aided or abetted, or conspired to commit terrorist acts, or (3) has knowingly harbored one or more of these individuals.

Several months after the issuance of this military order, the administration began using the term “enemy combatant” to describe those subject to detention and trial by military commission. The administration’s definition of enemy combatant, however, has varied over time. The administration sometimes uses the “enemy combatant” label as a term of art to describe a new and unique category of combatant in the post 9/11 world. On other occasions, the administration uses the term generically to describe what traditionally has been called lawful and unlawful combatants, while at other times the term is used synonymously with unlawful combatants. On June 7, 2004, the Department of Defense (DoD) formally defined enemy combatant as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” According to this definition, the term “enemy combatant” is not limited to war combatants alone, but includes anyone who has aided terrorist organizations fighting against the United States, including those who may have unwittingly given financial support to al Qaeda. The Joint Chiefs of Staff issued a slightly different definition of “enemy combatant” on March 23, 2005. According to Joint Publication 3-63, entitled “Joint Doctrine for Detainee Operations,” the term enemy combatant describes “a new category of detainee” and “includes, but is not necessarily limited to, a member or agent of Al Qaeda, Taliban, or another international terrorist organization against which [the]

15 66 F.R. 57833 (Nov. 16, 2001).
17 In Ex parte Quirin, 317 U.S. 1, 30-31 (1942), the Supreme Court distinguished lawful from unlawful combatants as follows: “By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”
United States is engaged in an armed conflict.’’ The MCA (enacted on October 17, 2006) contains a definition of “enemy combatant” that distinguishes between lawful and unlawful enemy combatants—only the latter of which are subject to trial by military commission. The term “unlawful enemy combatant” is broadly defined as “(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”

The ambiguous nature of the “enemy combatant” label still persists, however, because the MCA goes on to include the following additional category of persons subject to military commissions: “(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.” Since 9/11 only fifteen of the detainees at Guantanamo Bay have been charged with a crime and only one military tribunal has been completed. Nevertheless, all of the remaining detainees have been labeled “enemy combatants” and as such are being held indefinitely during the war on terror. Although the definition of those subject to President Bush’s military order has changed over time, one thing has remained constant: Those subject to the order have been denied habeas corpus rights in federal court.

The Bush administration has defended its military order on both legal and policy grounds. The legal argument is that neither the Constitution nor international law applies to the Guantanamo detainees. As for the former, the Constitution’s Suspension Clause (Art. 1, section 9) and the Due Process Clause (Fifth Amendment) cannot be relied upon by the detainees because they are foreign nationals who were captured overseas and are being held at the Guantanamo Bay Naval Base, over which the U.S. lacks sovereign authority. On this view, the rights and protections of the U.S. Constitution do not have extraterritorial application to non-citizens. For support of this view, the administration has relied upon various Supreme Court precedents, and in particular Johnson v. Eisentrager (1950). In that case, the justices denied habeas corpus jurisdiction to twenty-one German nationals who were convicted of war crimes by a U.S. military commission and imprisoned at the Landsberg Prison in U.S.-occupied Germany for aiding the Japanese after Germany had unconditionally surrendered to the United States during World War II.

As for international law, the Bush administration claims that the Geneva Convention on Prisoners of War does not apply to the Guantanamo detainees because they are unlawful enemy combatants to whom the Geneva Conventions have no

---

19 Joint Publication 3-63 (March 23, 2005). After this Joint Publication received extensive criticism from human rights groups, the defense department removed it from its web site and has said that it would issue another publication at a later date. At the time of this writing, one has not been issued.
20 10 U.S.C. Section 948a(1).
22 See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment did not protect nonresident aliens against unreasonable searches and seizures conducted outside the sovereign territory of the United States); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”).
applicability. The Geneva Conventions, according to the administration, apply only to signatory states, and al Qaeda (and even the Taliban\textsuperscript{24}) is not one of them. The administration has also made a number of policy arguments to support its detention order. Based on national security concerns, the administration has argued that the detainees cannot be released because they could join back with al Qaeda or other terrorist organizations and cause further harm to the United States. Moreover, the detainees at Guantanamo Bay could be important sources of information and therefore should be held during the war on terror in order to be questioned about the future strategies and tactics of al Qaeda.


The Supreme Court’s initial examination of the Bush administration’s detention policy came in *Rasul v. Bush*.\textsuperscript{25} In this case, two British,\textsuperscript{26} two Australian, and twelve Kuwaiti citizens, through their next friends, challenged their detention at Guantanamo Bay Naval Base. Each of the petitioners were captured during U.S. military operations in either Pakistan or Afghanistan and transferred to Guantanamo Bay sometime between January and March 2002. All of the petitioners denied that they were enemy combatants or had any involvement, direct or indirect, in the terrorist attacks on the United States on September 11, 2001 or in any other terrorist acts affecting U.S. interests. Relying upon *Eisentrager*, the Bush administration argued

\textsuperscript{24} Several members of the Bush administration have argued that Afghanistan is a “failed state” and thus the Geneva Conventions do not apply to the Taliban regime. See, e.g., Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush (January 25, 2002), in *The Torture Papers: The Road to Abu Ghraib*, eds. Karen J. Greenberg and Joshua L. Dratel (Cambridge University Press, 2005), p. 118-121. Although President Bush accepted the view that he had the authority to suspend the Geneva Conventions as between the United States and Afghanistan, he declined to do so. Instead, he determined that the Taliban detainees are unlawful enemy combatants to whom the Geneva Conventions do not apply. Memorandum from President Bush (February 7, 2002), in *The Torture Papers*, pp. 134-135. This article does not deal here with the administration’s international law argument, although it is important to note that while a signatory state can opt out of the Geneva Conventions if another state does not follow the normal rules of war, the custom has been to grant Geneva Convention status to other states (e.g., Korea, Vietnam) in order to maintain traditional U.S. values. Cf. *Hamdan v. Rumsfeld*, 415 F.3d. 33, 41 (D.C. Cir. 2005) (signatory states to Third Geneva Convention remain bound to the provisions as long as non-signatory power accepts and applies provisions of convention). At a minimum, this would apply to the Taliban government, and arguably even al Qaeda, a non-state terrorist actor, whose members were allegedly involved in a conflict in the territory of a High Contracting Party (i.e., Afghanistan) to the Geneva Conventions. See Common Article 3 of the four Geneva Conventions of 1949 (In a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions protecting “persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by … detention.”). Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364. The unprecedented action taken by the Bush administration (i.e., to deny POW status to the Taliban government even though the U.S. has never previously denied the applicability of the Geneva Conventions to a High Contracting Party) will also likely have negative consequences for our own soldiers. If the United States does not provide the Taliban with POW status, other nations may rely upon this decision to justify their own refusal to grant U.S. soldiers captured in a war zone POW status. For concerns along these lines, see Memorandum from Colin L. Powell, U.S. Department of State, to Counsel to the President (January 26, 2002), in *The Torture Papers*, pp. 122-125.

\textsuperscript{25} 542 U.S. 466 (2004).

\textsuperscript{26} By the time the Supreme Court heard the case, the two British detainees (Shafiq Rasul and Asif Iqbal) had been released from detention at Gitmo.
that the detainees did not have habeas corpus rights in U.S. federal court—a view supported by both the D.C. District Court and Court of Appeals. In a major blow to the administration, however, the Supreme Court reversed. In a 6-3 decision, the Court held that *Eisentrager* did not negate a statutory entitlement to habeas corpus, and that the current habeas corpus statute, which traces its origins back to the first grant of federal jurisdiction in 1789, did not deny “the privilege of litigation” to the Guantanamo Bay detainees, because the writ of habeas corpus applies to the person who holds a prisoner in alleged unlawful custody, not to the prisoner who seeks relief. In an opinion by Justice John Paul Stevens, a majority of the justices also rejected the government’s reliance upon a “longstanding principle” that federal legislation is presumed not to have extraterritorial application unless such intent is supported by a clear statement. Stevens noted that this principle does not apply here because the express terms of the 1903 Lease Agreement with Cuba states that the United States exercises “‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.”

He also cited early English common law cases in which British courts exercised habeas jurisdiction over territories “under the subjection of the Crown.”

On the same day that it decided *Rasul*, the Court handed down *Hamdi v. Rumsfeld*. There the justices ruled that a U.S. citizen being detained in the United States as an “enemy combatant” had a right, as a matter of due process, to “notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”

### CSRTs and the Detention Treatment Act of 2005

Eight days after the rulings in *Rasul* and *Hamdi*, the Department of Defense established Combatant Status Review Tribunals to determine if the foreign nationals held at Guantanamo Bay were properly being detained as enemy combatants. Pursuant to the CSRT process, each detainee at Guantanamo has an opportunity to challenge his classification as an enemy combatant before a panel of three military officers. During the process, the detainee is assigned a personal representative (a military officer with appropriate security clearance) to assist the detainee in the review process. The detainee has the following rights during the proceedings: “notice of the unclassified factual basis for his designation as an enemy combatant,” the right to an interpreter and to be “advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him,” the right “to attend all proceedings, except for proceedings involving deliberation and voting by the members [of the Tribunal] or testimony and other matters that would compromise national security,” the right “to call witnesses if reasonably available, and to question those witnesses called by the tribunal,” the “right to testify or otherwise address the Tribunal in oral or written form, and to introduce

---

28 Id. at 482.
30 Id. at 533.
31 See Deputy Secretary of Defense Paul Wolfowitz, Memorandum for the Secretary of Navy, “Order Establishing Combatant Status Review Tribunal” (July 7, 2004); See also Secretary of Navy Gordon England, “Implementation of Combatant Status Review Tribunal Procedures Detained at Guantanamo Bay Naval Base, Cuba” (July 29, 2004).
relevant documentary evidence,” and the right not to be compelled to testify before the tribunal. For its part, the three-judge tribunal “shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith.” The tribunal is not bound by normal rules of evidence but may “consider any information it deems relevant and helpful to a resolution of the issue before it,” including hearsay evidence. The tribunal makes its determination in closed session and by majority vote. The government’s burden of proof for an enemy-combatant designation is by a preponderance of the evidence, and there is also “a rebuttable presumption” in favor of the government’s evidence. The tribunal’s decision is reviewed by a newly-created Director of Combatant Status Review Tribunals who “may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.” If the tribunal determines that the detainee shall no longer be classified as an enemy combatant, he is supposed to be released.

In December 2005, Congress passed and President Bush signed into law the Detainee Treatment Act (DTA). This act sanctioned the Defense Department’s CSRT process by designating the D.C. Court of Appeals as having the exclusive and limited jurisdiction of reviewing enemy-combatant determinations by the CSRTs. By its terms, the scope of review for the Court of Appeals is to determine that a “status determination … was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence).” Consistent with President Bush’s original military order, the DTA also deprives federal courts of the authority to hear habeas corpus claims by the Guantanamo Bay detainees. In particular, the act added a subsection to the habeas statute directing that, except as otherwise provided in the DTA, “no court, justice, or judge shall have jurisdiction to hear or consider … an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”


The following year, the Supreme Court handed down another important decision in Hamdan v. Rumsfeld (2006). There the justices were confronted with the question of whether the structure and procedures of military commissions established by President Bush’s Military Order conformed to U.S. and international law. Salim Ahmed Hamdan, a Yemeni national, was captured by militia forces in Afghanistan in November 2001, turned over to the U.S. military, and then transported to Guantanamo Bay in June 2002. In July 2004, Hamdan, the alleged driver and body guard for Osama bin Laden, was charged with one count of conspiracy “to commit … offenses triable by military commission.” In his defense,

33 DTA Section 1005(c)(2)(C)(i).
34 DTA Section 1005(c)(1).
35 126 S. Ct. 2749.
Hamdan claimed that the military commission established to try him violated the Uniform Code of Military Justice (UCMJ) and international law. He also objected to particular procedures of the military commission system, including those allowing defendants to be excluded from the trials and the government’s use of hearsay evidence. Finally, Hamdan claimed that the conspiracy charge made against him was not one traditionally recognized as a war crime. The government moved to dismiss the suit under the DTA.

In a 5-3 decision, the Supreme Court ruled against the government and held that the DTA did not apply retroactively to pending cases, including Hamdan’s. Justice John Paul Stevens, for the Court, also held that the military commission system authorized by President Bush violated the UCMJ and international law. With respect to the former, the Court cited a historical “uniformity principle” whereby the procedures used in military commissions have been the same as those used to govern courts-martial—a principle that finds legislative support under the UCMJ.\footnote{Id. at 2788-2793. Section 836 of the UCMJ provides: “The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.”} In examining the Bush administration’s argument for deviating from this uniformity principle—“the danger posed by international terrorism”—the Court found it to be unconvincing. As Justice Stevens put it, “The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter.”\footnote{Id. at 2792.} A majority of the Court also ruled that Common Article 3 of the Geneva Conventions applied to Hamdan’s trial by military commission, which requires judgments “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”\footnote{Id. at 2795.} Here again, the Bush administration’s deviations from the procedures used by general courts-martial were found to be unsupportable. Four of the justices also held that the government’s conspiracy charge against Hamdan was not punishable as a violation of the law of war.

The Military Commissions Act of 2006

In response to Hamdan, Congress passed the MCA, which President Bush signed into law on October 17, 2006.\footnote{Pub. L. No. 109-366, 120 Stat. 2600 (2006).} The basic purpose of the MCA is to establish procedures governing the use of military commissions. With some notable exceptions,\footnote{For example, UCMJ’s provisions relating to speedy trials, compulsory self-incrimination, and pretrial investigation do not apply to military commissions. Moreover, evidence is admissible if it has probative value and the proceedings can be closed to the public and the accused can be excluded from the proceedings under certain circumstances.} the procedures are based on those used for trial by general courts-martial under the UCMJ. Congress also mandated that no alien unlawful combatant subject to trial by military commission may invoke the Geneva Conventions as a source of rights, and amended the federal habeas corpus statute as
follows: “No court, justice, or judge shall have jurisdiction to hear or consider an
application for a writ of habeas corpus filed by or on behalf of an alien detained by
the United States who has been determined by the United States to have been
properly detained as an enemy combatant or is awaiting such determination.”41 In
contrast to the DTA, the MCA explicitly states that this jurisdiction-stripping
 provision applies to pending cases.42 Unlike the DTA, the MCA does not limit its
habeas restriction to only those detained at Guantanamo, but rather applies the
limitation to all alien enemy combatants. Under the MCA, the U.S. Court of
Appeals for the D.C. Circuit has exclusive jurisdiction to review final decisions
rendered by the military commissions, but the scope of review is limited to
considering “whether the final decision was consistent with the standards and
procedures specified” in the MCA, and “to the extent applicable, the Constitution
and the laws of the United States.”43


In *Boumediene v. Bush* (2007),44 the case the Supreme Court reviewed during
its 2007-08 term, a three-judge panel of the D.C. Court of Appeals ruled that the MCA
eliminated statutory habeas corpus claims by the foreign nationals held at
Guantanamo Bay. Just as importantly, the Court of Appeals also held that the U.S.
Constitution’s Suspension Clause (Article I, Section 9) does not apply to the detainees
since they were captured and held outside of U.S. sovereign territory. In reaching this
conclusion, the court placed great reliance upon the Supreme Court’s decision in
*Eisentrager*,45 and concluded that the MCA, in depriving the courts of jurisdiction over
the detainees’ habeas petitions, did not violate the Suspension Clause of the
Constitution. In dissent, Judge Judith Rogers agreed with the majority that the MCA
withdrew federal jurisdiction from the detainees’ claims, but disagreed with its
constitutional analysis. According to Judge Rogers, the Suspension Clause operates
as a limitation on congressional power and is not a grant of individual constitutional
rights. Judge Rogers also cited early English common law cases in which the courts
did exercise habeas jurisdiction over aliens under the control of Crown, and she took
the majority to task for “ignoring the Supreme Court’s well-considered and binding
dictum in *Rasul*, that the writ at common law would have extended to the
detainees.”46

---

41 MCA Section 7(a)
42 The amendment to the habeas corpus statute denies federal courts of jurisdiction in all cases, “without
exception, pending on or after the date of the enactment of this Act,” which relate to any aspect of the
detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States
since September 11, 2001.” MCA Section 7(b).
43 MCA Section 950g.
44 476 F.3d 981 (2007).
46 479 F.3d. at 995.
Analysis

Eisentrager v. Rasul

The D.C. Court of Appeals in Boumediene erroneously decided that the Suspension Clause does not apply to the Guantanamo Bay detainees. The court failed to distinguish the petitioners in Eisentrager from the prisoners at Guantanamo. In Eisentrager, the petitioners, twenty-one German nationals, were captured in China for allegedly “collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces” during World War II.47 The petitioners were tried by a U.S. military commission headquartered in Nanking, convicted of violating the laws of war, and transferred to a prison in Germany, which was under the control of the United States army. The twenty-one German nationals sought writs of habeas corpus in the United States District Court for the District of Columbia, claiming violations of the U.S. Constitution and the Geneva Convention of 1929. The District Court dismissed for lack of jurisdiction, but the D.C. Court of Appeals disagreed and reversed its judgment. In a 6-3 decision, the Supreme Court reversed and denied the petitioner’s habeas corpus request. Justice Robert Jackson, for the majority, observed that he could find “no instance” where a court issued the writ to “prisoners [who] at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States.”48 In reaching this decision, the Supreme Court relied upon the following six crucial factors: the prisoner “(a) [was] an enemy alien; (b) ha[d] never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and [was] at all times imprisoned outside the United States.”49

The facts in Boumediene, however, are far different from those in Eisentrager. First and foremost, the Guantanamo Bay detainees are being held within the territorial jurisdiction of the United States. U.S. laws and regulations apply to the Naval Station at Guantanamo Bay and have done so for over 100 years. The initial lease agreement between the U.S. and the Republic of Cuba, which was ratified in 1903, explicitly states that Cuba retains “ultimate sovereignty” over Guantanamo, but it also states that the United States has “complete jurisdiction and control” over the military base.50 A subsequent agreement between the two countries, entered into in 1934, provides that the stipulations of the original agreement shall remain in effect “[u]ntil the two contracting parties agree to the modification or abrogation” or the U.S. abandons the naval station.51 Rear Admiral M.E. Murphy, who wrote the official history of Guantanamo Bay for the U.S. Navy, interpreted these two agreements as giving the U.S. a “perpetual lease” on the naval base. He also opined that “for all practical purposes … [the naval base] is American territory.… [T]he United States has

47 339 U.S. at 766.
48 Id. at 778.
49 Id. at 777.
for [over one hundred years] exercised the essential elements of sovereignty over this
territory, without actually owning it. Unless we abandon the area or agree to a
modification of the terms of our occupancy, we can continue in the present status as
long as we like.”

Thus, the Guantanamo Naval Station stands on the same footing as
any other U.S. territory where the Court has previously held judicial authority
extends. After reviewing the lease agreements between the United States and the
Republic of Cuba, Justice Anthony Kennedy noted in his concurring opinion in Rasul:
“Guantanamo Bay is in every practical respect a United States territory…. [The
Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the
discretion of the United States. What matters is the unchallenged and indefinite
control that the United States has long exercised over Guantanamo Bay. From a
practical perspective, the indefinite lease of Guantanamo Bay has produced a place
that belongs to the United States, extending the ‘implied protection’ of the United
States to it.”

Moreover, the defendants in Eisentrager were provided with more due
process protections than the prisoners held at Guantanamo Bay. The German
nationals in Eisentrager were denied habeas review only after a military commission
found them to be enemy aliens and guilty of war crimes. Here, the Guantanamo Bay
prisoners contest that they are enemy combatants and claim that they have been
denied a hearing before a neutral and independent tribunal. The Bush
administration’s broad definition of “enemy combatant” also draws distinctions with
Eisentrager. Eisentrager dealt with unlawful enemy combatants who continued to
fight against the U.S. after Germany formally surrendered. The Bush administration’s
definition of enemy combatant, however, covers noncombatants who may have only
materially supported al Qaeda, the Taliban, or associated forces. (According to one
report, only 55 percent of the Guantanamo Bay detainees have been determined to
have committed any hostile acts against the United States or its coalition allies.)
To be sure, persons who have materially supported al Qaeda or other terrorist
organizations may have committed serious crimes, but if they are not traditional
combatants (lawful or unlawful) then their offenses have not historically been
considered war crimes. For this reason, the broad scope of the Bush administration’s
enemy combatant label requires more judicial scrutiny and due process protections.
As Justice Kennedy noted in Rasul, the Guantanamo prisoners’ “indefinite detention
without trial or other proceeding presents altogether different considerations” from

52 M.E. Murphy, “History of Guantanamo Bay, 1494-1964” (originally published Jan. 5, 1953), Ch. 3,
available at https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmoistgeneral/gtmohistmurphy/gtmohistmurph
hyvol1/gtmohistmurphyvol1ch03/CNIC_040535.
53 See, e.g., In re Yamashita, 327 U.S. 1 (1946) (granting habeas review to a Japanese military general
who was charged with committing war crimes against the civilian population in the Philippines). In
Eisentrager, Justice Jackson distinguished Yamashita from the 21 German nationals by observing that
“Yamashita’s offenses were committed on our territory, he was tried within the jurisdiction of our
insular courts and he was imprisoned within territory of the United States.” 339 U.S. at 780.
54 542 U.S. at 487 (Kennedy, J., concurring in judgment).
55 From 2002-2004, the Guantanamo Bay detainees were denied any sort of due process review, and since
2004 their status has been subject to review by the Defense Department’s CSRT process, which for
reasons noted below is not sufficient.
56 Mark Denbeaux, et al., “Report on Guantanamo Detainees: A Profile of 517 Detainees through
detention of the *Eisentrager* prisoners, who were convicted of war crimes after a full military commission trial. “It allows friends and foes alike to remain in detention.”

The length of the detention of the Guantanamo Bay detainees also distinguishes *Boumediene* from *Eisentrager*. Typically, detentions of enemy aliens last as long as the war. Here, however, there is no foreseeable end to the war on terror, and thus the individuals who have been held by the United States as “enemy combatants” could be kept in captivity for the rest of their lives. The Bush administration defends its indefinite detention policy on military necessity grounds, which is certainly justifiable. The administration does not want to release individuals who could cause further injury to the United States. As a practical matter, however, there must be some limits to this argument, particularly when due process protections have been so lacking. The United States is not presently in a state of armed conflict similar to that which preceded the *Eisentrager* litigation. During the six-and-a-half years of captivity for the Guantanamo Bay prisoners, the administration could have created a legitimate review process to accurately and fairly assess whether they are in fact enemy combatants. But it has not done so. As Justice Kennedy noted in *Rasul*, “where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”

Finally, the location of the detention facility distinguishes *Boumediene* from *Eisentrager*. The *Eisentrager* defendants were imprisoned in Germany after being found guilty of war crimes by a military commission convened in China, the site of their capture. Military commissions are creatures of war. They historically are convened close to battlefields and are a quick and expeditious way of meting out justice. As Colonel William Winthrop, a leading expert on military law, put it: “The [military] commission is simply an instrumentality for the more efficient execution of the war powers….”

Here, however, the detainees captured during the war on terror are being held at Guantánamo Bay, which is “far removed from hostilities.” What is more, there is strong evidence that the administration chose Guantánamo Bay not for military reasons alone but to avoid judicial scrutiny. As John Yoo, then Deputy Assistant Attorney General under the Bush administration, explained: “No location was perfect, but the U.S. Naval Station at Guantánamo Bay, Cuba, seemed to fit the bill…. [T]he federal courts probably wouldn’t consider Guantánamo as falling within their habeas jurisdiction, which had in any event been understood to run only within the territorial United States or to American citizens abroad.” If the prisoners captured during the war on terror were detained and tried in Afghanistan as an incident of war, the administration’s argument would be more compelling. But many of the Guantánamo Bay detainees were picked up in other countries and claim not to have been involved in the 9/11 attacks at all. In short, the differences between

---

57 542 U.S. at 488.
58 Id.
61 In one case, six individuals were allegedly seized from their homes in Bosnia on suspicion of plotting to attack the U.S. embassy in Sarajevo. *Boumediene v. Bush*, 355 F. Supp. 2d 311 (D. D.C. 2005).
Boumediene and Eisentrager are dramatic, and were ably summarized by Justice Stevens in Rasul:

[The petitioners] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two [now six and a half] years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. 62

The Suspension Clause

Article I, Section 9 of the U.S. Constitution provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” This guarantee, which traces its origins back to the Magna Carta (1215), was put into the Constitution as a remedy against illegal detentions by the government. It is referred to as the Great Writ because without this basic guarantee all other rights would be rendered meaningless. As Alexander Hamilton put it in Federalist 84, “the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.” 63

Quoting the English legal jurist William Blackstone, Hamilton continued: “To bereave a man of life … or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.” 64

Under the express language of the Suspension Clause, Congress has the authority to suspend the writ of habeas corpus in cases of rebellion or invasion. However, habeas corpus has only been suspended four times in U.S. history and the Bush administration has not requested Congress to suspend the Great Writ during the war on terror, nor would it likely be successful. Since 9/11 there has been no evidence of an ongoing rebellion or invasion, and previous suspensions of habeas corpus have always been short in duration. 65 In lieu of suspending the writ of habeas corpus, Congress could provide an adequate and effective substitute through which the Guantanamo Bay prisoners could challenge their detention. Only twice in U.S. history, however, has the Court found a constitutionally adequate substitute for habeas corpus. 66 In each of these cases the Court determined that the substitute ensured the same level of protections as the traditional writ of habeas corpus. The problem with the CSRTs is that they are not an adequate substitute for habeas corpus review.

62 542 U.S. at 476.
64 Id. at 474-475 (quoting William Blackstone, Commentaries on the Laws of England 1:132-33 (1765).
65 Moreover, the text of the MCA does not attempt to suspend the writ, and the legislative history of the MCA suggests that Congress did not believe that the detainees had a constitutional right of habeas review that would need to be suspended.
Under the CSRT procedures, the Guantanamo Bay prisoners are not given a meaningful opportunity to rebut the evidence against them. According to the Denbeaux Report, a comprehensive study examining all of the publicly available CSRT proceedings, the government relied on classified evidence, which is withheld from the detainees, to support its enemy-combatant designation in every case. Moreover, the government relied exclusively on classified evidence in 52 percent of the cases. The detainees also were unable to present exculpatory evidence. Requests by detainees to produce documentary evidence were denied in 60 percent of the cases, and the only documentary evidence that the detainees were allowed to produce was from family and friends. At the same time, while the CSRT procedures allow detainees to call witnesses, these requests are subject to the discretion of the CSRT’s presiding officer that the witness is “reasonably available.” In fact, the CSRTs denied every request for a witness to appear who was not at Guantanamo Bay and denied 74 percent of the requests for witnesses who were at Guantanamo. As the Denbeaux Report observes, “the only witnesses that were allowed under the CSRT process were presumed enemy combatants testifying in favor of other presumed enemy combatants.”

The reliability of evidence is also a major issue. Unlike in court-martial proceedings, hearsay evidence is admissible. In addition, the FBI has already admitted to waterboarding Khalid Sheikh Mohammed, the alleged architect of 9/11, and several other Guantanamo Bay detainees have claimed that they made confessions during interrogations only after being tortured. Mamdouh Habib, for example, alleged that after being captured in Pakistan and sent to Egypt for interrogation, he “was subjected to torture there, including routine beatings to the point of unconsciousness.” He also claimed that “he was locked in a room that would gradually be filled with water to a level just below his chin as he stood for hours on the tips of his toes,” and that “he was suspended from a wall with his feet resting on the side of large electrified cylindrical drum, which forced him either to suffer pain from hanging from his arms or pain from electrical shocks on his feet.” Moreover, evidence has been introduced in earlier proceedings indicating that abuse of detainees took place at Guantanamo Bay itself. Under the MCA, coerced statements obtained

68 Id. at 3.
69 Id. at 2-3.
70 Id. at 5.
71 Michael Isikoff and Dan Ephron, “Is This Terror on Trial?” Newsweek, June 16, 2008, p. 38.
73 Id.
74 One example of alleged abuse was found in an exhibit filed in the In re Guantanamo Bay Detainee Cases, which discussed interrogation techniques by U.S. officials. The exhibit, whose author was unknown but was assumed to be affiliated with the FBI, contained the following observations:

On a couple of occasions [sic], I entered the interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated [sic] on themselves, and had been left there for 18-24 hours or more. On one occasion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP’s what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out
prior to December 30, 2005—the date of the enactment of the Detainee Treatment Act—can be admitted if the totality of circumstances renders the statement reliable or sufficiently probative—and almost all of the CSRT hearings were performed prior to this date. Meanwhile, coerced statements obtained after the passage of the DTA, are still admissible if they do not amount to “cruel, inhuman, or degrading treatment.”

The Guantanamo Bay detainees have also been denied legal counsel. The personal representative assigned under the CSRT procedures is neither a lawyer nor an advocate. In practice, the personal representative’s role has been minimal. In the vast majority of cases, the personal representative “met with the detainee only once (78%) for no more than 90 minutes (80%) only a week before the hearing (79%).”

They have also been inactive during the hearings. For example, the personal representatives said nothing in 12 percent of the cases, did not make any substantive comments in 36 percent of the cases, and failed to exercise their right to comment on the decisions in 98 percent of the cases. What is worse, some of the detainees regarded their relationship with their personal representative as adversarial. In the 52 percent of the cases where the personal representative did make substantive comments, those comments sometimes advocated for the government. In Powell v. Alabama, the Supreme Court recognized the importance of legal counsel for those accused of crimes: “He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

There is also the serious problem of command influence, which has placed considerable pressure on the members of the CSRTs to rule in favor of the government’s enemy combatant designation. Prior to the creation of the CSRTs, enemy-combatant determinations were made “through multiple levels of review by military officers and officials of the Department of Defense.” Accordingly, if the CSRT panel members were to rule that a person was improperly detained, they would be going against the judgment of superior officers. Moreover, there is evidence that on the rare occasion when a panel did disagree with an earlier enemy-combatant determination, they were pressured by superior officers to reconsider their ruling.

throughout the night. On another occasion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor. (Id. at 474.)

Denbeaux supra note 60, at 3.

Id.

Id.


Lieutenant Colonel Stephen Abraham, a liaison officer and member of one CSRT tribunal, described his experience as follows:

On one occasion, I was assigned to a CSRT panel.... There was no credible evidence supporting the allegation. All of us found the information to lack substance.... On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. [The Office for the Administrative Review of the Detention of Enemy Combatants] leadership, including Captain Sweigart, immediately questioned the validity of our findings and directed us to write out the specific questions that we had concerning the evidence to allow the Recorder an opportunity to provide further responses.... Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our
An essential element of habeas corpus is the right to a hearing before a neutral and independent judge, which the CSRTs do not provide.

Finally, one of the principal purposes of a writ of habeas corpus is release upon conclusion that the detention is unlawful. However, under the CSRT process release upon a finding that the detainee is not an enemy combatant is not assured. In reviewing CSRT determinations, the D.C. Court of Appeals is limited to considering whether the CSRT procedures were used. The DTA does not provide the judicial remedy of release from imprisonment if the detainee is not properly detained as an enemy combatant. Instead, the government has argued that a remand for another CSRT determination is the appropriate remedy. The DTA’s failure to expressly authorize a court to discharge a prisoner whose detention is invalid renders it an inadequate substitute for the guarantee of habeas corpus.

In sum, the Guantanamo Bay prisoners have been held for more than six and half years without meaningful due process protections. In fact, the process they have received has been less than that received by detainees charged with war crimes and designated for military tribunals. The latter at least have been afforded with a formal notice of charges, have been regarded as innocent until proven guilty, and have been granted the right to counsel, among other basic rights. Accordingly, because Rasul correctly determined that the writ at common law would have extended to the detainees at Guantanamo Bay, and because the substitute DTA review process is not constitutionally adequate, the MCA violates the Suspension Clause since it denies the detainees access to the writ.

Conclusion

On November 13, 2001, President George W. Bush issued an executive order allowing for the trial before military commission of aliens suspected of involvement in terrorist activities against the United States as well as members of the organization known as al Qaeda. This order specifically denied those detained during the war on terror of a right to be heard in federal court. In 2006, Congress passed and the president signed into law the MCA, which sanctions the Bush administration’s policy of denying habeas corpus rights to alien enemy combatants captured abroad. This article has argued that the MCA violates the Suspension Clause of Article I, Section 9. Congress has not formally suspended habeas corpus, nor likely could it, since the U.S. is not in a state of rebellion or being invaded. Congress has the option of substituting a constitutionally adequate process for habeas corpus, but the hastily crafted CSRTs do not fit this bill. The Guantanamo Bay prisoners have been detained for six-and-a-half years without any meaningful due process protections, drawing extensive criticism from the world community for violations of U.S. and international law.

The Bush administration’s concerns about the war on terror are real. The plurality opinion in Hamdi maintained that appropriate deference should be given to determination that the detainee was not properly classified as an enemy combatant…. I subsequently learned, based on the government’s factual return in Mr. Al-Ghazawy’s habeas corpus case, that he was subjected, without his knowledge or participation, to a second CSRT panel two months later that reversed my panel’s unanimous determination that he was not an enemy combatant.

the executive branch in devising an enemy combatant review process. The plurality also noted, however, that the president does not get a “blank check” during the war on terror. As Justice David Davis eloquently wrote in *Ex parte Milligan*: “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” The president (now with the approval of Congress) cannot create a legal black hole at Guantanamo Bay by placing foreign nationals held during the war on terror outside of the protections of U.S. or international law. Contrary to the wishes of the Bush administration, the indefinite detention of the Guantanamo prisoners has not made the U.S. safer; it has made it less safe. And the longer the detentions take place, the more problematic they have become. If after a fair and legitimate review process is established, a prisoner is found to be an unlawful combatant, then so be it. It has not been argued here that the administration cannot detain for a reasonable length of time “unlawful combatants” (as defined historically) if due process is afforded. If a prisoner who was captured during the war on terror has unlawfully taken up arms against the United States, then he should be detained and tried for war crimes. But if he has not been properly detained as an unlawful combatant, then he must be released in accordance with U.S. and international law.

---

80 71 U.S. 2, 120 (1866).
81 In *Ex parte Quirin*, 317 U.S. 1, 31 (1942), Justice Stone described the unlawful combatant as “[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property … .”
Abstract
There are many variables that influence decision-making after an event such as 9/11. Self-esteem, ideology, religiosity, right-wing authoritarianism, and demographics all interact to determine how an individual may respond to heightened government security measures. Using survey data from the northwest United States, this research analyzes the personal characteristics and attitudes of students to determine if differences exist in how they view government surveillance and government access to personal records. Such attitudes are discussed in terms of a trade-off between rights and security and in terms of the major role that public opinion plays in the formulation and execution of governmental policy.

Resist or Comply: An Examination of Student Attitudes on Surveillance and Government Access of Personal Records

Freedom is not something to be secured in any one moment of time. We must struggle to preserve it every day. And freedom is never more than one generation from extinction. - Ronald Reagan, 1984

There is an interminable battle between the preservation of personal liberties and the need to obtain security. Since 9/11, the U.S. government’s response has been aggressive with legislation such as the Patriot Act (PA) designed to increase the level of U.S. security. Such measures by the government have not been undertaken without criticism. Still, the need to assess public opinion on this ongoing topic remains. This research proposes to examine these fundamental issues. First, the balance for civil liberties will be discussed. Does everyone agree that there is a trade-off between civil liberties and security? Secondly, student attitudes towards surveillance are presented. Why are some students more acquiescent toward increased government surveillance and what theoretical assumptions can help explain any variation? Thirdly, student attitudes towards the government’s collection of personal information are examined. What attitudinal and personal characteristics are associated with students’ compliance or resistance to governmental access of personal information?

The Balance Between Security And Civil Liberties

Generally, most people believe that increasing security causes a reduction in individual liberties. The University of Central Missouri’s Terrorism & Justice Conference is itself indicative in the subtitle: “The Balance for Civil Liberties.” Such a balance implies a tradeoff. Still, there are those that believe that you can increase security without reducing liberty. In a December 16, 2005, interview President Bush noted: “I think the point that Americans really want to know is twofold. One, are we doing everything we can to protect the people? Secondly, are we protecting civil liberties as we do so? And my answer to both is yes, we are” (Lehrer, 2005, ¶ 23). Dinh (2002, p. 106) also attacked the assumption that championing
both liberty and security implies a tradeoff. Specifically, by maintaining that security is a “precondition of freedom,” he argued that it is necessary for the state to remain in order to embrocate civil liberties. In other words, only if Americans are protected, can liberty be achieved. While such ideas may seem logical to many, Dinh fails in his effort entirely if the risk to the State is overestimated. Dinh even went so far to suggest that freedom includes the absence of fear. Even under this standard, can the risk of crime, drugs, or even the lack of health care or loss of employment qualify as fear? Additionally, if fear is the threshold, are there not other greater fears, including the fear of too many government restrictions of liberty? No doubt, the use of the words “war on terror” implies the risk is great, and that the PA and other government initiatives (including the Iraq War) are necessary. Using a Dinh-like reasoning, what is to keep any administration from overstating the threat in order to secure more power even if it is at the expense of liberties? After all, those who determine the risk level may also be in position to gain from their own risk assessment. As will be discussed later, how the public frames the risk may be key to public support or opposition. Others like Dershowitz (2002) are a bit more hesitant. Dershowitz contended the only method by which safety and civil liberties are not in conflict is to allow the civil libertarians into the negotiating process, allow debate, and strike a balance.

Offering an alternative view, Waldron (2003) warns us against the notion of a proper balance between security and liberty. Specifically, change may not be appropriate for individual rights. Secondly, when the government does make changes toward heightened security the effects are not distributed equally. Undoubtedly, certain ethnic and religious groups have born most of the burdens of governmental policies that have been used to fight terrorism. Thirdly, a balance implies that as liberties are reduced, security is enhanced. Waldron noted that this is not always the case. There could even be situations where a reduction in liberty harms our security.1

Still, while some may argue that heightened security does not reduce civil liberties or that there is no guarantee of a trade-off, it is believed that under most circumstances a trade-off does occur. Davis and Silver (2004, p. 29), for instance, suggested:

In the post-September 11 period, however, the civil liberties vs. security trade-off has mainly been framed as one of protecting individual rights or civil liberties from the government as the government seeks to defend the country against a largely external enemy, albeit one that has infiltrated American society and poses a domestic risk to safety and security.

Former Supreme Court Justice Rehnquist also stated: “Without question the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war” (1998, p. 218).

The Role Of Public Opinion

Having established that increased government security measures generally do imply a reduction in civil liberties it becomes even more important to examine the public’s opinion on heightened government security actions. While some might be quick to dismiss the role of public opinion, it plays a huge role in what government can and cannot do. Francis Biddle, (1971, p. 7) who was President F. D. Roosevelt’s Attorney General, noted that:

Power in America rests on public opinion, which at present seems to be approving the slow abandonment of individual freedoms, so gradually achieved, so casually discarded. The struggle for freedom is no longer against an oppressive tyrant of the people. The tyrant is public opinion, the people themselves, who, in fear of an imagined peril to their institutions of freedom, demand that they be secured by repressions which may ultimately stifle them.

One of the worst cases of America suspending civil liberties was the internment of Japanese-Americans in World War II. While the United States security and potential military threats were generally cited as the justification of the arrests and treatment of Japanese Americans, “various agencies involved enunciated the following two justifications: to appease public opinion and assuage public fears” (Kashima, 2003, p. 53). Individual leaders or even the courts may at times suspend certain American rights and liberties but it is the public (and hopefully the Constitution) that ultimately will decide how far

---

1 See Waldron (2003) for other arguments against why liberty and security may not be balanced.
the government will proceed in instituting new rights-reducing measures. Such an emphasis on public opinion provides the justification to not only describe what students may feel about government surveillance but also to examine some of the underlying assumptions as to why some people are more compliant to government measures than others.

**Theoretical Insights into Attitudes Toward Surveillance**

There are various theories which offer explanations into how people respond to terrorism and the corresponding actions that government undertakes to increase security. “Obviously, choices about how to respond to terrorist action or other threats to our personal security rest on fundamentally different political and psychological ideologies. Some people facing a threat will advocate caution, while others will seek out more active forms of vengeance” (McDermott, 2004, p. 261). While McDermott is emphasizing how decisions are made according to prospect theory, the notion that people frame their decisions differently can, at least in part, help explain differences in accepting or resisting measures such as the PA. Other research has also evaluated specific variables that influence the public support for anti-terrorism measures. Huddy, Feldman, Taber, and Lahav (2005, pp. 595-596), for instance, looked at “Americans’ reaction to the threat of terrorism to better understand the political effects of threat and anxiety on support for government anti-terrorist policies.” They found that higher levels of perceived threat are a factor in support for “heightened surveillance policies” whereas anxiety was not a significant factor (p. 604).

Terror management theory (TMT) specifically posits how mortality salience can affect a person’s decision-making. Generally, the theory is empirically tested by manipulating thoughts concerning deaths, leaving those with lower buffers to anxiety to cling to their own beliefs more and disdain those associated with another worldview.

If the cultural worldview and self-esteem serve as a death-denying, anxiety-buffering function, other individuals who threaten self-esteem or espouse different cultural worldviews will typically be psychologically discombobulating because alternative conceptions of reality dispute the absolute validity of one’s own. (Solomon, Greenberg, & Pyszczynski, 2000, p. 201).

Ideology and right-wing authoritarianism (RWA) also are key variables into how a person will respond to the threat of terrorism and enhanced security measures by government. One can make numerous assumptions that bring varying degrees of separation between liberals and conservatives. Psychological theories have linked various propensities to conservatives, namely that conservatives are less likely to accept change and more likely to be willing to accept inequalities in life (Jost, Glaser, Kruglanski, & Sulloway, 2003, p. 344). Scales have even been constructed over the years to tap various dimensions, including authoritarianism, fascism, and economic conservatism. Variables that suggest conservatism may also include fear, aggression, rule following, “personal need for structure,” “the need for prevention-oriented regulatory focus,” and anxiety related to mortality salience or a heightened fear of death (Jost et al., 2003, p. 345).

Many of these items used to describe conservatives are also related to authoritarianism. To Altemeyer, (1981, p. 148) three things exist in his definition of RWA. These include a greater propensity to submit to those in authority, the ability to be aggressive against targets that the legal authorities have sanctioned, and the compliance of individuals to established “social conventions.”

The authoritarian does not ordinarily feel vulnerable to established authorities. On the contrary, he feels safer if authorities are strong. He supports government censorship in order to “control others,” never imagining that the government would feel it necessary to censor what he regards, sees, and hears. His reaction to electronic surveillance, unlawful search, and mail-opening by officials is that only wrongdoers would object. To a considerable extent, he believes that established authorities have an inherent right to decide for themselves what they must do, including breaking the laws they make for the rest of us (Altemeyer, 1981, p. 151).

**Survey And Methods For Examining Preferences**
The entire survey was administered to college students in early 2003. While every survey is simply a snapshot in time, this data is important because the time it represents is not only before the Iraq war which began on March 19, 2003, but also before the rights violations of the Federal government became public knowledge. Future surveys will no doubt be more influenced by the vast amount of publicity that has occurred with revelations of the encroachment of everything from NSA collecting millions of phone records to the FBI monitoring library use (Cauley, 2006; Gelman, 2005).

The survey was constructed using a type of semantic differential scale with numbers ranging from 1-21. Each side of the scales had contrary verbs to accurately gauge an attitude or belief. The dependent variables were taken from multiple questions and scaled as an additive index. The independent variables were either dichotomous, based on an individual question or were also additive indexes drawn from a series of questions. All indexes were subjected to a reliability analysis using Cronbach’s alpha.

Assumptions

The questions examined in this research that comprise the dependent variables are student attitudes in regards to surveillance and attitudes about government access of personal information. The assumptions for both of these models include:

1. Ideologically, Republicans are more supportive of increased government surveillance and are more complaint in allowing government access to personal information. Conservatives’ overall compliance predispositions, according to Altemeyer (1981), stem from RWA. Higher levels of RWA also were found to be a key explanatory factor “of support for surveillance measures and restriction of civil liberties” in Cohrs, Kielman, Maes and Moscner’s (2005, p. 271) study in a post 9/11 sample of Germans. Thus, conservatives should be more complacent with government access. It is also expected that conservatives are less likely to believe they could become the subject of surveillance.

2. Students with a higher level of fear (which may also include anxiety) should be more willing to take risks as far as what the government can do about terrorism. Thus, those who are more fearful will be more compliant to government monitoring.

3. Higher levels of intolerance, as measured by questions about the protection of American borders or illegal aliens will result in a greater willingness to trade rights for security, to allow access to private records, or to believe secret surveillance is appropriate. Such intolerance may be the result of low self-esteem, fewer anxiety reducing buffers, or the inability to accommodate differing cultural worldviews (Solomon, Greenberg, & Pyszczynski, 2000, p. 201).

4. Hunsberger and Jackson (2005) examined decades of studies that examined the relationship between religion and prejudice and found that most religious measures were associated with higher levels of prejudice. Such intolerance to others is likely to have spillover effects into anti-terrorist measures by the U.S. government. Thus, it is expected that Christians will be more supportive of government surveillance and access to records.

5. People with higher incomes try to protect themselves from crime and other social problems through various strategies including gaining greater levels of home security or distancing themselves in gated communities or suburbs. Such self-protective tendencies should be no different for terrorism as these people develop attitudes about terrorism. It is therefore expected that students with higher family incomes will desire greater security measures and have a willingness to allow their own private space to be accessed for the sake of the war on terror.

6. Females may feel more vulnerable to terrorism and be willing to allow greater surveillance measures and allow more access to personal records.

7. Those that support the UN should be more concerned about individual liberties and less willing to allow an erosion of these rights to the U.S. government for surveillance or the monitoring of personal information.

---

2 See Vincent, Straus and Biondi (2001, p 72) for a published source using this type of scaling.
3 See Gliem and Gliem for a discussion of reliability analysis.
4 Cohrs, Kielman, Maes & Moscner had separate measurements for ideology and RWA. Both conservatives and those scoring high on a RWA scale were found to be accepting of a greater reduction in civil liberties.
8. Given that minority’s rights have been violated historically, it is expected that they will be less willing to lose individual rights for the sake of enhanced security.

Attitudes Toward Increased Surveillance

The dependent variable surveillance was measured by three questions: (1) Do you believe surveillance for national security should override individual rights to privacy? (2) Do you think secret surveillance measures are, in fact, a useful tool in thwarting terrorism? (3) Do you think secret surveillance is appropriate for national security purposes? These questions formed an index with a possible range from 3 (lowest support for surveillance) to 63 (highest support for surveillance).

<table>
<thead>
<tr>
<th>Surveillance Model</th>
<th>Y = B1 + B2X2 + B3X3 + B4X4 + B5X5 + B6X6 + B7X7 + B8X8 + u</th>
</tr>
</thead>
<tbody>
<tr>
<td>Y</td>
<td>Surveillance index</td>
</tr>
<tr>
<td>X1</td>
<td>Gender</td>
</tr>
<tr>
<td>X2</td>
<td>Race</td>
</tr>
<tr>
<td>X3</td>
<td>Religion</td>
</tr>
<tr>
<td>X4</td>
<td>Family income</td>
</tr>
<tr>
<td>X5</td>
<td>Ideology index</td>
</tr>
<tr>
<td>X6</td>
<td>Attitude towards aliens and border security</td>
</tr>
<tr>
<td>X7</td>
<td>Level of fear</td>
</tr>
<tr>
<td>X8</td>
<td>Attitude toward the United Nations</td>
</tr>
</tbody>
</table>

Ordinary least squares regression was utilized to determine which variables were associated to this index of surveillance.

<table>
<thead>
<tr>
<th>Table 1 Y = Surveillance Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent Variable</td>
</tr>
<tr>
<td>-----------------------</td>
</tr>
<tr>
<td>Gender</td>
</tr>
<tr>
<td>Race</td>
</tr>
<tr>
<td>Religion</td>
</tr>
<tr>
<td>Family Income</td>
</tr>
<tr>
<td>Ideology Index</td>
</tr>
<tr>
<td>Attitude towards aliens and border security Index</td>
</tr>
<tr>
<td>Level of fear</td>
</tr>
<tr>
<td>Attitude towards the United Nations</td>
</tr>
</tbody>
</table>

Findings On Student Attitudes Toward Surveillance

The overall models adjusted R square is .431 and significant at the .000 level. The findings for each of the independent variables are as follows:
1. Females were less likely to approve of secret surveillance measures. This was almost significant at the .05 level and was unanticipated.
2. Race, religion, family income levels and attitudes toward the U.N. were not statistically significant.
3. Conservatives were found to be more supportive of government surveillance. Such a pattern can be easily detected as shown by the scatter diagram (Chart 1).
4. Those who desired more restrictions on the rights of non-citizens and stricter border controls were also more agreeable to heightened government surveillance.
5. Those who self reported higher current levels of fear about terrorism were also more willing to accept greater surveillance measures.

Various diagnostics were run for both OLS models. There was some multicollinearity among independent variables but nothing at the level that would preclude the use of regression.
Altogether, several key variables do help explain why some students are more accepting of increased government surveillance. More conservative ideology, fear, intolerance to aliens and the male gender are associated with a willingness to allow increased levels of surveillance.

Government Access To Personal Records

A second model was constructed that looks specifically at student opinions on the level of government access. The variables in this model are identical to the surveillance model except for the change in the dependent variable. The dependent variable consists of two sets of individual questions which address information from (1) library, (2) purchasing, (3) phone, (4) email, and (5) travel records. One set of questions asked: What level of access do you believe the government “currently has” over your _______ records? The other set of questions using the same five types of records asked: What level of access do you think the government “should have” over your _______ records? Student responses are shown in Tables 2 and 3.

<table>
<thead>
<tr>
<th>What level of access do you think the government currently has over your _______ records?</th>
<th>Leans toward full access</th>
<th>Leans toward no access</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Library</td>
<td>76.2%</td>
<td>12.6%</td>
<td>11.1%</td>
</tr>
<tr>
<td>Phone</td>
<td>87.4%</td>
<td>6.1%</td>
<td>6.6%</td>
</tr>
<tr>
<td>Email</td>
<td>78.3%</td>
<td>14.6%</td>
<td>7.1%</td>
</tr>
<tr>
<td>Purchasing</td>
<td>78.8%</td>
<td>10.6%</td>
<td>10.6%</td>
</tr>
<tr>
<td>travel</td>
<td>87.4%</td>
<td>9.1%</td>
<td>3.6%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What level of access do you think the government</th>
<th>Leans toward full</th>
<th>Leans toward no</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
should have over your _________ records? | access | access |
| Library | 34.8% | 48.5% | 16.7% |
| Phone | 41.4% | 48.5% | 10.1% |
| Email | 34.8% | 53.0% | 12.1% |
| Purchasing | 34.8% | 49.5% | 15.7% |
| travel | 66.2% | 25.8% | 8.1% |

In Table 2, most students do expect that the government has some access to the five types of personal records. Meanwhile, Table 3 is different in that it asks what level of access the government should have. In this case, about 50% of those surveyed lean toward the government having no access. The exception is that students do seem to be less concerned about governmental involvement in travel records. The conclusion that can be made from these percentages is that most students do believe that government currently has more access than they should. To take this a step further, all individual scores were added from each type of record and summed forming an additive index. This index was formed using the total sum of respondent answers to what level of access the government CURRENTLY has minus the total sum of what level the government SHOULD have. This results in a range of the dependent variable from -100 to +100. The simple interpretation of this transformed index is that those with positive scores of this variable believe the government has much more access than it should. Those with a score near zero believe that the governments’ current access is about right, and those with negative scores feel the government needs more access than it currently has. Using this as a dependent variable, the coefficients and significance levels of each independent variable are shown in Table 4.

Table 4  Y = Index of the level of access the government currently has minus the level of access it should have

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>B</th>
<th>T value</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>-12.35</td>
<td>-2.63</td>
<td>.009</td>
</tr>
<tr>
<td>Race</td>
<td>.44</td>
<td>.09</td>
<td></td>
</tr>
<tr>
<td>Religion</td>
<td>-2.79</td>
<td>-6.41</td>
<td></td>
</tr>
<tr>
<td>Family Income</td>
<td>1.44</td>
<td>.80</td>
<td></td>
</tr>
<tr>
<td>Ideology Index</td>
<td>-.43</td>
<td>-2.52</td>
<td>.012</td>
</tr>
<tr>
<td>Attitude towards aliens and border security Index</td>
<td>-.44</td>
<td>-3.22</td>
<td>.002</td>
</tr>
<tr>
<td>Level of fear</td>
<td>-.79</td>
<td>-1.91</td>
<td>.057</td>
</tr>
<tr>
<td>Attitude towards the United Nations</td>
<td>.47</td>
<td>2.54</td>
<td>.012</td>
</tr>
</tbody>
</table>

Findings For Student Attitudes Toward Government Access

The adjusted R square for this overall model was .277 with a significance of .000. While this model is weaker in explanatory power than the surveillance model, it nonetheless does offer some important clues as to what variables are associated with student attitudes about government access.

The findings for each of the independent variables are as follows:
1. Overall, both genders were more likely to believe that the government has more access than it should. However, in females, this measure was less pronounced indicating greater compliance with government access.
2. Race, religion, and family income levels were unrelated to the differences in government access.
3. Those who identified themselves as more conservative also found that the current level of government access was closer to what it should be. Thus, conservatives are found to be more compliant of government measures as was expected.
4. Those who desired more restrictions on the rights of non-citizens and stricter border controls also were more likely to feel that current levels of government access were relatively close to what they should be.
5. Those who supported the U.N. the most believe that the U.S. government currently has far more access to personal records than it should.
6. Similarly to the findings of attitudes on surveillance, those who expressed greater levels of fear also were compliant and more supportive of current levels of government access.

Conclusions

A number of opinions exist in regards to government actions that impact individual liberties. Some people may even disagree as to whether initiatives such as the Patriot Act and other forms of U.S. government intervention are hurting or aiding the cause of individual rights and liberties. Unfortunately, there is no magical equilibrium between rights and security. Even if such equilibrium did exist it could not be applied to all individuals or groups equally since many would be affected by government actions asymmetrically. Still, the notion of a tradeoff between security and liberty is advantageous to discuss not only because the threat of terror is real but also because advances in technology make it easier for government to monitor and collect data on citizens.

To a large extent, the battle to maintain liberties rests with public opinion. Important questions such as how do people view government surveillance measures and government access to personal information are important research topics. While the survey undertaken here was confined to students in the northwest, the implications of the results could be much larger. Both the theories and assumptions presented here provide some important considerations. The attitudes and personal characteristics represented by the variables in this survey create a profile of those who are more compliant or at least relatively more tolerant of government surveillance and government access to personal records. Conservatism, a willingness to increase restrictions on aliens and tighten border security and higher levels of fear are all factors that suggest a greater acceptance of government measures. Inversely, one may also profile those who are more likely to resist government rights-reducing measures as: liberal, pro-alien and less fearful of terrorism. Additionally, males and supporters of the U.N. were more likely believe that the government had too much access to their personal information. Such findings do have theoretical and practical implications. Theories on RWA and the law and order approach associated with conservatism were found to be corroborated with this survey. We must also consider that those with more narrow worldviews as measured by intolerance to aliens and a desire for more border security may help explain why border control measures have been so popular even though unemployment has been near record lows. Additionally, one may speculate that if fear is a proxy for relative amounts of loss, then those who are more fearful are also willing not only to give up more individual liberties, but also willing to approve of more government action of various other forms not limited to, but including, war. It is also likely that higher levels of fear also may be associated with anxiety. If we can assume this connection then it could be implied that raising self-esteem and creating more anxiety reducing buffers would help reduce the public’s need for greater security.

Altogether, it would be egregious to neglect the rights-reducing actions of the U.S. government in the name of increased security. We must be vigilant in assessing public opinion and be knowledgeable about the implications of individuals’ attitudes. This is especially a concern during periods where threats or acts of terrorism are greatest. Equally important, we should expect honest threat assessment levels from government. Fear-mongering on issues of security for political gain or assuaging negative attitudes towards aliens should be confronted. Only by doing this and more are we living up to Reagan’s caution, that freedom is only preserved through a daily struggle.

References


ABSTRACT

The teaching of security-related subjects at university level raises some difficult ethical and civil libertarian questions. This paper addresses some of them – and from a distinctly British point of view. We focus upon the changing context of British higher education: upon the terrorism issues that British universities must confront and the response of various interested parties to this threat.

Terrorism, as a field of academic inquiry, has grown exponentially in recent years. It is wide in scope, including, amongst many others, works on the Cultural History of Terrorism (Burleigh, 2008); Inside Terrorism (Hoffman, 2006); Globalization, Democracy and Terrorism (Hobsbawm, 2008); Nuclear Terrorism (Allison, 2006); Terror and Consent (Bobbitt, 2008); The Spirit of Terrorism (Baudrillard and Turner, 2002); Al-Qaeda: The True Story of Radical Islam (Burke, 2004); Preserving Civil Liberties (Ackerman, 2006); and the Terrorism Act (Jones, Bowers and Lodge, 2006). There are, however, many critical texts on the subject, which include Terrorism and the Politics of Fear (Altheide, 2005), Writing the War on Terrorism (Jackson, 2005), and Overblown (Mueller, 2006). Even academic journals are now devoted to the subject, examples of which are: Studies in Conflict and Terrorism; Terrorism and Political Violence; and Critical Studies on Terrorism.

With the exception of one or two pieces of research discussed below, there has been comparatively little attention paid to the subject of terrorism on university campuses, in particular, that of terrorism on British university campuses. That is the subject of this paper. Our focus is therefore narrow but timely, given that this is an under-researched area. This paper raises questions relating to terrorism within UK universities, and the issues that arise thereof; for example, the teaching of terrorism-related programs. The paper is therefore divided into four major sections: the changing context of higher education; UK universities and terrorism; the response of interested parties; and the teaching of terrorism-related programs. The aim here is to raise questions that have importance not only to the university sector, but to society at large. We are setting the scene for a debate which, we argue, must be held. Consequently, it is our hope that further research will be able to answer some – if not all – of the many questions asked; questions that are highly controversial in their nature. But to reiterate, we are raising questions of great significance because, up to
this point, the debate has been relatively muted. Indeed, because so little has been written on this subject in the academic literature, it is necessary to illustrate our arguments by drawing on material from important British (and US) newspapers and websites.

The Changing Context of Higher Education

The British understanding of terrorism and related civil libertarian issues ought to be seen in the context of a long, slow retreat from Empire and the associated struggles, sometimes violent, for national independence from that Empire. For British citizens, terrorism has been part of the general background noise for a very long time; to take one example, the Troubles in Northern Ireland resulted in over 3,000 fatalities. We grew up with it most recently in Northern Ireland. Nevertheless, most British citizens paid little attention to this background noise. The Troubles in Ulster were regarded by many as an important, but containable, conflict. But the events of 9/11 have proven critical in the way that many British citizens view security matters. For some – particularly on the Left of the political spectrum – nothing has really changed. But in the aftermath of the Istanbul, Bali and Madrid attacks, not to mention the carnage of the London bombings, at least some British citizens are now really paying attention to the issues of terrorism and civil liberties.

In the course of the last ten years or so, something important has changed in the relationship between the West and other parts of the world. Writing long before the 9/11 attacks, Samuel Huntington (1996) predicted a *Clash of Civilizations*. President George W. Bush has famously argued that the West in general and the US in particular is involved in a War on Terror, although he has subsequently spoken about a “long war”. Call it what you will. The argument here is that, semantics aside, the British ought to think very long and very hard about the implications of this change. And amongst these implications is the impact which it is going to have on our universities.

In the course of the last ten years or so, something important has changed in the relationship between the West and other parts of the world. Writing long before the 9/11 attacks, Samuel Huntington (1996) predicted a *Clash of Civilizations*. President George W. Bush has famously argued that the West in general and the US in particular is involved in a War on Terror, although he has subsequently spoken about a “long war”. Call it what you will. The argument here is that, semantics aside, the British ought to think very long and very hard about the implications of this change. And amongst these implications is the impact which it is going to have on our universities.

From at least the time of Cardinal Newman (1996; [1852]) in the nineteenth century onwards authors speculating on the role of universities have talked in an elevating kind of way about their purpose being to raise the intellectual tone of society, to cultivate the public mind and purify the public taste. A broad liberal education, as distinct from a narrow professional training, was to be about the development of character, the refinement of manners, the inculcation of scholarly values, the training of the mind and its critical and creative faculties. It was about increasing the common stock of cultural information. It was about what Elias (2000 [1939]) called *The Civilizing Process*. It was about modernity and the making of both material and moral progress. It has always been about trying to teach the very best that has been thought and known.

Two current (American) formulations seem to us (British) authors to express the notion of the university and its liberal ideals very effectively. First, according to the Association of American Colleges and Universities (1998):

A truly liberal education is one that prepares us to live responsible, productive, and creative lives in a dramatically changing world. It is an education that fosters a well-grounded intellectual resilience, a disposition toward lifelong learning, and an acceptance of responsibility for the ethical consequences of our ideas and actions. Liberal education requires that we
Welsh & McLean 311

understand the foundations of knowledge and inquiry about nature, culture and society; that we master core skills of perception, analysis, and expression; that we cultivate a respect for truth; that we recognize the importance of historical and cultural context; and that we explore connections among formal learning, citizenship, and service to our communities. (para. 1)

And second, according to the Students for Academic Freedom (2007):

The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the study and reasoned criticism of intellectual and cultural traditions, the teaching and general development of students to help them become creative individuals and productive citizens of a pluralistic democracy, and the transmission of knowledge and learning to a society at large. Free inquiry and free speech within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depend upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in the classrooms and lecture halls. These purposes reflect the values – pluralism, diversity, opportunity, critical intelligence, openness and fairness – that are the cornerstones of American society. (para. 1)

While the first of these statements seems to be admirable if somewhat vague and rather pusillanimous, the second, purportedly from American students themselves, gets straight to the point: the central purpose of universities is the pursuit of truth and in that pursuit, freedom is the fundamental precondition. British and American scholars can probably agree that these are the kinds of values whose meanings and implications ought to be argued about peaceably and rationally. And we can probably agree that our universities must be citadels of liberty, bastions of the civilization whose best qualities we strive to represent. And that academic freedom, freedom of inquiry, and freedom of expression by faculty members and their students are essential to the mission of the university.

But what consequences follow when there are people on campus who simply do not share these values, who actively reject them and who indeed violently oppose them? What happens when people like these are attracted specifically to the subjects that one teaches but who then find the treatment of them grossly unfair, insensitive or unacceptable to the point where they believe action is urgently necessary? Not to put too fine a point upon it, in today’s world the communication of ideas that are, in contemporary parlance, offensive to others can lead to instant public vilification, death threats and even murder (not to mention disciplinary action, job loss and possible imprisonment). So are there perhaps some subjects which large numbers of undergraduate (and postgraduate) students might indeed find fascinating to study but which ought not be taught (or which wise people ought not to volunteer to teach) – if only for prudential reasons?

American colleagues are no doubt adept at negotiating the minefields of the “culture wars” between the so-called Secular-Progressives and Traditionalists in their society. No doubt they have learned to tread carefully around such issues as abortion, sexual orientation, euthanasia, stem cell research, the theory of evolution, problems of ethnocentricity in the curriculum and so on. No doubt the kind of row precipitated by
Mearsheimer and Walt’s *The Israel Lobby and U.S. Foreign Policy* (2007) can be kept well within the bounds of civilized discourse. While the debates in the United States surrounding all such questions can seem, from the British point of view, to be somewhat puzzling and strange we too are nevertheless aware that there are important matters of public concern which generate at least as much heat as light – and that, moreover, there may be others who are now militantly watching everything that academics might say and do. One particular example of this is Campus Watch (2008):

Campus Watch, a project of the Middle East Forum, reviews and critiques Middle East studies in North America, with an aim to improving them. The project mainly addresses five problems: analytical failures, the mixing of politics with scholarship, intolerance of alternative views, apologetics, and the abuse of power over students. Campus Watch fully respects the freedom of speech of those it debates while insisting on its own freedom to comment on their words and deeds (para. 1).

And on the other hand, there are organizations dedicated to highlighting religious discrimination. One example of this, Islamophobia Watch, states:

Islamophobia Watch has been founded with a determination not to allow the racist ideology of Western Imperialism to gain common currency in its demonisation of Islam. Islamophobia, as a racist tool of Western Imperialism, is strongly advocated by the political right but has also found an echo in the left, particularly sections of the left in France and the countries that make up the United Kingdom. Islamophobia Watch will regularly report opinion columns and news items which match the editorial brief of the website, both articles that we believe advocate Islamophobia and those writers and organizations taking a stand against Islamophobia. (paras. 2-4)

The context within which academic work takes place appears to be changing. It may well be the case that there have always been commercial and ideological pressures shaping the curriculum in ways that at least some academics do not like and find illegitimate. Again, maybe self censorship has always been at work here. Perhaps academics were just not aware of this. A time may be approaching, however, when abstract academic arguments over rival theories are not so much part of a metaphorical battle of ideas as part of a new front in a very real and bitter conflict raging just outside our doors; the doors to the academy.

**UK Universities and Terrorism**

In his first public speech since taking over as Head of the British Security Service MI5 Jonathan Evans said in November 2007 that “MI5 has now identified around 2,000 individuals who we believe pose a direct threat to national security and public safety [in the UK] because of their support for international terrorism” (Johnston, 2007, para. 11). According to Mr. Evans, the terrorist threat to the UK has not yet reached its peak. There was, he thought, a steady flow of new recruits to the extremist cause:
As I speak, terrorists are methodically and intentionally targeting young people and children in this country. They are radicalizing, indoctrinating and grooming young, vulnerable people to carry out acts of terrorism. This year we have seen individuals as young as 15 and 16 implicated in terrorist-related activity. (Evans, 2007, para. 10)

If it is true that terrorist recruitment amongst young people in Britain has been proceeding apace, how is this reflected in British universities and colleges? One might also reasonably ask: are the institutions of higher education now home to a generation of prospective terrorists? And to what extent, if any, are these processes being mediated in or facilitated by British universities and colleges? In order to begin to answer some of these questions, it is necessary to analyze the data on UK higher education. According to the Higher Education Statistics Agency Limited (HESA), in 2004/2005, there were some 1,678,904 million students in the UK (HESA, 2006, para. 6). Significant numbers of these students in the UK come from minority communities. As the Promoting Good Campus Relations (PGCR) document reminds us, students from black and ethnic minority groups in Britain comprise some 16% of the total, reaching 50% in some metropolitan institutions (PGCR1, 2005, p. 9). There are some 90,000 Muslim students at British and Irish universities (Henry, 2005, para. 5). In 2007, 385,000 or some 13% of students in British universities came from overseas. The latest figures from the HESA show an increase of 12% in the numbers of overseas students between 2005-2006 and 2006-2007. This has led some commentators to note that “Britain is beginning to topple America as the most popular place for overseas students to study…” (Hodges, 2008, para. 1). British universities are highly competitive, commercially-driven organizations. They make very considerable efforts to recruit students from overseas and from outside the European Union. The principal reason for this is easily discovered: non-EU, overseas students pay much higher fees (domestic British students pay £3,070 per annum for social science degrees; overseas students pay £7,995 per annum for the same degrees).

It might be argued that these institutions are not particularly well focused on the traditional or proper purpose of a university as described above but are, of necessity, focused instead on selling their products to customers around the world. They are profit-driven and, some would argue, not averse to cutting corners. Quality controls over the recruitment and processing of students which may look good on paper are probably much less effective in reality. Parliament’s own Select Committee on Education and Skills (2004), for example, has expressed concerns about overseas recruits arriving in Britain with their study visas and never being heard of again (Question 12 section, paras. 1-4). There are concerns about students overstaying on study visas and the authorities being unable or unwilling to pursue them (Sparrow, 2008). There may be many international people loitering on British campuses who may not be bona fide students at all.

---

1 Evans goes on to say that:  
“Another development in the last 12 months has been the extent to which conspiracies here are being driven from an increasing range of overseas countries. Over the last five years much of the command, control and inspiration for attack planning in the UK has derived from Al Qaeda’s remaining core leadership in the tribal areas of Pakistan – often using young British citizens for the actual attack. (Evans, 2007, paras. 11 and 12)
For a variety of reasons there is now little personal or social contact between academic staff and students. According to Steve Thomas, a principal lecturer at Glamorgan University: “There can be hundreds of students attending lectures, and 10-20% can be missing without the lecturer realizing” (Meikles, 2006, para. 5). Poor student performance has prompted some universities to ask students “to ‘clock in’ to lectures and tutorials in an attempt to ensure attendance and cut drop-out rates from courses” (as cited in Meikles, 2006, para. 1). Others would even go so far as to say that the prevailing culture is one of condoning failure “because cash-strapped British universities are awarding degrees to students who should be failed, in return for lucrative fees” (Bright, 2004, para. 1), whilst some argue that British university degrees are “worthless” (Cassidy, 2008, para. 1). Moreover, a recent report by Professor Geoffrey Alderman into British higher education found a “culture of lenience, including the permissive marking of non-European students, tolerance of plagiarism, and rampant grade inflation” (as cited in Churchwell, 2008, para. 1).

Lecturers’ unions have argued for years that the system is seriously under-resourced, under-staffed and unsustainable; that there is consequently low morale with staff feeling stressed, under-valued, and even intimidated by the circumstances in which they have to work. As noted on the website of the University and College Union (UCU) (the main lecturers’ trade union): “Rising workloads, poor management culture, excessive audit and inspection, job insecurity and poor facilities have all contributed to rising concerns over stress and its causes” (UCU, 2008, para. 1). Rate my Professor is not as popular in the UK as it is in the US, but students are able to voice their concerns over their degrees through online communities such as Facebook. Entries onto this site tend to be piecemeal, however. Nevertheless, the Higher Education Funding Council for England recently launched the National Student Survey (NSS). This, it has been argued, brings both benefits and drawbacks. Critics of the NSS allege that this exercise places an additional strain on academic staff with the student-as-customer now being a principal arbiter of quality assurance. Other critics argue that universities are concerned with their “league position, despite the meaningless of the tables” (Harvey, 2008, para. 2). Moreover, the abandonment of the practice of writing (confidential) references for graduates as a consequence of the UK Freedom of Information Act in favor of writing (seen) testimonials adds, so it can be argued, further to undermine the authoritative voice of academic staff in both the institution and wider society.

It might be argued that this leads to a poorly-regulated laissez faire environment and culture where extremist groups might flourish undetected. In groundbreaking research titled When Students Turn to Terror, Anthony Glees and Chris Pope (2005, p. 10) argue that extremist groups are in fact actively recruiting at UK universities and colleges, ranging from “Jihadism to Animal Liberation”, to the British National Party. For Glees and Pope (2005):

The following groups – Hizb ut-Tahrir, Al Muhajiroun and the Muslim Public Affairs Committee (MPACUK) are all officially banned on British campuses though the two former organizations – Hizb ut-Tahrir and Al Muhajiroun are

---

2 For ministers, the results of the survey will be one of the best ways of informing future students about universities and colleges and enabling them to compare teaching of the same subject at different institutions. For some academics, however, the whole exercise is a pointless waste of money. (as cited in MacLeod, 2004, para. 3)
accused of carrying on their work, under the mask of cover names and front groups. (p. 41)

Glees and Pope (2005, pp. 42-50) argue that these organizations have helped to promulgate extremist views on British university campuses. Combined with an academic environment which has failed “to address the problem of security – a failure which has many sources, not least a fear of being deemed illiberal or Islamophobic, extremism has been allowed to propagate itself” (Glees & Pope, 2005, p. 68).

Glees and Pope (2005, p. 7) name several former British students who have turned to terror or extremism. For example: Azahari Husin and Shamsul Bahri Hussein, suspects in the Bali bombing, studied at Reading and Dundee Universities respectively; Asif Hanif and Omar Sharif, suicide bombers at Mike’s Place bar in Tel Aviv, 2003, were former students of Kingston University and King’s College, London respectively; Mohammed Sidique Khan and Shehzad Tanweer, two of the London 7/7 bombers in 2005, were former Leeds Metropolitan University students; Omar Sheikh, found guilty of murdering US journalist Daniel Pearl, had been a student at the London School of Economics and was previously a public school boy, privately educated in the UK; and Zacarias Moussaoui, convicted for his part in the 9/11 attack on the World Trade Center, had been a master’s student at London Southbank University. It cannot reasonably be argued that these particular cases are insignificant.

According to Glees and Pope (2005, p. 8), many of Britain’s 100 or so universities and colleges, including the most prestigious such as Oxford, Cambridge, Imperial College London and the London School of Economics have been infiltrated by extremist groups. This has prompted the authors to remark that “this is a serious threat … We have discovered a number of universities where subversive activities are taking place, often without the knowledge of the university authorities” (Taylor and Smithers, 2005, para. 4). Glees is chilling in his assessment:

Unless clear and decisive action against campus extremism is taken, the security situation in the UK can only deteriorate … The security officers at Oxford University should be looking into this. People who take the al-Muhajiroun line are going up and down the country and talking to students. I do think we are talking about thousands of students being recruited. (as cited in Holehouse and Scherbel-Ball, 2007, paras. 26 and 28).

Glees and Pope (2005) ask: “How safe then are British universities?” Their answer is that:

Safe does not simply mean safe from attack by extremists of whatever leaning. It also means safe in the sense that university students and facilities are properly protected against infiltration and penetration by extremist groups and individuals who might also exploit the possibilities for recruitment and organization offered by each of Britain’s hundred or so universities. The question is truly important, although it is scarcely ever asked. Our reply, alas, is a disturbing one. They are not safe now, and there is every reason to believe that unless major changes are effected they will be even less safe in the future. (p. 10).}

---

3 Glees and Pope (2005) go on to argue that:
Nevertheless, others (not least ex-Jihadists) have tended to confirm the existence of this terrorist recruitment problem in British universities (see, for example, the statements of Sheik Musa Admani, the Imam at London Metropolitan University (Gardner, 2006, paras. 9-12); Ed Husain (2008); Shiraz Maher (Kovaleski, 2006, para. 23); and Hassan Butt (2007, paras. 12-13)).

To date, no academic studies have been published either to confirm or to refute the kinds of numbers Glees and Pope are talking about. This is rather worrying because these are not numbers that can be airily dismissed. If correct, these are numbers that ought to be acted upon as a matter of some urgency. If incorrect, one might ask, what then are the correct numbers? Is it not wise, is it not prudent, is it not necessary, to draw public attention to these alleged facts, to question them and to explore what they might mean? The majority of British academics do not seem to think so. As we have seen, there has been no serious debate. There has been a more or less profound silence. But perhaps this is the entirely rational course of action: to raise issues like these is perhaps to invite unwonted attention. So it might be argued that perhaps the wise course of action for both individuals and institutions is to say and do nothing. In such a climate, it has fallen on the Government to take the lead.

The Response of Interested Parties

The main Government response to the developments above has come in the form of three new sets of guidelines for universities and colleges. The first of these, entitled PGCR1, was published in 2005. The second, entitled Promoting Good Campus Relations: Working with Staff and Students to Build Community Cohesion and Tackle Violent Extremism in the Name of Islam at Universities and Colleges (PGCR2), appeared in 2006. And the third (a revamped version of the second), entitled Promoting Good Campus Relations: Fostering Shared Values and Preventing Violent Extremism in Universities and Colleges (PGCR3), came out in 2008.

Even though the guidelines fail to engage either with the numbers or with the recommendations supplied by Glees and Pope, many of the statements in these
documents are eminently sensible and worthy of support. PGCR1 begins almost immediately with a reaffirmation of core principles:

The key principle for dealing with hate crimes and intolerance on campus is to understand that all staff and students have the right to work, study and live without the fear of intimidation, harassment and threatening or violent behavior. The key ingredient for the preservation of academic freedom is tolerance and respect for diversity. (PGCR1, 2005, p. 6)

The document then goes on to acknowledge that the United Kingdom has a serious problem: “The threat to values of liberalism and democracy posed by extremists has been recognized by government ministers” (PGCR1, 2005, p. 12). Furthermore, it notes that amongst the principal victims to date are individuals from minority communities: “Muslim students have, in a number of cases, been victims of hate crimes and intolerance on campus” (PGCR1, 2005, p.14) and: “The UK has seen the number of anti-Semitic assaults and other incidents increasing steadily since 2001” (PGCR1, 2005, p. 14).

PGCR2 (2006) and PGCR3 (2008) go so far as to identify the nature of what they see as the principal threat:

There is a real, credible and sustained threat to the UK from violent extremism in the name of Islam. To overcome this threat the government firmly believes that all organizations and communities should be involved in working together to tackle the shared problem. (PGCR2, 2006, p. 4).

The government judges the principal current terrorist threat to the UK to be from Islamist terrorism. The threat is international in scope, involving a number of individuals, networks and groups who are driven by violent and extremist beliefs. They are indiscriminate – aiming to commit murder and cause mass casualties, regardless of the age, nationality or religion of their victims; and they are prepared to commit suicide in order to do so. The overall assessment is that the threat is unlikely to diminish for some years. (PGCR3, 2008, p. 6)

Moreover, PGCR2 (2006) specifically identifies the problem in the higher education sector:

Universities and colleges can provide a recruiting ground for extremists of all forms, and particularly those that target young people. Student communities provide an opportunity for extremist individuals to form new networks, and extend existing ones. (p. 7)

In PGCR3 (2008), the Government then formulated five Key Objectives’ for British Higher Education:

---

4 In a ringing declamation of support for the classic values of a university education, PGCR3 (2008) states that:

Freedom of expression is a cornerstone of our democracy. We want our universities and colleges to be integrated communities where all staff and students are safe and secure and where free and open debate can take place. A valued aspect of the right to freedom of expression in the UK is that
[First], to promote and reinforce shared values; to create space for free and open debate; and to listen to and support mainstream voices. [Second], to break down segregation amongst different student communities including by supporting inter-faith and inter-cultural dialogue and understanding and to engage all students in playing a full and active role in wider engagement with society. [Third], to ensure student safety and campuses that are free from bullying, harassment and intimidation. [Fourth], to provide support for students who may be at risk and appropriate sources of advice and guidance. [And fifth], to ensure that staff and students are aware of their roles in preventing violent extremism (p. 6).

The response to these government initiatives began even before the first of the PGCR documents were released. University representatives, staff, and student organizations were invited by the press to respond to leaks about the contents of the documents – which they promptly did. Universities UK (UUK), an organization which represents the views of vice-chancellors, said the main problem with the advice was the way it emphasized Islamic extremism. In a statement ignoring the points raised in the government guidelines, UUK President, Professor Drummond Bone, said that “there were dangers in targeting one particular group” (as cited in McConkey, 2006) “Extremism Alarms,” 2006, Targeting section, para. 3). Not only was this “unreasonable but it could be counterproductive” (Paton, 2006, para. 7). The vice chancellor at Bristol University, Professor Eric Thomas, said that the government’s proposals were tantamount to “spying on behalf of the state” and that his university had “‘no intention of keeping a special watch on Muslim’ or any other students” (para. 2). The National Union of Students (NUS), the UCU, Unison (the university support workers’ trade union), the Federation of Student Islamic Societies, and the Equality Challenge Unit issued a joint statement declaring that “singling out Muslim students could jeopardize trust and confidence between staff and students” ((as cited in “Extremism Backfire,” 2006, para. 7). NUS President Gemma Tumelty ((as cited in “Extremism Alarms,” 2006) said:

Demonizing and stigmatizing student communities is no way to defeat terror. Indiscriminate monitoring of groups on campus assumes collective guilt. This will only fuel the racism and Islamophobia that our society should be trying so hard to stamp out and also runs the risk of alienating those students who oppose terrorist attacks. (Stigmatizing section, paras. 1 and 2)

Likewise but more obscurely, UCU joint general-secretary Paul Mackney (as cited in “Extremism Alarms,” 2006) said: “Members may be sucked into an anti-Muslim McCarthyism which has serious consequences for civil liberties by blurring
the boundaries of what is illegal and what is possibly undesirable” (“Extremism Alarms,” 2006, Civil section, para. 1). Equally obscurely, fellow UCU joint general-secretary Sally Hunt (as cited in “Extremism Alarms,” 2006) said: “The last thing we need is people to too frightened to discuss an issue because they fear some quasi secret service will ‘turn them in’” (Civil section, para. 3.). The UCU “voted unanimously to reject the government’s calls for universities to help monitor Islamic extremism within the student population” (“Lecturers Must,” 2007, Rejected section, para. 1). The Federation of Student Islamic Societies Head of Student Affairs, Faisal Hanjra (as cited in “Extremism Alarms,” 2006), said: “There is also no substantial evidence that recruitment has been taking place at universities. The irony is that we have evidence that the BNP [British National Party] and other right-wing extremists are active on campus” (“Extremism Alarms”, 2006, Targeting section, paras. 8 and 9).

One month later, it was reported Mr. Hanjra as being “worried that university and college authorities will start to look for things that are not there” (“Campus Radicals,” 2006, Exaggeration section, para. 4).

This is the rather debased intellectual context of rumor and second guessing, logic-chopping, confused thinking, scare-mongering and perhaps even hysteria in which the question of terrorist infiltration and extremism is being discussed, and in which the teaching of such subjects as national security and terrorism will have to take place. If the lecturers’ unions are correct in their description of the bureaucratic nature of UK higher education, then the debate on terrorism and national security has to take place in an institutional context which is to a large extent paralyzed by the inertia of its own standard operational procedures. Hamstrung with university regulations and procedures, it might be argued that no one is being clear and decisive about the answers to the all-important questions: what exactly are the facts here and what is to be done about them? It is not as if the allegations made by Glees and Pope are unimportant. Nothing, surely, could be more important. But instead of clarity of thought and decisiveness in action, and instead of all concerned being thoroughly determined to get at the truth, it is obfuscation and confusion that rule.

Teaching Terrorism-Related Programs

As already noted, it might be argued that the higher education sector is not free from similar bureaucratic pressures. If this is truly the case, then whose job is it to ensure that “staff and students are aware of their roles in preventing violent extremism” (PGCR3, 2008, p. 6)? Staff and students are certainly not aware of their roles. When exactly will their epiphany come? More specifically, what exactly is awareness going to mean in this context anyway? And, as Glees and Pope (2005, p. 71) ask, how exactly is it possible to construct teaching programs which deal with subjects like violent extremism, terrorism and national security; subjects which, given their nature and salient profile in the press and on television, are generating huge amounts of interest in the student population? Can these subjects now be taught in ways that are sufficiently value-free, politically neutral, conceptually unproblematic, ideologically decontaminated, non-stereotyping, culturally sensitive, and inoffensive? Or are all such efforts doomed to accusations of bad faith and worse?

It should be noted that when it comes to constructing a program of studies focusing upon terrorism and national security, the key processes of conceptualizing, explaining and countering terrorism are framed by a considerable proportion of British students in a way that US colleagues might not have anticipated. For many of the
students at British universities coming fresh to the study of terrorism and homeland security, terrorism is, plainly and simply, something that the government of the United States does. Drawing inspiration from Noam Chomsky (2004), many British students agree that terrorism is what the United States has been doing in Latin America and elsewhere for a number of years. When asked to explain terrorism and to identify the kinds of economic, social and political factors that might contribute to its presence or absence in any given situation, many of them by way of explanation will point immediately to the actions of the United States government as being amongst the principal causes. When asked how to counter terrorism, at least some of them will want to talk about the means to ensure American defeat. The very terms and preconditions of the political argument, it might be argued, are framed in a manner in which the United States is viewed as the principal threat to global stability. This raises several important questions: is it possible to put together a well-balanced program of studies that recognizes a variety of approaches and answers to the key questions in the field? And how is it possible to do this in a way that is both academically challenging but also supportive of students from minority communities and engenders trust; a way that is honest, fair, accurate and truthful; that is challenging, meaningful and even enjoyable?

This leads to another problem. The difficulties associated with the teaching of subjects that focus upon terrorism and national security are likely to be of a different order to those associated with, say, the teaching of classical languages, art history, or economics. That is not to say that universities do not confront difficult and contentious subjects – for example, in Religious Studies, debates about Darwinian evolution and Intelligent Design; and in Criminology, debates on the nature of the criminal justice system – are testament to this. Nevertheless, the teaching of terrorism and security modules is more complex for two principal reasons. First, there is the possibility that academics who teach and publish in this field might be in grave danger of compromising their own personal safety, should the contents of their lectures or research find their way onto a Jihadist website. Second, and in the UK in particular, there is a danger that academics teaching and publishing in this field might be ostracized by their peers or, more ominously, fall foul of recent government legislation outlawing the glorification of terrorism (Terrorism Act 2006, pp. 1-7). As is widely accepted, “glorification” is a notoriously elastic concept, and, given the nature of the British legal system, there are cases on this matter that are currently being brought before the courts. Hence, it might be argued that a lecture or academic paper looking into the controversies surrounding terrorism might, inadvertently, be regarded as “glorifying” terrorism under British law. Again, it might be worth considering whether there ought to be some kind of restricted access to these kinds of programs. In other words, instead of such courses of study being open in principle to all prospective students, there ought to be some kind of screening process beforehand. Yet as noted above, the regulatory arrangements in universities and colleges which deliver these different kinds of courses tend to be cumbersome in responding to change. In the light of what Glees and Pope and the UK government itself are suggesting, however, perhaps these arrangements need to be different.

There are difficult choices here, and no easy resolution to them. On the one hand, civil libertarian considerations would suggest that all must have free access to all, despite difficulties that might arise as a result. There are a whole host of situations that might arise, for example, where students might deny the existence of the Holocaust or the fact that 9/11 took place. Alternatively, some students might take it
upon themselves to exhibit homophobic behavior, display hostility to women, or signal an aversion to the liberal values upon which the institution is founded. In such circumstances, it is to be assumed that such students would be dealt with through the normal university disciplinary procedures. On the other hand, given the particularly sensitive nature of the subjects of terrorism and security issues, it might be prudent to screen potential students beforehand so as to exclude from such courses those whose stated beliefs or previous behavior might prove disruptive to the class; who might threaten those individuals with whose views they disagree, who might frighten or make other students uncomfortable; who might take violent exception to or offense at the course materials; or who might be in danger of committing an offense under the Terrorism Act 2006. A particular difficulty here is, of course, that of trying to ensure what gets discussed in class stays in class. Perhaps these subjects should come with an explicit health warning. Given that, in the present climate, some prospective students are likely to see the very existence of such programs of study as acts of provocation in themselves, then maybe they should be very carefully labeled in the prospectus. Then students who think there is the slightest possibility of finding anything in the following course materials objectionable or offensive ought not to take it.

Again, this raises further questions. Should academic staff refuse to teach certain individuals whom they have reason to believe are on a mission to be offended or who, for whatever reason, appear to be dangerous? Should academics insist on students signing good behavior contracts, which might actually violate the principles of a broad liberal education outlined above? Academics have a duty of care to all students and to members of minority groups, to protect and advance their civil liberties, to enable them to pursue unmolested the university education of their choice. But they also have a duty to uphold the kinds of liberal democratic values that universities are supposed to serve.

To conclude, for a very long time all kinds of assumptions have been taken for granted about the liberal education universities seek to provide. Post 9/11, some of these assumptions are being challenged. Some of the challenges are being made in class. British universities find themselves only just at the beginning of having to address them. This paper has raised several questions relating to extremism within British universities, and the teaching of terrorism-related courses. It is a depressing picture. A genuine debate on these questions is largely lacking but, it is to be hoped, further research will begin to answer some of the questions raised above. In other words, in the spirit of a liberal higher education, this is a discussion that must take place. Meanwhile, our old friend prudence is already taking up the burden of deciding between those things that can and cannot be said and done in British higher education.

References


DEFINING TORTURE: 
THE POTENTIAL FOR ‘ABUSE’

Lisa Yarwood* 
University of Exeter, UK

ABSTRACT
In 2007, the Appeals Chamber of the ad hoc Criminal Tribunal for the Former Yugoslavia confirmed the criminal prohibition on torture is as defined in the 1984 Convention Against Torture and Other Inhuman or Degrading Punishment. The Chamber rejected the Appellant’s submission that torture is distinguished from other forms of ill-treatment where the pain and suffering is extreme. Confirmation that pain and suffering need only be severe in nature to amount to criminal torture is consistent with both international opinion and regional implementation, but this article argues that until there is a shift from a victim focused determination to one that contemplates the culpability of the offender, the potential for impunity lingers.

‘Impunity is the friend of torture.’

Torture attracts a ‘special stigma’ necessitating a distinction between abuses generally and ‘deliberate inhuman treatment [that] causes very serious and cruel suffering.’ Following disclosure of the horrors at Abu Ghraib, the permissible limits of State discretion in distinguishing between torture and abuse have come under criticism. Classifying the acts and omissions merely as ‘abuse’ offends not only popular moral instinct but breaches the prohibition against torture as expressed in international law. In failing to ensure that the ‘grave nature’ of the wrongdoing at Abu Ghraib was punished with ‘appropriate penalties’ the American government thus breached the imperatives both in the Torture Convention and pursuant to the customary prohibition.

* The author would like to thank the reviewers for their considered and helpful response and Dr. Caroline Fournet and Dr. Chris Gallavin for comments on an earlier draft.

Direct correspondence to L.Yarwood@exeter.ac.uk
© 2008 by the authors, published here by permission
The Journal of the Institute of Justice & International Studies vol. 8

3 Aydin v Turkey, 25 September 1997 (Judgment) European Court of Human Rights para 82.
5 Article 4 Convention Against Torture and Other Inhuman or Degrading Punishment 1984.
In the opinion of the American government the treatment of detainees at Abu Ghraib in violation of domestic and international criminal law and labeled ‘inhumane or coercive without lawful justification’ constituted only ‘abuse.’ The controversial 2002 Bybee Memorandum, commissioned by the U.S. Attorney General, had earlier employed a similar threshold and contended torture amounted to pain that is “difficult to endure…and equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death.”

The Memorandum was subsequently retracted but an appropriate institutional response to Abu Ghraib remained elusive. This suggests the American government considered that contextual vagaries could necessitate a shifting definitional threshold to displace the absolute nature of the torture prohibition. Compromising the legal prohibition to accommodate extrinsic factors, it is argued in this article, increases the potential for abuse of the protections against torture arising under international law.

In response to the raised definitional threshold suggested by the American government, the international criminal courts confirmed the lower definitional threshold traditionally employed. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected the Bybee standard and in referring to the UN Convention noted:

“severe pain or suffering” is not synonymous with “extreme pain or suffering” and…not required by the Convention Against Torture … Physical torture can include acts inflicting physical pain or suffering less severe than “extreme pain or suffering” or “pain … equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.

The rejection of an extreme suffering threshold is welcome; but dogmatic adherence to the severe suffering standard alone cannot satisfy the need to stigmatise torture as distinct from abuse. A strictly objective determination of severe suffering fails to consider ‘subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority’. The Tribunals have designated all these factors relevant in ‘assessing the gravity of the harm’.

Reference to the subjective experience of the victim to identify severe suffering facilitates the protections arising from the prohibition, but in isolation it does not guarantee liability is correctly determined. Given that the class of potential victims of torture is broadening, due to the contemporary challenges in maintaining both domestic and international peace and security, any discretion in implementing the prohibition of torture is intolerable should an abusive application permit the culpability of the perpetrator to remain unchecked.

---

10 Supra note 5, para 247.
11 Id., para 249.
12 Prosecutor v Brdjanin, IT-99-36 2004 (Judgment) para 483.
This article will first consider the prohibition’s traditional application, to determine the extent to which either the scope for impunity arises from the lack of specificity within the legal definition of torture, or consequently when its implementation excludes certain acts and omissions from definitional stigma. Attention will then turn to the utility in employing a threshold measured by the level of suffering in isolation, in light of the potential for abuse.

Even where there is consensus as to what satisfies a threshold of severe suffering, doubt lingers as to whether there is scope within this standard for contemporary forms of torture, and whether the potential for abuse in its implementation by States, require reconsideration of the definition. This is apparent in the extent to which the definitional difficulties and loopholes inadvertently sanction an erroneous implementation of the prohibition, by permitting State discretion. This article concludes in advocating for a perpetrator-centred threshold to distinguish torture from other forms of abuse and guarantee the prohibition is not subject to abuse.

### I. Traditional Definitions Of Torture

Consideration across international and domestic forums confirms the prohibition against torture, as articulated in the 1984 UN Torture Convention, is authoritative. Debate as to the elements for criminal liability continues, but a substantive focus on victim protection is consistently identifiable.

#### a. Defining Torture Under the 1984 UN Torture Convention

The prohibition on torture is captured in several instruments and treaties with jurisprudence recognising the 1984 Torture Convention as authoritative. Article One dictates criminal torture is an intentional action or omission inflicting pain or suffering for a prohibited purpose of ‘obtain[ing] information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.’ It encapsulates the prohibition expressed under customary law and operates ‘without prejudice to any international instrument or national legislation … of wider application.’ It substantially reflects the 1975 Declaration that was adopted without objection, is incorporated in the working definition utilised by the European Court. Further, Article One represents the approach under the Geneva Conventions, of the Special Rapporteur on Torture and encompassed in various regional instruments.

---


14 See in particular Prosecutor v Tadic; supra note 7 at 86.


16 Prosecutor v Furundžija id., para 162; Prosecutor v Čelebići IT-96-21 1998 (Judgment) para 468; Prosecutor v Semanza (Judgment) para 343; Prosecutor v Brdjanin supra note 11, para 481.

17 Supra note 11, para 481.

18 Prosecutor v Brdjanin supra note 5, para 246; Prosecutor v Čelebići, supra note 5, para 459.

19 Article 1, 1984 Torture Convention.

20 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by Resolution 3452 (XXX) 1975.

21 While the Geneva Conventions do not define torture the Commentary to Article 147 of the Fourth Geneva Convention notes ‘the word torture has different acceptations. It is used sometimes even in the sense of purely moral suffering, but in view of the other expressions which follow it seems that it
The variety in expressions of the prohibition is substantively unified in defining torture to the exclusion of ‘inhuman treatment’. For example, the European Court distinguishes torture from inhuman treatment based on a ‘minimum level of severity’ in victim pain and suffering. The Court refers to factual precedent rather than the pragmatic ‘we’ll know it when we see it’ approach used by the former European Commission on Human Rights, but all approaches distinguish torture from other forms of abuse with reference to the victim’s suffering.

b. Defining Torture as Distinguished From Other Forms of Ill-treatment

i. Defining Torture: Defences Available to the Perpetrator: A distinction is drawn with other forms of cruel, inhuman, or degrading treatment or punishment to ensure the prohibition on torture is absolute and does not tolerate defences equating to superior orders or ‘exceptional circumstances’ that seek to excuse lesser forms of abuse. In defence of their actions, the accused at Abu Ghraib referred to the ‘control of environmental factors such as light, food, clothing, and temperature’ and ‘the use of stress positions, the removal of clothing, isolation, and sleep deprivation’ as permissible interrogation techniques contextually sanctioned by the US Army. Indeed the Army Field Manual on Intelligence Interrogation, referred to by the soldiers in their defense, specifically distinguishes the ‘psychological techniques and principles in this manual [which] should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, physical or mental torture.’

The acts and omissions in the Manual are capable of satisfying the severe suffering threshold however the attribution of ‘abuse’ status or contextual sanction within the ‘definite limits’ needed to induce co-operation, effectively condone the superior orders defence simply based on the non-fulfilment of definitional

22 For example Article 2 of the Inter-American Convention to Prohibit and Punish Torture. The prohibition on torture found in Article 3 of the European Convention on Human Rights has been held by the European Court to amount to ‘deliberate inhuman treatment causing very serious and cruel suffering’ (Republic of Ireland v United Kingdom (1979) (Judgment) 2 ECtHR 25 para 167) with the purpose of obtaining information or confessions, or is the infliction of punishment’ (‘Greek Case’ (1969)12 Year Book European Convention Human Rights186).
23 Supra note 2 at 82.
24 Republic of Ireland v United Kingdom, (1979) (Judgment) ECtHR 25.
26 Id. at 1921.
27 The status of the prohibition of torture as a jus cogens norm is beyond the scope of this paper. For a discussion on this topic see De Wet, E. The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law, 15 EUROPEAN J. INT’L L. 97, 110 (2004). For arguments the prohibition is elevated to jus cogens status see Evans, M. Getting to Grips with Torture, 51 INT’L COMP. L. Q. 365 382.
28 Per Article 2 Torture Convention as noted in Aswad, E., supra note 24 at 1914.
29 Adams, G., Balfour, D. and Reed G., supra note 3 at 687.
31 Id. citing the Geneva Convention Relative to the Treatment of Prisoners of War.
requirements. Successful reliance on military dogma to excuse the use of tools of inquisition would be inconsistent with the official American position expressed in the Nuremberg Charter, to which the US is party, discounting the superior orders defence. It permits perpetrators to escape not only the stigma of being labelled a torturer but potentially liability altogether.

**ii. Defining Torture: The Rights of Victims:** Torture victims have a right to compensation, are more likely to see universal jurisdiction exercised on their behalf and are beneficiaries of the express Convention requirement that States actively maintain the prohibition. Abu Ghraib type abuse or ill-treatment imports the responsibility on States to give effect only to generic human rights standards that due to a lack of specificity are less stringent. For example, classification as ill-treatment does not automatically provide refugees with protection from refoulement, and the removal of individuals from a State for the purpose of ‘interrogation,’ being actions or omissions that constitute abuse instead of torture, permits the originating State to negate its sovereign obligation to ensure protection.

**iii. Defining Torture: The Pain of the Victim:** It is the level of pain suffered by the victim, as opposed to the level of suffering inflicted by the perpetrator that international forums refer to in distinguishing torture from abuse. The ICTY identified other forms of punishment as those that cause ‘serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture’. Cumulative convictions for torture and ill-treatment cannot therefore arise for the same act, and the associated stigma means designation of an act as torture rather than ill-treatment is ‘preferred’ to effectively address the severe pain and suffering of victims.

The European Court of Human Rights similarly distinguishes torture based on the pain and suffering of victims. In Ireland v United Kingdom the Court employed this threshold to find that the combined use of wall-standing, hooding, subjection to noise and deprivation of sleep and food constituted inhuman or degrading treatment rather than torture. Employing the severity threshold in subsequent cases would result in similar treatment designated as an aggravated form of inhuman treatment. Such a hierarchical distinction, in relation to the same

---

34 Article 4, 1984 Torture Convention.
35 Id. Articles 8 and 9.
36 Id. Article 14.
37 Article 33 of the Refugee Convention 1951 and Article 3 of the European Convention for Fundamental Freedoms prohibit refoulement where there is torture or a threat to life – a higher threshold than that evidenced by ill-treatment. Aswad, E., supra note 24 at 1915.
38 Article 16 1984 Torture Convention requires States to protect from other forms of ill-treatment ‘in any territory under its jurisdiction’.
39 Prosecutor v Kvocka, IT-98-30-1 2001 (Judgment) para 542.
40 Id., para 226.
42 Supra note 23 at 25.
43 Aktaş v Turkey, No. 24351/94 313 EChHR (2003); Akkoc v Turkey, Nos. 22947/93 & 22948/93 115 EChHR (2000); Kaya v Turkey, No. 22535/93 117 EChHR (2000).
actions, amounts to an objective determination that the pain and suffering of one victim is greater than that of another.

Emphasising the victim’s suffering operates to the prejudice of contemplating the culpability of the perpetrator, and in light of the stigma attached is inappropriate to attribute criminal responsibility. Without regard to factors unrelated to the victim, in particular the culpability of the perpetrator, an objective and paternalistic determination is required in order to determine the severity of subjective suffering and apportion responsibility on that basis. Psychological tests show the reaction of individuals to torture and ill-treatment to be similar, and instead external factors elevate acts and omissions of torture above abuse. Psychologists contend ‘the issue of control’ rather than the level of physical pain leads to trauma necessitating a consideration of the role played by the offender, to ensure commensurate and effective victim redress.

c. Defining Torture By Its Legal Elements

i. Prohibited Purpose: Acts and omissions inflicting severe suffering on the victim will not attract criminal responsibility for torture unless the motivation of the perpetrator is designated ‘prohibited’. The Brdjanin Appeal confirmed that “acts of torture aim, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even a very severe infliction of pain would not qualify as torture.”

The ad hoc Tribunals and the European Court of Human Rights recognise obtaining information, punishment, intimidation or coercion of victims and third parties and discrimination as prohibited purposes, in accordance with customary law. In Prosecutor v. Furundzija the list was expanded to include the intention to humiliate and in Prosecutor v. Kunarac the Appeals Chamber confirmed that ‘if one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial’. Unlike distinguishing between torture and ill-treatment solely based on victim suffering, the intent requirement for criminal liability broadens the inquiry to contemplate the perpetrator’s perspective.

The Bybee Memorandum considered the ‘express purpose of inflicting severe pain or suffering’ a ‘prohibited’ one. The reluctance to identify torture, inferred from the adoption of an ‘extreme’ suffering threshold in the 2002 Memorandum, is anomalous to satisfaction of the prohibited purpose requirement merely where the intention of the perpetrator was to inflict pain. This incongruity is rationalised, not only due to the inhibiting effect of the extreme standard adopted by the Memorandum, but because the prohibitive purpose requirement relates to establishing criminal liability rather than defining torture per se.

---

45 Id.
46 Supra note 11, para 486.
48 Supra note 15, para 162.
50 Supra note 8.
An element of intent is not consistently required and instruments such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment do not employ such a definitional requirement. The prohibited purpose requirement, although inconsistently adopted, supports the contention that the perspective of the perpetrator is relevant. As with the severity standard, when employed in isolation these tests are susceptible to manipulation and abuse and inhibit rather than facilitate the effective implementation of the prohibition against torture.

Heightening this risk is the increasing liberty afforded to States in exercising their prerogative to use force against individuals when addressing security threats. The inherent urgency in a ‘ticking bomb’ scenario exposes any discretion, to determine the purpose in perpetrating the acts and omissions was not prohibited, open to abuse - there is an undeniable risk that a spurious motivation may impinge on the distinction drawn between torture and abuse.

At the time of the 2002 Bybee Memorandum the U.S. had poured over 18 billion dollars into restoration of Iraq, with little evidence of an end to the fiscal drain. A cynic may link the shifting boundaries of torture with the desire for a speedy conclusion to the American presence in Iraq. This observation confirms the prohibited purpose requirement is relevant as it invokes to assess the culpability of the perpetrator of torture, rather than as a tool to distinguish it from other forms of ill-treatment.

ii. Official Sanction: A requirement that torture is officially sanctioned is similarly useful to determine instances of torture but without reference to the perpetrator in defining torture, the potential for impunity remains.

The Ad Hoc Tribunals rely on the prohibited purpose to distinguish public from private abuse disputing that the perpetrator of torture had to ‘be a public official’\(^{52}\). There is no customary requirement that torture was committed in the presence of officials, and the Courts view acquiescence by the State may be implicit.\(^{53}\) By contrast the equally, if not more, authoritative definition in the 1984 Convention premises criminal accountability on establishing commission was both for a prohibited purpose and perpetrated ‘with the consent or acquiescence of a public official or other person acting in an official capacity’\(^{54}\).

Dogmatic adherence to definitional elements can render what should amount to ‘technical rationality’\(^{55}\) to be irrational and by over-emphasising the role of the State, the culpability of low-level perpetrators may be bypassed. Alternatively, a physical distance from torture may permit senior officials, such as those at Abu Ghraib, to escape liability without recognition that systemic preconditions facilitated commission.\(^{56}\) In attributing responsibility for torture as consequential to inflicting pain and suffering, rather than a consequence of pain and suffering perpetrated within an institutional framework, liability is correctly determined.

iii. Pain and Suffering: The level of suffering that amounts to torture and dictates commensurate responsibility is determined contextually. In Ilhan v. Turkey

---

52 Prosecutor v Kunarac, IT-96-23 2001 (Judgment) paras 488-496; Prosecutor v Kunarac, supra note 44 para 148; Prosecutor v Brdjanin, IT-99-36 2004 (Judgment) para 488.
55 Adams, G., Balfour, D. and Reed G. supra note 3 at 683.
56 Id.
torture combined action, being mistreatment, and omission, being denial of medical attention\textsuperscript{57} and in \textit{Prosecutor v. Delalic} the ICTY confirmed torture might result from omission alone.\textsuperscript{58} Both physical pain and mental suffering theoretically satisfy the suffering threshold so the only limitation in the scope of actions and omissions that amount to torture are those of the perpetrator’s imagination.

Jurisdictional inconsistency in adopting a victim-focused threshold to distinguish torture, is exacerbated with the discretion, implied by definitional deficiencies, to refer to contextual necessities; highlighted in the fine distinction employed between torture and interrogation. In 2003 the Pentagon’s Working Group on Detainee Interrogations in the Global War on Terrorism\textsuperscript{59} construed the imperative of domestic security rendered the prohibition on torture ‘inapplicable to interrogations.’\textsuperscript{60} The Report went on to condone the following ‘interrogation techniques’ that were subsequently identified by the International Red Cross to have occurred at both the Guantánamo and Iraqi detention facilities: “[H]ooding, long interrogations and environmental stress; physical contact and slapping; ‘fear up’ and threats (‘threats of ill-treatment, reprisals against family members, imminent execution or transfer to Guantánamo’); and forced nudity, isolation, deprivation of sleep and contact, dietary stress and long periods of standing.”\textsuperscript{61}

A finite categorisation of acts and omissions that amount to torture provide ‘a challenge to the ingenuity’\textsuperscript{62} of the perpetrator. The failure in adequately defining torture provides ‘a challenge to the ingenuity’ of States, while professing to uphold their obligations under the prohibition. To reduce the potential for abuse in affording States discretion in implementing the prohibition against torture, a definitional standard of severe suffering has emerged as the threshold to identify and stigmatise torture.

\textbf{iv. Severe Suffering Threshold:} The Bybee Memorandum was cited in the 2007 Brdjanin appeal as authority that torture required suffering ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death’\textsuperscript{63}.

In advocating a threshold of extreme suffering in the 2002 Memorandum, the U.S. Department of Justice was reverting to the earlier approach of the U.S. government when it entered reservations to the 1984 Convention. The UN Committee on the Prevention of Torture\textsuperscript{64} considered these reservations had led to adoption of the

\begin{itemize}
  \item \textsuperscript{57} Ilhan v Turkey 27 June 2000 (Judgment) ECHR para 87.
  \item \textsuperscript{58} Prosecutor v Delalic IT-96-21-T 1998 (Judgment) para 468.
  \item \textsuperscript{59} Available at Amnesty International ‘Human Dignity Denied Torture and Accountability in the ‘War on Terror’ (2004): http://web.amnesty.org/library/Index/ENGAMR511452004?open&of=ENG313
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{63} Quoting the Bybee Memorandum or as the Chamber said at footnote 467 ‘The only citation provided for the block quote on paragraph 256 of the Appellant’s Brief is “Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib, Harper Collins, New York, 2004, p. 4-5.” See Prosecutor v Brdjanin IT-99-36-2 2005 (Appellant Brdjanin’s Brief on Appeal) footnote 237. The quoted text is originally from the Bybee Memorandum, Sura note 8 and noted at Prosecutor v Brdjanin IT-99-36 (2007) supra note 5.
  \item \textsuperscript{64} Supra note 54.
\end{itemize}
Convention prohibition in a manner consistent with the domestic Constitution but incompatible with international law.

Bad luck or bad management saw the 2002 Memorandum leaked at the same time the Abu Ghraib atrocities became public. In 2004, the Department of Justice unsurprisingly retracted its earlier position to conclude suffering was ‘not limited to excruciating or agonizing pain…or even death.’ The American Government can be viewed as responding to the contextual political necessity in stating the Convention definition to be definitive.

Acts and omissions distinguished from other forms of ill-treatment due to ‘the seriousness of the pain or suffering’ constitute torture for which criminal liability is required. The 2007 Appeals Chamber rejected, as argued by Brdjanin and in the 2002 Memorandum that only ‘conduct involving excruciating and agonizing pain or suffering’ amounted to torture, including ‘acts that cause severe physical suffering even if the acts do not also cause severe physical pain’ within the definition. Noting calls for a higher standard of ‘extreme pain and suffering’ were rejected during Convention negotiations the Court was confirming rather than declaring the requisite standard of suffering to be severe.

The Brdjanin decision confirms the definitional threshold without clarifying what severe suffering is. This definitional loophole increases the risks associated with the discretion afforded to States in implementation. Natural justice requires conflicts in interpretation to be resolved in favour of an accused, excluding acts otherwise within the definitional scope of torture and undermining the effective implementation of its prohibition. Analysis of the practical application of the suffering threshold will determine whether a consensus has emerged to meet this risk and compensate for definitional deficiencies.

II. Defining Torture: A Victim Centered Threshold

Reference to a variety of both criminal and non-criminal forums to assist in identifying torture continues to emphasise the specific and subjective experience of the victim and bypass the role of the perpetrator. The scope in approach amongst jurisdictions illustrates that a reconsideration of how to define torture, to ensure the correct attribution of criminal liability, and as advocated in this article, is not novel.

The Brdjanin Appeal confirmed the historical approach taken by the Tribunals that without a judicial determination as to ‘the absolute degree of pain

---

65 Id.
67 Id. at Introduction.
68 Id.
69 Article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 9 December 1975, G.A. Res. 3452, annex, 30 U.N. GAOR Supp. (No. 34) at 91 UN Doc A/10034 (1975) states: “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”
70 Prosecutor v Brdjanin, IT-99-36-2 2007 (Prosecution Response Brief) para 7.36 (citing the Memorandum Opinion for the Deputy Attorney General 30 December 2004 the text of which may be found at http://www.usdoj.gov/olc/18usc23402340a2.htm).
71 Supra note 5, para 248.
72 J. Herman Burgers and Hans Danelius, The United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (Martinus Nijhoff 1988) 45.
73 Op Cit., para 249.
required for an act to amount to torture 74 a fact specific inquiry 75 is required. On one hand, the capacity to accommodate the vagaries of changing geographic and temporal contexts that international law seeks to address will inevitably contribute to a breadth in accountability. On the other, judicial discretion (as seen above with the exercise of State discretion in implementation) permits inconsistency - anathema to the successful continuance of international criminal law, frustrating the effectiveness of accountability sought and undermining efforts to crystallise a legal definition that would promote a substantive depth in accountability.

Two points highlight the danger in deferring to an isolated factual analysis for determining the definitional scope and application of the prohibition. A contextual inquiry provides insight into ‘the distinct role and function attributed to States and individuals’ 76. This ensures any condemnation directly links the unique facts to the criminal elements and provides an effective context specific deterrent. Success in accommodating the vagaries of one context however do not overcome lingering definitional issues that inhibit the condemnation of torture in all jurisdictions and further tools must be employed for this purpose.

A second potential anomaly arises when criminal responsibility for torture is determined with reference to the approach of domestic or regional non-criminal forums. ‘To assess the gravity of the act of torture’ 77 the ICTY considered a contextual analysis would provide assistance and referred to the jurisprudence of the European Court to determine allegations of torture. The Court undertook a holistic analysis of ‘the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim’ 78 for the purpose of distinguishing instances of torture. This approach is commensurate with the European Convention on Fundamental Freedoms, which vests the Court with a mandate of victim protection rather than the pursuit of offender accountability, as at the ICTY. But the victim focus can lead to an erroneous finding that acts and omissions are abuse rather than torture. Where the approach taken by alternative forums frustrates effective identification of the perpetrator’s culpability, it cannot be relied upon to define torture.

Judicial notice was taken by the European Court for Human Rights that ‘what might have been inhumane treatment in the past is now seen as torture in the light of the increasingly higher standard of human rights protections’ 79. The Court’s human rights mandate has influenced the adoption of an increasingly flexible definition of torture that include acts and omissions that may or may not result in severe suffering.

In one of the earliest pre-1984 Torture Convention contemplations in Republic of Ireland v. United Kingdom, 80 the European Court held the deprivation of food was not of sufficient intensity 81 to constitute ‘very serious and cruel suffering.’ 82

74 *Supra* note 47, para 149.
75 The Appeals Chamber confirmed the approach as previously enumerated in *Prosecutor v Naletilić and Martinović* (Appeal Judgment) para 299 (*supra* note 5, para 251).
77 *Id.*, para 181.
78 *Supra* note 52, para 106.
79 *Selmioui v France* 1999 (Judgment) ECHR para 101 cited in *Prosecutor v Brdjanin, supra* note 5, para 250.
80 *Supra* note 23 at 25.
81 *Supra* note 23, para 167.
82 *Id.*, para 167.
By the 1999 judgment in *Selmouni v. France*\(^8^3\) the Court capitulated to ‘the increasingly high standard being required in the area of the protection of human rights’ noting classic categorisations of torture and inhuman treatment may, in the future, be overturned. The judgment in *Selmouni* accommodates the broadening in scope of actions and omissions considered able to inflict severe suffering and pre-empts the broader definition of torture, beyond merely the level of victim suffering, advocated here.\(^8^4\)

The Court is not isolated in adopting a progressive approach in defining torture that accords with the respective forum’s mandate. The European Committee on the Prevention of Torture\(^8^5\) distinguishes torture from other ‘forms of physical or mental treatment which simply fall short of torture for whatever reason.’\(^8^6\) The fluidity of this standard compliments the focus on prevention by the Committee\(^8^7\), which is not possessed with any equating capacity to make legal determinations.\(^8^8\) This mandate is satisfied without including a prohibited purpose requirement in the European Convention and the Committee distinguishes abuse from torture on the basis that suffering ‘falls short’. This wider approach confirms the view taken here, that in isolation a severe suffering threshold is insufficient to ensure maintenance of the prohibition against torture.

The subjective complexity of pain renders it a phenomenon that is difficult to assess objectively.\(^8^9\) A more readily identifiable objective, argued here as the culpable infliction of pain and suffering, provides a credible alternative in distinguishing torture from other forms of abuse. The varying approaches to implementation amongst the forums considered previously, illustrates that a formulaic victim-centred determination of severe suffering is impracticable and may serve to inhibit effective protection from torture and undermine the mandate of the respective forum. Actions and omissions objectively perceived to result in ‘intense, lasting, or heinous’ suffering will prove indicative but not necessarily determinative of the offender’s culpability and criminal responsibility.\(^9^0\)

---

\(^8^3\) *Supra* note 74.

\(^8^4\) Evans, M., *supra* note 26 at 371.


\(^8^6\) Evans, M. *supra* note 26 at 374.

\(^8^7\) Indeed to allay fears that there would be an overlap of jurisdiction between the Committee and the European Court Article 17(2) Convention for the Prevention of Torture and Inhuman or Degrading Treatment specifically notes ‘nothing in this Convention shall be construed as limiting or derogating from the competence of the organs of the European Convention on Human Rights or from the obligations assumed by the Parties under that Convention.’

\(^8^8\) *Supra* note 80 at 138.


III. Defining Torture: The Need For A Perpetrator Centered Threshold

A perpetrator-centred threshold is essential to distinguish and stigmatise torture, from other forms of abuse. Employing a definitional threshold that is satisfied with reference to the subjective experience of the victim, fails to establish and communicate the link between the perpetrator’s culpability and criminal liability. This risk is clear when a victim-centred approach permits the perpetrator to escape criminal responsibility when sexual violence and psychological harm do not satisfy the severity threshold. The definition of torture must be robust to ensure perpetrator liability equates to perpetrator culpability.

a. Dangers in Failing to Distinguish Torture

In its report into the Abu Ghraib abuses, the U.S. Department of Defence claimed most ‘abuse occurred separately from scheduled interrogations and did not focus on persons held for intelligence purposes.’\(^91\) Where government policies ‘circumvent’ the prohibition,\(^92\) effectively providing institutional acquiescence, the fact the abuse occurred off-duty fails to mitigate either the suffering of the victims or the culpability of the offenders. Orders to ‘soften up’ suspects with Pentagon sanctioned interrogation techniques and the wilful blindness of staff, such as medical officers who failed to report suspicious injuries, indicate the abuse did not occur in isolation.\(^93\) Any institution that condones actions necessary for interrogation, without pre-empting the threat of abuse in implementation, is equally as culpable as the principal perpetrator.\(^94\) A definition that does not guard against abuse through discretionary implementation, risks establishing an environment in which the erroneous labelling of torture as a lesser form of ill-treatment is tolerated, and the criminal responsibility of the perpetrator evaded.

Distinguishing torture from other forms of abuse ensures commensurate legal redress while encouraging societal and cultural protection. The discrepancy in the legal rights afforded to victims of abuse suggests that the designation of torture may assist in overcoming societal taboos.\(^95\) Pejorative community perspectives relating to rape and homosexuality can lead to a hostile reception toward victims of sexual abuse. A legal classification of torture discourages victim marginalisation, affords international protection, encourages disclosure, and combats the threat of impunity.

In contrast the failure to classify actions as torture suggests the victim’s suffering is less worthy as it displaces the protection and status such designation would afford.\(^96\) The potential for the actions of perpetrators to escape stigma arises due to a restrictive interpretation of the prohibitive purpose requirement, over-reliance on the subjective suffering of the victim and the contextual necessity influencing States in their implementation of the prohibition. This risk is exacerbated should a restrictive definition exclude modern manifestations not readily brought within

\(^{92}\) Adams, G., Balfour, D. and Reed G. supra note 3 at 686.
\(^{93}\) Id. at 688.
\(^{95}\) Supra note 23 at 1915.
\(^{96}\) Id. at 1915.
traditional definitions of torture, permitting the justification of otherwise abusive actions as necessary interrogation and increasing the risk of impunity.

b. Psychological Torture

The observation of the Special Rapporteur on Torture that ‘there has been a manifest trend away from the physical to the psychological’ in the scope of actions constituting torture is judicially supported. As early as 1979 the European Court noted in Republic of Ireland v. United Kingdom that ‘modern techniques of oppression’ that ‘shatter … mental and psychological equilibrium’ were just as invidious as physical acts of torture. More recently in Akkoc v. Turkey the European Court categorised threats directed against children of the complainant as torture, due to the ‘psychological pressure suffered … le[aving] the applicant with long term symptoms … diagnosed as post-traumatic stress disorder.’

Psychological manifestations of torture challenge reliance on a solely objective analysis of suffering, due to the difficulties in measuring intangible psychological injuries. Whether torture is physical or psychological in nature, a study at King’s College London, and published in the Archives of General Psychiatry, concluded the suffering arising from torture is not a quantum of pain but the non-autonomous collusion of the physical body with the will of the torturer, to affect a ‘forced self-betrayal.’ The victim’s pain and suffering is incidental to and not reflective of the perpetrator’s culpability for which responsibility is sought. The fierce public condemnation of the abuses at Abu Ghraib, without evidence of tangible injury to the victims, illustrates this.

c. Sexual Torture

Recognition that sexual violence may amount to torture further confirms that suffering is not consequentially dependent on physical harm and objectively assessable forms of suffering. One Danish study notes 61% of all reported torture involves sexual violence, the rise in commission was confirmed by the Appeals

---

98 Supra note 23 at 25.
99 Id. at 25.
100 Akkoc v Turkey (2000) (Judgment) ECHR.
101 Id. at para 116.
105 Prosecutor v Furundzija, supra note 15, para 163; Aydin v Turkey, supra note 2, para 83; Mejia v Peru Annual Report of the Inter-American Commission on Human Rights, Report No. 59/96, Case No. 10.970, 1 March 1996 para 182; and the U.S. Torture Victims Relief Act 1998 includes in the definition of torture ‘the use of rape and other forms of sexual violence by a person acting under the colour of law upon another person under his custody or physical control.’
106 This statistic represents claims by 56% of men and 80% of women - Pearce, H. ‘An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture’ 14 J. REFUGEE L. 534, 540 (2003).
Chamber in the Brdjanim Appeal\textsuperscript{107} and its prevalence is apparent in the extent to which sexual violence underlies charges brought before the ad hoc Tribunals.\textsuperscript{108}

The vulnerabilities of victims, rendering them susceptible to the initial attack and discouraging disclosure due to the sensitivity of the subject,\textsuperscript{109} combined with the unresolved definitional loopholes exacerbate the potential for impunity where torture is sexual.\textsuperscript{110} The combined physical and psychological suffering characteristic of sexual torture encourages an increase in utilisation, which must be halted.\textsuperscript{111}

It is the perspective of the perpetrator that distinguishes between rape, as primarily for sexual gratification and sexual torture, which seeks to exert control and power. Through placing emphasis on the culpability of the perpetrator, there is greater scope for identifying victims of sexual torture to ensure protection; whether through formal rights of redress under international law or informal contextual benefits, such as community support rather than marginalisation.\textsuperscript{112} In \textit{Prosecutor v. Ayakesu} the Tribunal noted ‘sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.’\textsuperscript{113} When the culpability of the perpetrator is the focus of analysis, these equally invidious but more subtle expressions of control and subjugation are capable of identification. It was the culpability of the perpetrator that proved influential in the Furundzija decision where the Appeals Chamber disputed that non-physical acts ‘namely, the rubbing of a knife against a woman’s thighs and stomach, coupled with a threat to insert the knife into her vagina, once proven, are not serious enough to amount to torture.’\textsuperscript{114}

In \textit{Delialic} the Court determined the severity of the suffering that related to charges of sexual torture, by assessing both physical and mental injuries as they manifest through direct personal and indirect social consequences.\textsuperscript{115} Suffering has included the effects on a victim in contracting a sexually transmitted disease and the effects of enforced pregnancy, given the wider community impact.\textsuperscript{116} Where suffering is contextually determined and not limited to manifest physical symptoms both direct

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{107} Supra note 5, para 258.
    \item \textsuperscript{108} ‘Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath’ Human Rights Watch 1996 in Pearce, H., \textit{supra} note 101 at 541.
    \item \textsuperscript{109} In particular women and children as noted by the Committee on the Elimination of Discrimination Against Women (CEDAW), in General Recommendation No. 19 (Report to the General Assembly of 24 June 1992 (A/47/38)); Declaration on the Protection of Women and Children in Emergency and Armed Conflict General Assembly Resolution 3318 (XXIX) considers ‘[a]ll forms of repression and cruel and inhuman treatment of women and children, including ... torture ... committed by belligerents in the course of military operations or in occupied territories shall be considered criminal’; Article 4 Fourth Geneva Convention provides ‘[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’.
    \item \textsuperscript{110} Lisa Kois in Pearce, H. \textit{supra} note 101 at 540.
    \item \textsuperscript{111} \textit{Supra} note 15, para 668.
    \item \textsuperscript{112} \textit{Prosecutor v Furundzija}, IT-95-17 2000 (Appeal) para 114.
    \item \textsuperscript{113} \textit{Supra} note 53 para 486.
    \item \textsuperscript{114} Mejia v Peru, Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10.970 1996. One study confirmed that the incidents of suicide amongst women who became pregnant as a result of rape were significant, Vera Folgenovic-Smalc \textit{Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and Bosnia-Herzegovina} in ‘Mass Rape’ 203 in Carpenter, R. ‘Surfacing Children: Limitations of Genocidal Rape Discourse’ 22 \textit{HUMAN RIGHTS Q.} 428, 435 (2000).
\end{itemize}
\end{footnotesize}
and indirect victims, including family and community members, may jointly and severally satisfy the threshold.\(^{117}\) Where torture is determined solely with regard to the consequences for the direct victim a perpetrator is able to avoid liability, despite the equally invidious impact visited on the wider societal framework.

The prohibitive purpose requirement is of assistance in ensuring a perpetrator does not escape responsibility, due to the definitional difficulties inhibiting satisfaction of the severity threshold for instances of sexual torture. In *Prosecutor v Kunarac* the Court noted that in the context of a policy of widespread rape the discriminatory selection of Muslim victims was sufficient to distinguish the acts.\(^{118}\) The Court considered that ‘like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.’\(^{119}\) Regardless of any accompanying sexual impetus, sexual violence can therefore be classed as torture where the culpability of the perpetrator demands this distinction be drawn.\(^{120}\)

The Appeals Chamber has confirmed the cumulative physical and psychological consequences of sexual violence would satisfy a severity threshold,\(^{121}\) capable of invoking criminal accountability for torture.\(^{122}\) Given that one estimate, places the incidence of sexual violence during the Yugoslav conflict alone at 20,000\(^{123}\) limitations in relying on an objective assessment of victim suffering cannot be permitted to prevent stigmatisation as torture.

As shown throughout this article, governments have been able to take advantage of definitional difficulties in order to implement the prohibition against torture in accordance with perceived contextual necessities. To meet the imperative of victim protection, international courts have been equally proactive in manipulating these same loopholes to ensure the attribution of criminal responsibility for sexual torture. To the extent that, as it currently stands, definitional difficulties and loopholes undermine the prohibition against torture, the definition must be addressed.

**IV. Conclusion: The Potential For Abuse?**

In 2007, the ICTY confirmed that as expressed in the 1984 Torture Convention, the threshold for defining torture was the infliction of severe pain and suffering. This standard seeks to distinguish torture from private or less serious forms of abuse, to combat impunity and ensure a correct attribution of the stigma associated

---


\(^{118}\) *Prosecutor v Kunarac*, supra note 48, para 144, with similar findings in *Prosecutor v Delalic*, supra note 54, para 494-6, *Prosecutor v Furundzija* supra note 14, para 172.

\(^{119}\) *Supra* note 15 at 687.


\(^{121}\) In *Prosecutor v Delalic* the Court held rape would amount to torture where there was: ‘(i) an act or omission that causes severe pain or suffering, whether mental or physical, (ii) which is inflicted intentionally, (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind, (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.’

\(^{122}\) *Supra* note 47, para 151.

\(^{123}\) *Supra* note 112 at 431.
with, and criminal responsibility for, torture. Problems in objectively determining whether subjective pain fulfils a standard of severe suffering, inhibits a consistent and sustainable definition for implementation, in accordance with this imperative.

It is unsurprising that images of abuse at the American detention facility in Abu Ghraib escaped classification as torture. This is due to not only definitional uncertainties but also the delicate balance between the imperative of prohibiting torture and contemporary challenges in maintaining domestic and international peace and security. The increasing exploitation of definitional uncertainties and relying on contextual necessity to downgrade an allegation from torture to abuse is regrettable. This trend is reversed by broadening the definition of torture to focus on the culpability of the perpetrator, rather than the experience of the victim; and the prohibition against torture protected from the potential for abuse.