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‘LESSER EVILS’ IN THE WAR ON TERRORISM*

Mark A. Drumbl†

Today’s panel dichotomizes the use of force (*i.e.* the deployment of military means) and the use of courts (*i.e.* the deployment of the criminal law). To be sure, there are important conceptual differences between constructing terrorist attacks as crimes or as armed attacks. However, it is possible to respond to criminal attacks through the use of both courts and force (for example, force can be used to locate and obtain custody over suspected terrorists and incapacitate those who resist), and to armed attacks through both courts and force (for example, courts can be used to prosecute terrorist combatants who flout the laws of war). Accordingly, conceptualizing the use of force and the use of courts as mutually exclusive response mechanisms builds somewhat of a false dichotomy. In fact, this is but one of three false dichotomies bouncing around the popular rhetoric and public policy that currently animate efforts to contain and eradicate terrorist violence. The other two are civil liberties *versus* national security and dissensus *versus* direction.

If we assume there to be a war on terror¹—as the U.S. Supreme Court has—we must also recognize that this war should be waged in the name of law, not against law. Victory certainly is the objective, but how victory is achieved also is crucial—especially for a war deemed to be just to remain just. As an aside, it is important to underscore that, although law is not as blunt a form of violence as is the use of military force, law and courts do represent the institutionalization and legitimization of coercion by the state or, increasingly, by international legal institutions. Let us not underestimate the force of the criminal law to neutralize, deter, punish, and stigmatize. Terrorism is an illegitimate use of force, but it also is a crime, and there are many compelling reasons for casting it as such in full complement to availing ourselves of military means to combat it when these are necessary in self-defense, or authorized by the United Nations

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¹ *But see* STEFAN HALPER & JONATHAN CLARKE, AMERICA ALONE 274-301 (2004) (voicing skepticism whether the war on terror is or can be a war at all and instead characterizing it as a more discrete “problem management issue”); Bruce Ackerman, *Don’t Panic*, LONDON REV. BOOKS, Feb. 7, 2002, at 15, 16 (describing the language of the “war on terrorism” as an “extravagant metaphor blocking responsible thought about a serious problem”).

Security Council, or required to track down and incapacitate terrorist war criminals.

Regardless, the current debate places law and force in opposition to each other. According to this binary—and mutually exclusive—world-view, states can conduct the war on terror in multiple theaters of operation as either a criminal investigation or as an armed conflict. In some quarters, largely populated by purists, humanists, perfectionists, human rights entrepreneurs, civil libertarians and, of course, many lawyers, law is viewed as an absolute, as a prerequisite to peace, and as reflective of our humanity. This community should honestly admit that it may at times overestimate the value of law in deterring suicide-bombers and neutralizing their threats. Moreover, this community may underestimate the terrorists' ability to exploit law and find safety in its cracks, crevices, protections, and nuances. An opposite—although equally reductionist—approach has been encouraged by many governments and broad swaths of people, including the occasional lawyer. This is a view that seeks to minimize the role of law in the war on terror. It constructs law as something cloying and annoying.² It posits a barbarians at the gate scenario in which the cities on the hills are ill-served by rules, regulations, or restraint.³ This alarming scenario assumes that the national security threats we face today are graver than threats we—or the civilized world as a whole—have faced before, thereby occasioning a possible under appreciation of our shared history and the major threats we have survived, resisted, and overcome in the past. The governments of the U.S., U.K., and Russian Federation, to varying extents *inter se*, have tended toward this end of the spectrum. The Bush Administration, for its part, has categorized terrorist attacks as armed attacks instead of criminal attacks, but then has cast international humanitarian law—which customarily governs the conduct of belligerents in armed conflict—as “quaint” and something to be circumscribed in conducting the war on terror.⁴ From this perspective, too much law—

² See Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1 (stating that after the September 11 terrorist attacks the administration's lawyers “were set to work to find legal arguments to avoid restrictions imposed by international and American law”).

³ Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L. J. 23, 23 (2002) (“I have been struck by how many Americans – and how many lawyers – seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules.”).

⁴ Pete Yost, *Did Administration Construct Legal Foundation Clearing Way for Abuse Scandal?*, SAN DIEGO UNION TRIB., May 16, 2004, available at <http://www.signonsandiego.com/news/world/iraq/20040516-2254-us-prisonerabuse.html> (last visited Feb. 26, 2005) (reporting correspondence from White House Counsel Alberto Gonzales to President Bush in which Mr. Gonzales stated that the “new paradigm” occasioned by the fight against terrorism “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions”).

namely, too deep an entanglement in the web of legalism and legalese—is dangerous insofar as it threatens U.S. national security interests.

This skepticism to law manifests itself in four important U.S. policy initiatives.

(1) *Guantánamo*. Roughly 550 foreign nationals have remained detained at the U.S. military base on Guantánamo Bay, Cuba for nearly three years already. They have not faced formal legal process. The U.S. government largely has thwarted meaningful public determination of their status as prisoners-of-war or unlawful combatants by a competent tribunal as envisioned by the Geneva Conventions.⁵ It has restricted detainees from substantive access to lawyers to learn of the charges they face or the grounds for their detention (thereby obscuring whether this detention is in fact preventative or punitive). Guantánamo—isolated, shorn of process, access, and transparency—sits as a stark metaphor of the perceptions among certain influential actors of the cramped role law should play in the war on terror⁶ and, in turn, a site of resistance for other important actors, including the United States Supreme Court—to which I will return in greater detail later.⁷ Many experts agree that the detentions, as well as interrogation methods deployed against the detainees, run afoul of international humanitarian law and international human rights law.⁸

⁵ See *infra* note 33 for a discussion of the combatant status review panels implemented in the summer of 2004 and conclusions regarding their falling short of the Geneva Convention requirements.

⁶ See Richard J. Goldstone, *International Human Rights and Criminal Justice in the First Decade of the 21st Century*, 11 HUM. RTS. BRIEF 3, 4-5 (2004).

⁷ See discussion *infra* notes 32-33.

⁸ Neil A. Lewis, *Guantánamo Inmate Complains of Threats and Long Isolation*, N.Y. TIMES, Aug. 7, 2004 at A9 (stating that “[w]hile the United States government has asserted no obligation to give the Guantánamo prisoners the protections of the Geneva Conventions,” but officials have insisted that they “have done so as a humanitarian gesture”); see also Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263, 319-348 (2004) (concluding that many of the substantive protections of the Geneva Conventions do not appear to be applied to these detainees); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N. C. L. REV. 1, 10 (2002); Dave Moniz, *U.S. Missed Chances to Stop Abuses*, USA TODAY, May 18, 2004, at A4 (reporting that in May 2003 “eight high-ranking military lawyers voiced concerns to Pentagon officials and the New York State Bar Association that new interrogation policies developed after the Sept. 11 attacks could lead to prisoner abuses” and that these policies “might reverse 50 years of a proud tradition of compliance with the Geneva Conventions”); Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES (Nov. 30, 2004) (reporting that the International Committee of the Red Cross has charged that the U.S. military has used psychological and physical coercion “tantamount to torture” on prisoners at Guantánamo).

(2) *U.S. citizen enemy combatants.* The White House has claimed that it has the unilateral ability to declare a U.S. citizen an enemy combatant and then deny that individual access to any form of legal process to contest the indefinite detention that might result.⁹ This, too, has been contested by the judicial branch.¹⁰

(3) *Military commissions.* A select number of Guantánamo detainees face prosecution on terrorism and war crimes related charges in specially created military commissions designed to prosecute foreign nationals.¹¹ Pretrial proceedings have begun against certain detainees but remain mired in controversy and fraught by challenge.¹² That said, the decision to create these commissions and the nature of the proposal reflect a calculus to cut out the ordinary federal courts and substitute those institutions and processes with a methodology that restrains due process rights in the name of national security.

(4) *Insulating the Executive branch from judicial review and accountability.* White House Counsel Alberto Gonzales advised the White House that declaring that Taliban and al-Qaeda detainees were not covered by the Geneva Conventions "substantially reduces" the threat of criminal prosecution for war crimes (defined to include any grave breach of the Geneva Conventions) under domestic U.S. law.¹³ Secretary of State Colin Powell submitted a sharp critique of this recommendation.¹⁴ The President followed suit by stating that Taliban detainees were entitled to the coverage

⁹ Anthony Lewis, *A President Beyond the Law*, N.Y. TIMES, May 7, 2004, at A31.

¹⁰ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (holding that due process demands that a U.S. citizen held in the U.S. as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker).

¹¹ Scott Higham, *Bin Laden Aide is Charged at First Tribunal*, WASH. POST, Aug. 24, 2004, at A1.

¹² Neil A. Lewis, *Guantánamo Tribunal Process in Turmoil*, N.Y. TIMES, Sept. 26, 2004, §1, at 29.

¹³ Memorandum from Alberto Gonzales, to the President, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) (on file with the author); see also John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, available at <http://msnbc.msn.com/id/4989481> (last visited Feb. 28, 2005); Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK, May 17, 2004, available at <http://msnbc.msn.com/id/4999734/site/newsweek/> (reporting that "the internal memos show that administration lawyers were privately concerned that they could [be] tried for war crimes themselves based on actions the administration were [sic] taking").

¹⁴ See Memorandum from Colin L. Powell, to Counsel to the President, Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002) (on file with author).

of the Geneva Conventions whereas al-Qaeda fighters were not; however, he then denied actual prisoner of war status to all detainees.¹⁵ This created a situation in which military personnel felt able to use interrogation methods that were more coercive in nature than those habitually permitted. In a different vein, U.S. officials have stated that the Administration "has decided to take the unusual step of bestowing on its own troops and personnel immunity from prosecution by Iraqi courts for killing Iraqis or destroying local property after the occupation ends and political power is transferred to an interim Iraqi government."¹⁶

Skepticism about the role of law also animated the now disavowed, and infamous, torture memoranda.¹⁷ There is cause to believe that these

¹⁵ Katharine Q. Seelye, *A Nation Challenged: Captives; In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1; Paul Koring, *No PoWs Being Held in Cuba, Bush Says*, GLOBE & MAIL (Toronto), Feb. 8, 2002, at A12.

¹⁶ Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004, at A01.

¹⁷ See Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), available at http://online.wsj.com/public/resources/documents/military_0604.pdf (last visited Feb. 28, 2005) [hereinafter Working Group Report] (classified draft document made publicly available by the Wall Street Journal). The Working Group Report advised that the President was not bound by an international treaty prohibiting torture or by federal anti-torture legislation owing to his authority as commander-in-chief to approve any technique needed to protect U.S. security and, furthermore, that any executive branch official could be immune from domestic and international prohibitions against torture. *Id.* at 20-22. Moreover, the Working Group Report defined torture narrowly, concluding that an interrogator who knows that severe pain will result from his actions lacks the requisite specific intent to torture even if he acted in bad faith so long as causing this pain was not his objective. *Id.* at 7-9. The Working Group Report drew heavily from an August 1, 2002 memorandum that argued that the President's wartime powers superceded anti-torture laws and treaties. See Dana Priest, *Justice Dept. Memo Says Torture 'May be Justified'*, WASH. POST, June 13, 2004 (stating that the August 1, 2002 memorandum was signed by former Assistant Attorney-General Jay Bybee, who is currently a judge on the Ninth Circuit). This August 1, 2002 memorandum, in turn, derives from earlier documentation, including a memorandum of Jan. 9, 2002. Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Department of Justice, to William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al-Qaeda and Taliban Detainees (Jan. 9, 2002), available at <http://www.msnbc.msn.com/id/5025040/site/newsweek> (last visited Feb. 28, 2005). The August 1, 2002 memorandum generated harsh criticism insofar as it appeared to justify the use of torture (stopping just short of death) in the war on terror and to immunize personnel committing torture from legal process. See Michael Ignatieff, *Mirage in the Desert*, N.Y. TIMES MAG., June 27, 2004, at 1 (describing the memorandum, and other work product, as giving new meaning to the phrase 'savage servility'). As a consequence of this controversy, the Justice Department eventually disavowed this memorandum. *Bush Claimed Right to Waive Prisoner Abuse Laws*, GLOBE & MAIL, June 22, 2004; David Johnston, *Uncertainty*

memoranda, along with other deliberate decisions made at senior levels to circumscribe the role of law, had an impact upon the degree of respect for law in the Abu Ghraib prison¹⁸ (along with prisons in Afghanistan)¹⁹ and, therefore, may well have contoured the sadistic environment and abusive conduct that took place in both locations. Independent and Army inquiries into the prison abuses suggest that senior officials, while not personally culpable, are to be faulted for failing to exercise proper oversight.²⁰ Moreover, there is evidence that abuses by U.S. forces took place in a number of locations throughout Iraq and Afghanistan, not to mention Guantánamo as well, disconcertingly suggesting that the “few bad apples” theory might not be too factually accurate.²¹

About Interrogation Rules Seen as Slowing the Hunt for Information on Terrorists, N.Y. TIMES, June 28, 2004, at 8.

¹⁸ See, e.g., Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, at A01 (reporting investigations of allegations at Abu Ghraib of savage beatings, prisoners being forced to retrieve food from toilets, sexual molestation, force-feeding of pork and liquor to Muslim prisoners, forcing prisoners to bark like dogs, riding prisoners like animals, forced masturbation, rape, and sodomy).

¹⁹ There are reports of significant human rights violations, including assault with intent to cause death and serious bodily harm, by U.S. forces in prisons in Afghanistan. Eric Schmitt, *3 Commandos Charged With Beating of Prisoners*, N.Y. TIMES, Sept. 25, 2004, at 7.

²⁰ The Church Report (a naval inspector general inquiry) faulted senior U.S. officials for failing to establish clear interrogation policies for Iraq and Afghanistan, but also found that senior officials were not directly responsible for the abuses and that there was no policy that approved mistreatment of detainees. Eric Schmitt, *New Interrogation Rules Set for Detainees in Iraq*, N.Y. TIMES (March 10, 2005) (reporting also that the Army had taken action against 109 soldiers, including 32 courts-martial). The Fay Report (an Army inquiry) found that senior U.S. commanders created conditions that allowed abuses to occur at Abu Ghraib when they failed to provide the leadership and resources required to administer the prison. Thom Shanker & Kate Zernike, *Abuse Inquiry Faults Officers on Leadership*, N.Y. TIMES, Aug. 19, 2004, at A1. The Fay Report found no evidence of culpability above the colonel who commanded the military intelligence unit in the prison. *Id.* Classified sections of the Fay Report state that the head commander in Iraq, Gen. Sanchez, sowed such confusion among interrogators in Iraq that they acted in ways that violated the Geneva Conventions, which in any regard they understood poorly anyway. Douglas Jehl & Eric Schmitt, *Army's Report Faults General in Prison Abuse*, N.Y. TIMES, Aug. 27, 2004, at A1. The Schlesinger Report (an independent inquiry) found that top Pentagon civilian and military leaders allowed conditions that led to the abuse of detainees in Abu Ghraib. Bradley Graham & Josh White, *Top Pentagon Leaders Faulted in Prison Abuse*, WASH. POST, Aug. 25, 2004, at A1; see also R. Jeffrey Smith, *Documents Helped Sow Abuse, Army Report Finds*, WASH. POST, Aug. 30, 2004, at A01 (discussing documents written by senior officials that Army officials say helped sow the seeds of prison abuse in Iraq).

²¹ Barton Gellman and R. Jeffrey Smith, *Report to Defense Alleged Abuse by Prison Interrogation Teams*, WASH. POST (Dec. 8, 2004); Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST (Dec. 1, 2004).

To be sure, the Bush Administration does not wholly dismiss the role of regular courts in the war on terror. In fact, there has been some use of the ordinary criminal law and process to host a number of terrorism related prosecutions—most prominently Walker Lindh and Moussaoui.²² These have occurred in U.S. court. However, even in each of these prosecutions, the ordinary role of rule of law and due process has been curtailed, often rather extensively. The push to convict has led to the subsequent unraveling of some prosecutions.²³ Attempts by other nations, for example Germany, to prosecute terrorist defendants have been undermined by due process concerns owing to U.S. refusal to permit those defendants to call relevant witnesses from detention at Guantánamo. The Department of Justice has asserted vigorous use of material witness warrants in terrorism investigations that far transcends the intended purpose of such warrants.²⁴ All in all, “[d]espite the 9/11 commission’s remarkable exercise in public education, the government is still trying to make the war on terror ever more secret.”²⁵ Some may say that secrecy is a necessity—or at least an inevitability—in the struggle against a shadowy, deadly, and shifty enemy that itself knows no regard for law or humanity. Others may intone that secrecy is not an inevitability, nor our destiny, but simply an ideological preference.

One of law’s most precious qualities is its public nature. Assuredly, there are situations where the public nature of the law could undermine the common good, for example through the dissemination of national security secrets. This has been one argument cited in favor of military commissions instead of criminal trials for alleged terrorist fighters. That said, there is an important role for public process in a democracy. I am guided in this regard by philosopher Michael Ignatieff, who argues that in combating the

²² Two hundred and eighty four persons have been charged with “terrorism crimes” in U.S. courts. See Comments of Larry Thompson, to the Panel on Terrorism and Civil Liberties, Southeastern Association of American Law Schools Conference (Aug. 3, 2004) (notes on file with the author). There have been 152 pleas. *Id.* There have been some convictions and some acquittals. *Id.* Although the definition of “terrorism crime” is very broad, the point remains that the U.S. has not fully disengaged domestic courts as mechanisms to fight terrorism.

²³ Danny Hakim & Eric Lichtblau, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. TIMES, Oct. 7, 2004, at 1.

²⁴ Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”*: Reexamining Material Witness Detentions in the Wake of the September 11 Dragnet, VAND. L. REV. (forthcoming 2005).

²⁵ Michael Ignatieff, *Lesser Evils*, N.Y. TIMES MAG., May 2, 2004, at 7 (referring to the government’s refusal to disclose how many times it has used its expanded authority under the Patriot Act and to disclose name of detainees), available at http://www.ksg.harvard.edu/news/opeds/2004/ignatieff_less_evils_nytm_050204.htm (last visited Feb. 28, 2005).

evil of terrorism we must follow the course of the “lesser evil.”²⁶ Although democracies must defend themselves—after all, “liberal states cannot be protected by herbivores”²⁷—they must not panic. They can circumscribe some of the freedoms they are fighting for, but this circumscription always must be strictly targeted and sharply tailored in a manner that minimally impairs those same freedoms. Ignatieff argues that,

the use of coercive force in a liberal democracy, not just in times of emergency, but in normal times as well, is regarded as a lesser evil. This particular view of democracy does not prohibit emergency suspensions of rights in times of terror. But it imposes an obligation on government to justify such measures publicly, to submit them to judicial review, and to circumscribe them with sunset clauses so that they do not become permanent.²⁸

Ignatieff’s shorthand for this obligation is “open adversarial review,” or a “duty of adversarial justification,” in which governments must justify the steps they take in public before legislatures, courts, and public opinion.²⁹ This process should be subject to what Ignatieff calls the “conservative test,” namely, “are departures from existing due process standards really necessary?”³⁰ For Ignatieff, “democracy depends on distrust, . . . freedom’s defense requires submitting even noble intentions to the test of adversarial review.”³¹

²⁶ See generally MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004).

²⁷ IGNATIEFF, *supra* note 26, at 12. Those who strictly adumbrate non-violence in the face of violence may be faulted for their passivity and the immediate social cost of their vision. Margaret MacMillan, *Terrorism: The Democratic Dilemma*, *GLOBE & MAIL*, May 8, 2004, at D6 (describing Gandhi as stating that violence is never justified and reporting that Gandhi “famously urged the British to let the Japanese invade India; in times his non-violence would change the invaders’ hearts.”).

²⁸ IGNATIEFF, *supra* note 26, at vii-viii.

²⁹ *Id.* at 24, 51. To this I would add that duties of review or justification can be exercised within the government by virtue of inter-agency discussion and collaboration. That said, in the formulation of the military commissions it appears that certain branches of government, in particular the State Department, were cut out of the decision-making process, thereby hamstringing deliberative discussions within the government in the name of direction over dissensus. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, *N.Y. TIMES* (Oct. 24, 2004).

³⁰ IGNATIEFF, *supra* note 26, at 24 (emphasis omitted). Ignatieff posits certain deprivations as beyond the pale and not subject to justification as lesser evils. These include torture, targeted assassinations, and indefinite suspension of habeas corpus. See *id.* at viii, 24, 118.

³¹ *Id.* at 119.

The importance Ignatieff accords to the duty of adversarial justification leads to the troubling false dichotomy between direction and dissensus. This dichotomy emerges most apparently in the notion that the courts should show deference to the President in times of war. With the nation at war, do we have the time to engage in messy, contrarian, time-consuming, and hairsplitting civil dissensus—in which policies are hashed through, often frustratingly, in painstaking detail? Do we instead need the direct, bright-line thinking that can best emerge from the office of the executive, especially in the delicate matters of foreign policy and national security? Should we judge early based on fears or slowly based on knowledge? Should we defer to top-down cues or come to independent bottom-up conclusions? In considering these questions, we must be mindful of history, which teaches us that humanity has long faced nihilistic threats of dismemberment and destruction. We are not the first generation to face such threats—many others have faced devastating violence—and we need to recognize this as we prepare our responses to the nihilistic challenges of today. History teaches us that there is considerable value in ensuring that derogations of the ordinary remain measured instead of impetuous.

In a brief filed in the DC Circuit in *Al Odah*, a separate case eventually consolidated before the Supreme Court, the U.S. argued that the scope of any rights of aliens detained abroad are to be determined by the executive and the military, not the courts. It took a similar approach before the Supreme Court in *Hamdi*³² and *Rasul*,³³ pleading in argument that it was the

³² *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (holding that due process demands that a U.S. citizen held in the U.S. as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker).

³³ *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004) (holding that U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay). Following the *Rasul* decision, the Defense Department initiated a policy whereby Guantánamo detainees could challenge their status as enemy combatants (although without legal counsel) within combatant status review panels. See John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, July 8, 2004, at A01. As of the time of these reports, 320 detainees have appeared; there have been 104 determinations of which 103 have resulted in findings of enemy combatancy; 150 other detainees who were once branded as dangerous terrorists by the U.S. government have been sent back to their home countries. Neil A. Lewis, *Guantánamo Prisoners Getting Their Day, but Hardly in Court*, N.Y. TIMES (Nov. 8, 2004); Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES (Oct. 24, 2004). These status hearings differ from the planned prosecution in military commissions of a tiny number of Guantánamo detainees for war crimes (these prosecutions face their own independent challenges). Status hearings have been subject to criticism for failing to meet the requirements of the Geneva Conventions. The government maintains that the proceeds of torture, namely evidence obtained pursuant to torturing a detainee, is properly admissible before a review panel in determining the status of the detainee. Associated Press,

province of the executive to determine how to conduct affairs in extraordinary times of war, even as regards the treatment of U.S. citizens. Ultimately, the Supreme Court decided to wade into the fray with its judgments in the *Hamdi* and *Rasul* cases, most strikingly with Justice O'Connor's admonition in *Hamdi* that a state of war is not a blank check for the President. With this in mind, the Court proceeded to grant detainees at Guantánamo and U.S. citizen unlawful combatants held in military brigades some access to public adjudication, at least to determine their status, although the exact extent of that access remains somewhat ambiguous and subject to subsequent and ongoing interpretation by the federal district courts. By injecting some dissensus into the direction of the executive, the Supreme Court played an important role in refining our response to the terror threat, ensuring that the responses are proportionate, and showing that dissensus can play a constructive role in combating terrorism and ensuring that what we are fighting for is not lost in the process. Justice Scalia's opinion in *Hamdi* (in which he was joined by Justice Stevens) was a particularly powerful rebuke to the government's claim. Justice Scalia maintained that any curtailment of civil rights during wartime must be done openly and democratically, thereby reaffirming the importance of the duty of adversarial justification.

The Supreme Court insisted that at least some of these important conversations be kept in the public space, and that the government be called to justify the impairments it makes to our freedoms in this war waged in the name of freedom. In this vein, the Supreme Court may have served a useful didactic function in instructing us about the false nature of the dichotomy between dissensus and direction and then providing a constructive role for mediating this important public debate. Over time, the availability of courts as a forum in which these conversations can occur could help defuse popular and often intransigent perceptions of these difficult issues. Moreover, this is not just a U.S. phenomenon. In the United Kingdom, courts that initially were diffident now have become somewhat more welcoming of discussions regarding the breadth of governmental claims to contain civil liberties and dissensus in the name of security and direction.³⁴

Democracies need to be particularly vigilant about the duty of adversarial justification, and willing, as the Israeli Supreme Court put it, to train to win with one hand tied behind their backs. After seeing the slippery slope that quickly arose once physical force was permitted in official questioning, the Israeli Supreme Court ruled in 1999 that "shaking suspects and confining them in chairs tipped forward in painful positions for long

Government: Evidence gained by torture allowed (Dec. 8, 2004) (on file with the author). *Habeas* petitions have been brought in federal court in favor of some of the detainees.

³⁴ See, e.g., *G. v. Secretary of State for the Home Department*, [2004] EWCA Civ. 265 (permitting release on bail of a suspected international terrorist in light of a finding that his mental illness was created by his extended indefinite detention).

periods were violations of Israel's national and international commitments against torture."³⁵ For Ignatieff, "liberal democratic regimes encourage a kind of moral narcissism, a blinding belief that because *this* kind of society authorizes such means, they must be acceptable."³⁶ He goes on to note that, as a consequence of this moral narcissism, "democratic values . . . may actually blind democratic agents to the moral reality of their actions. The nobility of ends is no guarantee against resort to evil means; indeed, the more noble they are, the more ruthlessness they can endorse."³⁷ The threat occasioned by our narcissism is precisely why legalism—and its companion, namely open adversarial review—is so important, and should remain so, in the struggle against terrorism. Our responses to threats and attacks can do more damage than the threats and attacks themselves. This too, forms part of the calculus of the apocalyptic mind of the terrorist agenda. We need to guard against it.

The White House is wise to realize that the terrorist threat does differ from the state-based threats that, at least initially, grounded modern international law.³⁸ But this argument cuts both ways. On the one hand, it suggests some basis to rescript traditional legal categories and blur the differences between criminals and enemies, war and defense, armed attacks and criminal attacks, and prisoners and detainees. On the other hand, this is not a war in any classic sense. Normally, war ends with a surrender, occupation, and dismantling of the opposing forces. This cannot happen in the case of the war on terrorism. So, this war could become never-ending or ending perhaps only when a greater threat emerges from somewhere else to which we much respond.³⁹ But that means that the changes to the law that seem necessary in the name of extraordinary national security concerns could very well and very easily become ordinary and, thereby, permanent. This suggests our societies require and deserve the dissensus and discussion that our governments may wish to avoid.

These concerns also suggest that criminal law approaches may merit greater discussion.⁴⁰ The criminal law, after all, permits the use of force to track down, capture, and neutralize suspected criminals who resist arrest. It also permits the use force in self-defense. This means that targeted

³⁵ Ignatieff, *supra* note 25, at 10.

³⁶ IGNATIEFF, *supra* note 26, at 119.

³⁷ *Id.*

³⁸ HALPER & CLARKE, *supra* note 1, at 32, 201. That said, the U.S. did revert to the traditional state-based model when it invaded Iraq, claiming *inter alia* Iraq's connections to terrorism among the reasons justifying the invasion.

³⁹ *Id.* at 3 ("war that has no dimensions, with elusive enemies who may be equally residents of Damascus or Detroit and with no definition of what constitutes victory and thus with no end in sight").

⁴⁰ So too, might civil litigation involving terrorist financiers, against whom criminal sanction also could be initiated.

assassinations of terrorists, a methodology used by certain states in the struggle against terrorism, do not necessarily flow exclusively from the armed conflict paradigm that has gained currency as the dominant response to terrorism. In those places where there may be consensus in favor of policies of targeted assassinations, one possibility is the initiation of judicial processes (ordinary judicial actors acting in secret if necessary) to review evidence *ex ante* and to issue warrants for targeted assassinations in situations where the imminence of their threats can be proven as a matter of self-defense, bearing in mind that the nature of the threat posed by terrorism may suggest a broader level of flexibility in assessing imminence to accommodate what might colloquially be called the "ticking time-bomb." The point of this aside is not to pronounce normatively on the merits of the criminal law paradigm or its marginalization but, rather, to underscore the overlap between force and courts in the struggle against terrorism. There is an overlap between the criminal law and armed conflict paradigms that essentialized portrayals of either paradigm do not acknowledge, accommodate, or permit.

Moreover, as Ignatieff observes, systemic human rights abuses can be perpetrated by anyone in the name of any side to a conflict.⁴¹ When governments begin to suspend law in one context and for one purpose (however limited), there may well be spill-over. It is difficult to contain the abandonment of legalism to specific narrow contexts for which that abandonment may initially have been contemplated. For example, methods darkly used against unlawful enemy combatants—methods that themselves pose serious challenges to international human rights and humanitarian law⁴²—quickly became transplanted to Iraq, where they were used against prisoners of war, those innocents detained by mistake, those detained for criminal activity (who mostly posed a rather limited security threat), and the odd terrorist.⁴³ Once governments go down the road of slicing away rule of law by bending the rules on torture, they may hungrily continue to slice, and ordinary individuals may internalize this hunger from above. In the end, one might soon end up in a stygian place, and perhaps have gotten

⁴¹ IGNATIEFF, *supra* note 26, at 118.

⁴² Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES (Nov. 30, 2004).

⁴³ Isikoff, *supra* note 13 ("Administration critics have charged that key legal decisions made in the months after September 11, 2001 including the White House's February 2002 declaration not to grant any Al Qaeda and Taliban fighters prisoners of war status under the Geneva Convention, laid the groundwork for the interrogation abuses that have recently been revealed in the Abu Ghraib prison in Iraq."); Tim Golden & Don Van Natta Jr., *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 ("Defense Department officials have acknowledged that American jailers in Iraq, under pressure to produce better intelligence, adapted some new, more aggressive interrogation techniques that were approved by Secretary of Defense Donald H. Rumsfeld for use at Guantánamo.").

there quite quickly. Abu Ghraib, along with reports emanating from prisons in Afghanistan, are deeply disturbing reminders of that reality. They also remind of Christopher Dawson's steadfast warning that "[a]s soon as men decide that all means are permitted to fight an evil then their good becomes indistinguishable from the evil that they set out to destroy."⁴⁴

In the war on terror, the use of abuse and torture to some extent has been sanitized under the guise of interrogation and intelligence-gathering. Rendering an individual for interrogation or holding someone for intelligence-gathering has bleached the more sinister reality of indefinite detention and infliction of aggressive use of violence (psychological and physical). After all, what value really can be had from the Guantánamo and Afghan detainees: incarcerated, isolated for three years already, has any information they might ever have had not become stale? Moreover, although the Iraq conflict is a traditional state-to-state conflict to which the Geneva Conventions unequivocally apply, there has been concerted effort by the U.S. to carve out exceptions to the Conventions in terms of their applicability to this theater of operations.⁴⁵ This further suggests that it is difficult to dam suspensions of law just to one context; in fact, once unleashed somewhere these suspensions may creep into different contexts for which they are not justified, thereby eroding or corroding the overall legal framework.

The falseness of the dichotomy between rights and security, which I mentioned earlier as the third strawman dichotomy, now can be brought home. The containment of law in the conflict in Iraq, and perhaps in the war on terrorism generally, may well have exacerbated the terrorist threat. Many observers suggest that the Abu Ghraib photos were the best terrorist recruitment tool possible. Whether that is true or not, I don't know. But I think it is fair to say that Abu Ghraib increased the risk that a greater number of previously unmotivated individuals now feel motivated to lead a life of terror. One Army report certainly thought these abuses were feeding the insurgency by making gratuitous enemies.⁴⁶ There is a link between disrespecting rights and threatening national security. There are situations where diligently respecting rights—in other words fighting with one hand tied behind one's back—may in fact enhance one's ability to fight by diminishing the will, appeal, frenzy, and recruitment of the enemy. What is more, even subtle civil rights violations degrade the effectiveness of anti-terrorism responses. For example, perceptions within law-abiding Arab-

⁴⁴ CHRISTOPHER DAWSON, *THE JUDGEMENT OF THE NATIONS* 13 (1942).

⁴⁵ Douglas Jehl, *U.S. Action Bars Right of Some Captured in Iraq*, N.Y. TIMES (Oct. 26, 2004) (reporting that a new legal opinion by the Bush Administration has concluded for the first time that some non-Iraqi prisoners captured by American forces in Iraq are not entitled to the protections of the Geneva Conventions).

⁴⁶ Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST (Dec. 1, 2004).

American communities of routine civil rights violations on the part of the U.S. government have hampered intelligence gathering and the gatekeeping function such communities can exercise over potential extremist elements. Governmental heavy-handedness has generated fears within these communities which, in turn, have induced a chilling effect that may well have inhibited more individuals from coming forward with information. In the end, this diminishes everyone's overall security.

In sum, calls by policymakers⁴⁷ and academics⁴⁸ that governments need to whittle down human rights in order to promote national security can be alarmist and short-sighted. It is important to recognize reciprocity. After all, if one government permits itself to rewrite the rules then everyone else can do so, too. If the U.S. is free to disregard the terms of the Geneva Conventions because of expediency, then so, too, is everyone else. Unsurprisingly, one of the most powerful amicus briefs filed in support of the Guantánamo detainees in *Rasul* was written by some former American prisoners of war.

I fear that abandoning the path of "lesser evil" may create a new type of chaos in international relations. U.S. national security still depends in large part on multilateral cooperation and the willingness of other nations to conform their conduct to the requirements of international law. If we lose what Robert Nye has called our soft power to convince other states to abide by and enforce the law because we view that same law as a constraint, then we are left only with hard power. In the seemingly multi-generational war on terrorism carried out in multiple spheres of engagement, eventually the deployment of this hard power may become too exhausting and too overwhelming.

⁴⁷ See, e.g., DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR (2003) (suggesting that, in the war on terror, the U.S. must be prepared to get tough and dirty and recognize that foreign suspects should no longer be able to claim the same rights before the law as U.S. citizens).

⁴⁸ See, e.g., ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002) (suggesting that torture should be banned but, if the U.S. relies on it, then Congress should regulate its use through applications to courts for torture warrants).