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## Waging War Against Terror: An Essay for Sandy Levinson

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# COMMENTS

## **WAGING WAR AGAINST TERROR: AN ESSAY FOR SANDY LEVINSON**

*Philip Bobbitt\**

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*I have heard that voice many a time when asleep  
and, what is strange, I understood more or less  
an order or an appeal in an unearthly tongue:*

*day draws near  
another one  
do what you can.<sup>1</sup>*

## I. INTRODUCTION

Wars are acts of State, and therefore there has never been a “war on terror.” Of course states have fought terrorism, in many guises, for centuries. But a war on terror had to await the development of states—including virtual states like al Qaeda’s global *ummah*<sup>2</sup>—whose constitutional order was not confined to a particular territory or national group and for whom terror could therefore be a permanent state of international affairs, either sought in order to prevent persons within a state’s control from resisting oppression by accessing global, empowering resources and networks, or suffered because other states wished to press such a condition on us and because our global vulnerabilities could not be detached from our prosperity and freedom.

Professor’s Levinson’s warning must therefore prepare us not only for the aftermaths of an attack by al Qaeda, but also for attacks mounted by twenty-first century terrorism of which al Qaeda is only a herald.<sup>3</sup> Just as terrorists in earlier centuries mimicked the states they were struggling against, so terrorists in the twenty-first century will copy the decentralized, devolved, outsourcing and privatized market-state of the twenty-first century, instead of modeling their activities after those of the national liberation groups of the twentieth century that fought nation-states.

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<sup>1</sup> CZESLAW MIŁOZ, *On Angels*, in *THE COLLECTED POEMS: 1931-1987*, at 248, 248-49 (1988).

<sup>2</sup> See S.A. NIGOSIA, *ISLAM: ITS HISTORY, TEACHING, AND PRACTICES*, at xvi (2004) (describing *ummah* as worldwide community of Islam).

<sup>3</sup> See generally Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699 (2006).

Although many people recognize the revolution in military affairs that is underway, and some recognize the revolution in constitutional affairs that is partly the result, very few recognize that the revolution in constitutional affairs is, in turn, driving the revolution in military affairs. The overwhelming military power of the United States is a direct consequence of its emergence as an entrepreneurial market state. The constitutional basis for the legitimacy of the states of the new, emerging, twenty-first century constitutional order—market-states<sup>4</sup>—differs profoundly from that of their predecessors, the twentieth century nation-states.<sup>5</sup>

The strategic *raison d'être* of the market-state is the protection of civilians, not territory or national wealth or any particular dynasty, class, religion, or ideology. Had nation-states been able to protect civilians successfully, they might have survived with their basis for legitimacy—the promise of ever-improving material well-being—intact.<sup>6</sup> During the wars of nation-states in the twentieth century, however, the ratio of civilian to military casualties went from twenty percent civilian in the First World War to eighty percent civilian in the Second World War and the wars that followed in its wake.<sup>7</sup> By changing the basis for legitimacy, market-states undertook to change the bargain offered for power. They promised to maximize opportunity, not guarantee security, and this new compact imposed an enormous security burden on market-states: their civilians had to be free of that coercive fear that vitiated any real increase in opportunity. Market-states that claim power on the basis that they maximize the opportunities of the individual citizen (including protecting civilian lives) undermine that claim when they must coexist with conditions of perpetual terror and pervasive fear.<sup>8</sup>

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<sup>4</sup> See generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 213-42 (2002) (describing rise of market-states).

<sup>5</sup> See Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 7-8 (discussing factors contributing to decline of nation-state).

<sup>6</sup> BOBBITT, *supra* note 4, at 216.

<sup>7</sup> Phillipa Kirsch, *The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression*, 32 CORNELL INT'L L.J. 437, 441-42 (1999).

<sup>8</sup> See BOBBITT, *supra* note 4, at xxvi (discussing conflict within market-states).

For market-states, the stakes are achingly high. For example, an avian flu epidemic—whether engineered by a state and given to terrorists, created by terrorists themselves (the genetic code of the 1918 flu that killed fifty million persons may be available on the Internet<sup>9</sup>), or naturally occurring—could strike globally with an unprecedented velocity. Similarly, a nuclear device detonated in a major twenty-first century city would dwarf the casualties at Hiroshima. This new vulnerability has important implications not just for diplomacy, but also for preemption and anticipatory strikes because it is a verity in international affairs that reason alone will seldom get states to listen to reason.

This development will force other states and nonstate competitors to adopt asymmetric tactics, and both these developments—U.S. military dominance and its reciprocal, asymmetric, outsourced tactics—will accelerate the emergence of market-states. At the same time the market-state, with its all-volunteer military forces, decentralized command, networked communities, and so forth, will determine the conditions of warfare. The ever-increasing trend toward individual empowerment, to which the market-state is a contributor, will inevitably, if paradoxically, imperil democratic systems that depend upon the individual conscience by empowering those who would destroy individual rights and powers.

It is the United States, our global presence, our overwhelming armed power, and our example as one of the first emerging market-states, that is the principal driver behind this new form of terrorism.<sup>10</sup> Those who oppose the United States, for whatever reason, confront an adversary they cannot attack by traditional military means, but whose organization for war—the market-state—they must copy in order to challenge us. Market-state terrorism will not be limited to Muslims or persons from the Middle East; indeed, in its most troubling form, we may never know the true identity of those who attack us. But these attacks will come because the United States is too powerful to challenge in any

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<sup>9</sup> Jamie Shreeve, *Why Revive a Deadly Flu Virus?*, N.Y. TIMES MAG., Jan. 29, 2006, at 48.

<sup>10</sup> See BOBBITT, *supra* note 4, at 819-21 (discussing 9/11 attacks).

conventional way, too vulnerable to be free from assault, and too ever-present either to avoid hostility or be secluded from harm.

After the September 11th attacks, it became fashionable to ask whether those atrocities were perpetrated by persons who hated the United States for what it does (aid to Israel, for example), or because of who we are (freedom-loving and materialist, perhaps).<sup>11</sup> Each of these answers is a half-truth, because by the things we do, so are we known. We are, to a large extent, what we do. The agenda of human rights protection is the central political idea of the West today, and it is an idea that, on the one hand, so reflects our identity and our aspirations that to compromise that idea is unthinkable. But on the other hand, it is a profoundly disturbing idea to those who believe we will not permit them—or perhaps owing to the global penetration of cultures, cannot coexist with others who want—to live as they wish.

To say that U.S. presence is the principal driver of market-state terrorism is not to blame the United States anymore than fourteenth century urbanization was to “blame” for the plague. The resentment this presence fosters cannot simply be laid to American interventions. U.S.-led intervention has been undertaken on behalf of Muslims in Bosnia, Kosovo, Kuwait, and Somalia. Moreover, in many places, the United States was the target of anger when it did not intervene.<sup>12</sup>

If the source of Islamic terrorism lay in Western intervention in the conflicts of the Middle East, one strategic response would recommend itself strongly:<sup>13</sup> Abandon Afghanistan and Iraq, vacate U.S. bases in the region, and disavow the state of Israel.<sup>14</sup> Whatever the other consequences of such a response, of one I am certain—Islamic terrorism would continue; indeed, it would become

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<sup>11</sup> See, e.g., Greg Winter, *In a Shift, Muslim Groups Cart Themselves as Loyal Critics*, N.Y. TIMES, Oct. 25, 2001, at A16 (stating that some groups blame American involvement in Middle East for 9/11).

<sup>12</sup> See BOBBITT, *supra* note 4, at 779 (discussing consequences of abandoning intervention).

<sup>13</sup> Though not decisively, because there are other items on the Western counterterrorism agenda.

<sup>14</sup> Olivier Roy, Op-Ed, *Why Do They Hate Us? Not Because of Iraq*, N.Y. TIMES, July 22, 2005, at A19.

far more confident and virulent. That is because the cause of this plague does not lie in the Middle East at all.

Of course, al Qaeda relentlessly raises the issue of the oppression of Muslims through the warfare in Palestine, Iraq, and Afghanistan as a way of gaining adherents and legitimacy, but these theaters cannot be said to be the motivating cause of a global jihad.<sup>15</sup> As has been often pointed out, the invasions of Afghanistan and Iraq came after 9/11 and well before bin Laden (or Mohammed Atta) showed any interest in Palestine, whose national liberation struggle he and other al Qaeda figures disparaged.<sup>16</sup> And although bin Laden complained of the proximity of U.S. bases to the holy Muslim shrines in Saudi Arabia following the first Gulf War, this came some time after his conversion to global jihad; in any case, the bases have been closed, and the jihad continues.<sup>17</sup>

Additionally, as Olivier Roy has observed, if Afghanistan, Iraq, and Palestine were the proximate cause of al Qaeda, why do we find almost no Afghans, Iraqis, or Palestinians among those jihadists who attack the West?<sup>18</sup>

Why would a [British citizen of] Pakistani [descent] or a Spaniard [of Moroccan ancestry] be more angry than an Afghan about American troops in Afghanistan? It is precisely because they do not care about Afghanistan as such, but see the United States involvement there as part of a global phenomenon of cultural domination.

[T]heir vision of a global ummah is both a mirror of and a form of revenge against the globalization that has made them what they are.<sup>19</sup>

Realizing this, however, gives us—those persons who wish to preserve states of consent—a precise locus for the solution even

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<sup>15</sup> *Id.*

<sup>16</sup> See Mark Danner, *Taking Stock of the Forever War*, N.Y. TIMES MAG., Sept. 11, 2005, at 45 (giving history of al Qaeda).

<sup>17</sup> *Id.*

<sup>18</sup> Roy, *supra* note 14.

<sup>19</sup> *Id.*

though the problem is amorphous and universal. We must heal ourselves and strengthen our alliances if we are to bear the burden of warring against terror. There is really no alternative to this struggle. Even though American power is the main element driving a new form of terrorism, reducing or hobbling that power will not make the terrorists go away, even while it cripples the one state capable of leading coalitions to defend us. Instead, that power must be employed preclusively, rather than waiting for an acute crisis that irrevocably puts us at a disadvantage. Preemption of terrorist attacks, active counterproliferation, and preventative intervention to forestall human rights abuses like genocide or other gross violations of human rights all have roles to play.

Finally, greater opportunities for marginal groups in the societies of the democracies can inoculate those persons who might otherwise be drawn into terrorist activities. For example, in the United Kingdom, there are groups whose young members convert to radical Islam—including not only second generation South Asians, but also those from the Caribbean islands. In the United States, there are groups drawn from similarly alienated minorities who, hardened by incarceration in penitentiaries, have embraced racialist ideologies. Co-opting these persons is one element of a preclusive strategy.

## II. THE WAR AGAINST TERROR AS AN "EPOCHAL WAR"

Can a state make terror an element of its claim to legitimacy, or must it win legitimacy by seeking the consent of the people it would control? This constitutional question is the common feature that ties together terrorism, the acquisition of weapons of mass destruction for compellance (rather than deterrence), and the terrorizing of domestic populations through genocide and ethnic cleansing.

In the twentieth century, the constitutional issue that united the First and Second World Wars, the Bolshevik Revolution, the Spanish Civil War, the wars in Korea and Vietnam, and the Cold War was: What sort of nation-state—a constitutional order that arose in the late nineteenth century, superseding the imperial order of state-nations that had dominated that century—would succeed to



the legitimacy of that earlier order? Would it be a communist, fascist, or parliamentary nation-state?

The twentieth century had barely ended, and its Long War resolved in favor of the parliamentary state, when a new war, the war on al Qaeda, began. This war—like the First World War that began the Long War, or the Bohemian Revolt in 1618 that sparked the Thirty Years War—began for local reasons. In this case, the war arose from the ambitions of Muslim fundamentalists and the transnational civil war they sought within Islam. But the war on al Qaeda is only a part, though the first part, of the larger war against terror that will continue until the fundamental question about the legitimacy of a new constitutional order is resolved. The constitutional question this larger war poses is: Will the legitimate form of the market-state be a state of consent or a state of terror? That is why I believe that historians may one day see the war against terror as an *epochal war*, a historical and constitutional characterization that can only be made retrospectively.<sup>20</sup>

In the twenty-first century, the war against terror can play an analogous role in history to that of the twentieth century's war on totalitarianism. In both cases, separate wars that began for local reasons eventually implicated the fundamental constitutional order of states, uniting these separate conflicts in a single epochal war.<sup>21</sup> Each became, as all epochal wars become, a war over the constitutional basis of the legitimate state. Yet this new war is also fundamentally different from its predecessor.

### III. THE WAR AGAINST TERROR AS A "PRECLUSIVE WAR"

Aggressor states seldom seek war. They seek victories and, if necessary, may be willing to risk war to gain those victories. Wars begin when a state resists aggression. A state that faces a deteriorating strategic position will join battle—for it takes two to make war—in order to prevent a further weakening of its situation. In this sense, all wars are wars of prevention.

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<sup>20</sup> See generally BOBBITT, *supra* note 4 (discussing epochal wars in context of shifting world orders).

<sup>21</sup> *Id.* at 24-69 (discussing 1914-1990 as epochal war).

The war against terror did not begin when Osama bin Laden declared war against the United States on August 23, 1996, nor when al Qaeda terrorist forces attacked two American embassies in Africa on August 7, 1998 and a U.S. naval vessel on October 12, 2000, nor even when the Pentagon and the World Trade Center were struck by hijacked commercial airliners on September 11, 2001.<sup>22</sup> Rather, it commenced when the United States determined to prevent further attacks by means of warfare. Bin Laden's 1996 "Declaration of Jihad against the Americans" was an act of diplomacy, an ultimatum, for which there are many precedents. The ensuing atrocities were infamous crimes. It was only when the U.S. decided to treat the attacks as acts of war, however, that the war against terror began.

The war against al Qaeda is the first in what will be a series of conflicts by which the United States and its allies attempt to preclude other states and nonstate entities from organized violence against their own people, their neighbors, and ourselves. In that sense, it is a war of prevention. Like epochal wars, preventative wars have occurred in the past.

The war against terror, however, is a unique form of preventative war because it is preclusive in nature; that is, it seeks prevent a state of affairs—humanitarian crises owing to genocide, compellance by means of Weapons of Mass Destruction (WMD), or terror that disables democracies—from coming into being well in advance of imminent aggression. This approach is necessary because after any of these states of affairs arises it is likely to be impossible to return to the *status quo ante*. Once Kim Jong Il actually acquires nuclear weapons, or once a million refugees have been driven from their homes in Darfur, or once a terrorist mass atrocity actually devastates an American city, it will be too late to undo the matter, and only tragedy and terror will follow. If unchecked, the ensuing loss will eventually include the conditions of consent that govern civilized democracies.

Bin Laden and his as yet inchoate successors understand that states that govern by consent cannot do so in conditions of terror.

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<sup>22</sup> See Excerpts from the Report of the Sept. 11 Commission: *A Unity of Purpose*, N.Y. TIMES, July 23, 2004, at A14 (describing terrorist attacks on United States).

They also understand that their own prescriptive role for the state demands that it create a condition of terror for its citizens. Imposing states of terror is their objective, for themselves and, paradoxically, for their enemies.

#### IV. THE EPIDEMIOLOGY OF TERROR

Plague treatises were books written in the fourteenth, fifteenth, and sixteenth centuries by physicians trying to explain to their contemporaries what had caused the plague and how to cope with it.<sup>23</sup> Some blamed the sinfulness of the victims. Others blamed infidels like Muslims and Jews, or heretics like certain Christian radical sects we might nowadays call “fundamentalists.” One author, John of Paris, wrote at the beginning of the fourteenth century that we might never know what truly caused the plague. Today, at the beginning of the twenty-first century, global, networked, market-state terrorism is not much better understood than the plague was then.

The problem of terrorism is similar in some ways to that of an epidemic. Like new antibiotic-resistant strains of tuberculosis, market-state terrorism is a function of what we have done successfully to eradicate old threats. That is, its principal causes are the liberalization of the global economy, the internationalization of the electronic media, and the military and technological revolution—all ardently sought innovations—that won the Long War.<sup>24</sup> New, mutated strains of tuberculosis are resistant to antibiotics for similar reasons; that is, they are the direct result of the successful treatment of earlier forms of the virus that has mutated in order to resist treatment.

We have had states of terror before, though perhaps we didn’t call them that. Now the connectivity of all parts of the world means that states have a harder time managing their affairs on the basis of consent when states of terror are allowed to flourish. Terrorism, relying on this connectivity, can even induce a humanitarian crisis

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<sup>23</sup> See generally George R. Keiser, *Two Medieval Plague Treatises and Their Afterlife in Early Modern England*, 58 *J. HIST. MED. & ALLIED SCI.* 292 (2003).

<sup>24</sup> BOBBITT, *supra* note 4, at 826.

through panic and disruption.<sup>25</sup> Consider this final scenario involving a so-called “dirty bomb”:

[F]our simultaneous attacks are made on the US, involving three truck bombs and a bomb in a shipping container, in Newark, Detroit, Long Beach and Miami. Fatalities are restricted to a few motorists . . . but because the bombs contain americium-241 and cesium-137 they spread panic out of all proportion to their actual damage. . . . People flee the infected cities. America closes its borders, paralyzing world trade. Supermarket shelves are emptying. There’s talk of airlifting food to Hawaii. The social, economic, and political costs of the attacks (which in themselves cause no more harm than the average industrial accident) are beyond calculation.<sup>26</sup>

The United States is, in a sense, the connectivity that makes such a scenario altogether plausible.

We may not appreciate the true etiology of market-state terrorism simply because we do not have the conceptual tools that enable us to analyze a new and complex phenomenon (as the authors of the plague treatises did not have the germ theory of infection). We must confront the possibility that we will not extinguish global terrorism because we and the rest of the international community will be unable to transform our ideas rapidly enough. Much important work remains to be done on the conceptual side of this war. We do not, as of yet, have the intellectual movement—of which Bernard Brodie and Thomas Schelling were leaders,<sup>27</sup> and the RAND Corporation a

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<sup>25</sup> See Jonathan Raban, *The Truth About Terrorism*, N.Y. REV. BOOKS, Jan. 13, 2005, at 22 (reviewing STEPHEN FLYNN, *AMERICA THE VULNERABLE: HOW OUR GOVERNMENT IS FAILING TO PROTECT US FROM TERRORISM* (2004) and describing potential crisis resulting from hypothetical terrorist attack scenario).

<sup>26</sup> *Id.*

<sup>27</sup> See generally, e.g., BERNARD BRODIE, *STRATEGY IN THE MISSILE AGE* (1959) (discussing origins of strategic air combat and suggesting deterrent solutions to problems created by advent of nuclear weapons); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1963) (using game theory to describe strategic problems of armed conflict, including special problems

center<sup>28</sup>—that achieved a consensus on nuclear strategies during the Cold War. The use of global scenarios is an underdeveloped, and at present underused, means of anticipating future crises and coping with or even preventing them.

What we do know is that terror is the enemy of conscience, and therefore, it is the enemy of consent. One who cannot say “no” cannot truly say “yes.” That places terrorism along with crimes against humanity and compellence by WMD at the center of our survival as states of consent. Others know this, too. On December 28, 2004, on the eve of the Iraqi elections, Osama bin Laden released an audio tape: “Everyone who participates in these elections will be considered infidels” and, as such, subject to attack, he said.<sup>29</sup> The true image of al Qaeda, and the Sunni cells with which it has linked up in Iraq, is not simply that of a stately bin Laden draped in the robes of an emir, announcing diplomatic initiatives on Al Jazeera. It is also a grainy, black and white telephoto of a gunman standing over an kneeling, unarmed election official whom he is about to murder in a street while passersby do nothing.

That is an image from a state of terror. We must also be clear, however, about what constitutes a state of consent. A state of consent need not be a Western-style democracy; indeed, as I have suggested, one terrible possibility is that the war against terrorism will be lost and that our democracies will become states of terror.<sup>30</sup> Rather, a state of consent is one in which all persons can exercise the rights of conscience and in the politics of which the individual conscience plays the decisive role. By assimilating this struggle into the Long War against twentieth century fascism and communism, we mistake what is unique to the war against terror—the import into our societies of psychological states that render free consent impossible, and the export into other societies of global effects that jeopardize traditional local coercion.

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presented by nuclear warfare).

<sup>28</sup> See PROJECT AIR FORCE: 1946-1996, at 23-28 (1996), available at <http://www.rand.org/publications/PAFbook.pdf> (detailing RAND participation and influence in developing nuclear strategy).

<sup>29</sup> *Tape Opposing Vote Attributed to Bin Laden*, N.Y. TIMES, Dec. 28, 2004, at A9.

<sup>30</sup> BOBBITT, *supra* note 4, at 729-35.

We will not win the “war on terror” if we do not understand the novelty of the problem we face. We must not neglect the symbiosis between strategy and law that is reflected in the revolution in military and constitutional affairs that is underway, and the transformation of the state that is both a cause and consequence of that revolution. Owing to this two-way relationship, terrorism is one of the principal forces destroying the legitimacy of the nation-state and leading to the market-state, and the market-state is a principal force in transforming twentieth century, nationalistic terrorism into twenty-first century, global, networked terrorism. Neglecting this relationship will delegitimize our legal standing in international and constitutional law and forfeit the fruits of our strategic advantages by using tactics that alienate domestic populations in the Middle East, Europe, and elsewhere.

The reason the United States is not itself a terrorist state even though its warfare brings suffering and destruction to many innocent persons, including civilians, is that it acts within the law. When it ceases to do so—when, for example, the law has not kept up with changes in the strategic context or when, without that excuse, U.S. strategy studiously ignores the applicable law—the United States runs the risk of becoming, in the eyes of many, simply another state of terror.

#### V. TWENTY-FIRST CENTURY TERRORISM AND THE CONSTITUTIONAL ORDER

In every era of the state, throughout the evolution of its constitutional orders, societies have confronted the problem of determining the proper relationship between strategy and law. Outside its territorial domain, the state seeks to be free of external coercion; this is strategy. Inside its boundaries, the state seeks to monopolize legitimate violence; this is law. But what measures are appropriate, within its territory, to prosecute the war outside when inside and outside have lost their clear boundaries—when terrorist warfare occurs within national peoples, like the civil wars of the past, and when events far from our societies have a delegitimizing effect on our states?

Governments must explore the changing relationships between the intelligence agencies (as they become more dependent on open sources) and the media (as they become more powerful purveyors and validators of secrets); between the political parties who must take up this highly charged debate in order to write laws that might be necessary in a time of emergency; between federal unions and their constituent parts (both in the United States and the European Union) where intelligence, in the case of the United States is not shared *by* the central union, and, in the case of the European Union, not shared *with* the central union owing to national distrust. Governments will have to learn how to find and work with private sector collaborators, partly because they own most of the critical infrastructure that we must make less vulnerable, and partly because they are market-oriented and global, thus arcing some of the gaps between the nation-state and the market-state. Governments must rethink ideas like “Homeland Security” when the threats to security cannot be neatly cabined as in or out of the homeland, just as the American and British governments must revisit the issues of cooperation between the CIA and the FBI and between MI5 and MI6—issues that arise owing to jurisdictional divisions between domestic and international operations—because these agencies are so completely defined by the Long War and its basis in the nation-state.<sup>31</sup>

States must measure their tactical and strategic policies against the effect these policies are likely to have on their legitimacy. If the United States were to abandon its executive order prohibiting assassinations, what is the cost to its legitimacy as a state that follows the rule of law, one principle of which is that no criminal penalty can be levied without a fair and open trial? On the other hand, if the United States is at war, is the executive order even relevant? By such means, the domestic environment of states is steadily militarized. Similarly, does it matter what we are fighting for, or is “one man’s terrorist another man’s freedom fighter”? We do not apply murder statutes to soldiers in battle, even enemy soldiers. Soldiers are permitted to maim and kill civilians if that is not their aim, while we condemn the terrorist whose objective is to

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<sup>31</sup> See BOBBITT, *supra* note 4, at 235-38 (discussing security in market-state).

kill civilians. By such means, the foreign environment can be degraded into a sea of “collateral damage.” Put the two together, and the “war on terror” can make our soldiers into organized vigilantes, using the methods of warfare against civilians, domestic and foreign.

If our governments engage in torture, perhaps by turning over prisoners to less squeamish national intelligence services, are they substantiating the charges made against them by those who say ours are the true rogue states, and that the state terror of the United States and its allies, including Israel, is every much a threat to mankind as the terrorism of al Qaeda? These are essentially constitutional issues. They are not so much matters of civil liberties, of course, as they are profound issues of the self-definition societies achieve through their constitutional processes in time of war. They are matters of constitutional legitimacy because they are matters of self-respect. States must have clear answers to these questions, because if the legitimacy of the state is compromised, it will seed its own terrorists who will take up arms against it in revulsion. For my own part, I believe there must be a bright-line rule against torture anywhere, even if, in the most extreme circumstance, this rule is broken by decent men willing to pay the legal penalties for their acts.

If the United States and the United Kingdom ally themselves with undemocratic autocracies who share our fear of al Qaeda but with whom we have little else in common, are we simply borrowing against a future in which those peoples we have helped to suppress rise up and blame us? We are often blamed for collaborating with dictators in the Third World to fight communism, though we are seldom blamed for the no less awful collaboration with communism to defeat fascism. Is there a realistic choice? If it is true that full and fair elections in a dozen Islamic states would bring bin Laden to power in every one of them, does the international community dare to risk such elections? And if it does not, does this make us hypocrites to claim that the sovereignty of other states, like Iraq, is forfeited owing to their undemocratic practices, while turning a blind eye toward the legitimacy of regimes that are allied to ours but which deny their citizens basic human rights? I believe that our commitment to globalize the systems of democracy itself—or what



we mistake for the pluralistic system we have evolved and called "democracy"—must be restated in terms that reflect the strategic interests of the states of consent to enlarge their number.

Answering urgent strategic questions about terrorism will also require us to give some thought to larger constitutional questions about sovereignty, democracy, and the laws of war. If we ignore these issues, we will find we have decided them, inadvertently, in unthinking acts of crisis. My own view, as I have argued in the preceding pages, is that the key concept we must define is not democracy *per se*, but rather the inalienable rights of which self-government is but one element. Respect for these rights assures a state of inviolable sovereignty, and that sovereignty is a *fortiori* a limited one. When this limited sovereignty is forfeited by acts of the state—against its own citizens, its neighbors, or the world order that underpins the recognition of sovereignty itself—then that state can be subject to sanction. Limited sovereignty, not simply majority voting, creates a state of consent. Therefore, one of our most urgent tasks is to develop legal standards in constitutional and international law that help us determine what is comprised by the idea of inalienable human rights.

## VI. THE ROLE OF THE UNITED STATES AND ITS ALLIES

It is clear that the terrorists of al Qaeda believe they can win this war because they perceive that other states, including American allies, lack a sincere interest in collaborating with the United States. All technologically advanced states will ultimately be threatened by twenty-first century terrorism. It is understandable, but regrettable, that some of these states would strive to protect their citizens by disassociating themselves from the United States and thus from the most prominent political target in the West.

While the United States must play a leading role in winning the war against terror, that war can only be won with the collaboration of many states, including some states that fear and even loathe American primacy. The risks of leadership are two-fold: If the United States is out in front, it becomes the target for every terrorist group that wants a free hand for its local predations. At the same time, America becomes the focal point of charges by other

states that it is seeking an empire. Some of those who make the latter charge believe that overwhelming power necessarily leads to empire, indeed, that such power is the very definition of empire.

The United States is very powerful, economically and militarily. It has the world's largest economy, greater than those of all the other members of the G8 combined, and it is growing at a faster rate than they are.<sup>32</sup> The United States is the only state that can settle its debts in its own currency.<sup>33</sup> It is the only remaining military superpower, owing to the collapse of the Soviet Union, and American defense budgets approach half a trillion dollars.<sup>34</sup> Yet we should not be misled by these figures. Like the much-cited increase in the gap between high and low income earners, these statistics conceal an equally important truth—that the development gap between high and low is closing. This means that while the United States has a large army equipped with infinitely superior weaponry and communications, the harm that can be done to the American nation is growing more quickly—as technology disperses and becomes cheaper—than its lead is growing. In other words, poor states—or rich terrorist groups—who could not begin to mount a challenge by invading across a contested plain, can hope to do enough damage to dissuade the United States or any other powerful state from attempting to coerce them. This paradox—America's increasingly greater power and greater vulnerability—means that America is the indispensable leader of the war on terrorism (because it alone has the resources) and that it has a vital interest in being such a leader (because it is also very vulnerable).

Yet American leadership actually tempts disarray and noncooperation. The former French Foreign Minister, Hubert Vedrine, spoke for many when he said, "We cannot accept a politically unipolar world."<sup>35</sup> It is regrettably true that when, in the

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<sup>32</sup> See CIA, *The World Factbook, Rank Order—GDP (2005)*, <http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html> (listing GDPs of nations that include current G8 members)

<sup>33</sup> See David H. Levey & Stuart S. Brown, *The Overstretch Myth*, FOREIGN AFF., Mar.-Apr. 2005, at 2, 3 (noting that the "United States' external liabilities are denominated in its own currency").

<sup>34</sup> See Jonathan Karp, *Military Budget Spares Weapons from Cutbacks*, WALL ST. J., Feb. 6, 2006, at A6 (reporting President Bush's proposed 2007 defense budget of \$439.3 billion).

<sup>35</sup> Christopher Layne, *What's Built Up Must Come Down*, WASH. POST, Nov. 14, 1999, at

midst of ongoing hostilities in Iraq, the French Foreign Minister Dominique de Villepin was asked at the International Institute for Strategic Studies which side he wanted to see win that war, he simply declined to answer.<sup>36</sup> Indeed there are many who see the war on terrorism as a kind of stalking horse for the creation of an American empire.<sup>37</sup> And, whatever their views about the “war on terror,” there are many who simply wish to see American forces defeated in whatever action they undertake.

One must shudder at the consequences for the world of such attitudes, to say nothing of the effect on the war against terror. They invite an anti-American multipolarity with which the worst and most retrograde forces can tacitly combine. Multipolarity is not simply a condition of mutually affecting forces but of mutually opposed forces. How many persons who have called for a European army in order to “balance” the Americans have actually thought through what such an army would do to achieve the objective of thwarting American unilateralism? If that army were to join American expeditions then it might well have influence on allied policy. But this is not what the opponents of U.S. leadership have in mind. Indeed they have frantically (and successfully) tried to keep NATO forces out of Iraq. If, however, the objective is to prevent U.S. forces from intervening in Serbia or Afghanistan or Iraq or the Sudan, then such an army must be used to threaten the use of force. What other role could it possibly play in achieving such an objective? That was how multipolarity checked U.S. policies before 1989 when the Soviet army stood ready to oppose any allied attempts to liberate Eastern Europe. Is it possible that any sane person would want to recreate the conditions for such an armed confrontation in the twenty-first century?

There is one scenario for which the world is not prepared. A series of strikes against the American and British homelands using nuclear or biological weapons would remove from the world’s affairs

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<sup>36</sup> Alan Cowell, *A Nation at War: Overture from Paris; France Holds Out a Tentative Olive Branch*, N.Y. TIMES, Mar. 28, 2003, at B10.

<sup>37</sup> See, e.g., Michael Meaches, Comment & Analysis, *This War on Terrorism is Bogus*, GUARDIAN, Sept. 6, 2003, at 21 (arguing that United States has used 9/11 as pretext for attempting global dominance).

the two states willing and, with others, able to organize the defense of the society of states of consent. Like the collapse of the Soviet Union, this is the one contingency for which no one has planned. I implore the reader to contemplate how terrible a fate this would be for human rights, for the economic development of all states, and for the security of those societies that wish to live in tranquility. We may think that it is the United States that disturbs that tranquility today because we measure our anxiety against the most peaceful recent past. We should instead measure our states against the alternative future of a world without the energetic but benign intentions of the Americans.

### VII. THE NEED FOR NEW STANDARDS

We must urgently develop legal and strategic parameters for state action in the war on terrorism. This will be a matter, ultimately, of drawing the links between successfully warring on terror and the evolving legal concepts of sovereignty and its relationship to lawful, legitimate governance. As Sir Michael Howard has wisely and trenchantly put it,

An explicit American hegemony may appear preferable to the messy compromises of the existing order, but if it is nakedly based on commercial interests and military power it will lack all legitimacy. Terror will continue and, worse, widespread sympathy with terror. But American power placed at the service of an international community legitimised by representative institutions and the rule of law, accepting its constraints and inadequacies but continually working to improve them: that is a very different matter. It is by doing this that the US has earned admiration, respect, and indeed affection throughout the world over the past half century. But if that relationship is to continue, and respect is to overcome hate, the US must cease to think of itself as a heroic lone protagonist in a cosmic war against 'evil', and reconcile itself to a less spectacular and more humdrum role: that of the leading participant

in a flawed but still indispensable system of co-operative global governance.<sup>38</sup>

There is, at present, no more important question before the world because failure to resolve the question of legitimate cooperation will frustrate not only our efforts against global terrorism, but also those aimed at avoiding regional climate change, regional and global epidemics, and great power confrontation.

We might start with the definition of what constitutes terrorism: Terrorism is the use of violence in order to advance a political cause by preventing persons from doing what they would otherwise lawfully do. Beginning with such a definition, we can then work out what a state is permitted to do in its search for terrorists and in its efforts to suppress them. With such a definition, we could seek an international convention universally outlawing terrorism as we outlaw piracy. With such a definition, we could determine when a group consists of terrorists or “freedom fighters,” and when other states may intervene to stop them. I have argued that only states of consent are, *prima facie*, the victims of terrorism.<sup>39</sup>

We might then be able to address the new U.S. National Security Strategy and its call for preemption<sup>40</sup> in light of its obvious conflict with Article 2(4) of the United Nations Charter, which prohibits the use of force outside the Charter’s carefully circumscribed limits.<sup>41</sup> These limits provide that it is unlawful for a state to use force in the absence of an actual or imminent attack except by Security Council authorization.<sup>42</sup> This suggests that it is also unlawful—in the absence of a Security Council resolution—for one state to preempt another’s warmaking capabilities before these are ever readied for use. Yet in the era of disguised attacks through terrorist networks, the proliferation of weapons of mass destruction can make preemption an absolute necessity. For once any state, no matter

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<sup>38</sup> Michael Howard, *Smoke on the Horizon*, *FIN. TIMES*, Sept. 7, 2002, at 1.

<sup>39</sup> See PHILIP BOBBITT, *THE WAR ON TERROR* (forthcoming 2007).

<sup>40</sup> The National Security Strategy of the United States of America 13-14 (2002), available at <http://www.whithouse.gov/nsc/nss.pdf>.

<sup>41</sup> U.N. Charter art. 2, para. 4, available at <http://www.un.org/aboutun/charter/chapter1.htm>.

<sup>42</sup> See generally U.N. Charter art. 39-51, available at <http://www.un.org/aboutun/charter/chapter7.htm> (concerning threats to peace and acts of aggression).

how repugnant, acquires nuclear weapons (a moment that no U.N. or U.S. monitoring seems capable of predicting with precision), it is too late to compel deproliferation. Once summoned, the genie must do the bidding of its new master.

Nor should a search for such parameters exclude the consideration of charges of American state terrorism. If assassinations and torture by allied states are countenanced, indeed financed, by the United States—either because we support their war aims or because they are our proxies—then, it is argued, the United States is rightly subject to the same accusations of terrorism it would hurl at any other state that employed such methods. The United States may be able to persuade its citizens and its allies that these tactics are the only effective means of protecting a society at war with those who can easily infiltrate it and whose operations prefigure the tactics we will ourselves be forced to adopt. Given the theatrical nature of twenty-first century terrorism, we cannot exclude the possibility that it will inevitably escalate in violence, as states of terror vie with their own past atrocities to capture the horrified attention of a busy and easily distracted people. But if such events compel the United States to adopt what are at present unlawful methods, we must have standards to determine whether they are more like the air campaigns of World War II that relied on strategic bombing to achieve their military goals (with such awful consequences for civilians at Hiroshima and Nagasaki), or more like the bombing of civilian populations that sought instead an *in terrorem* effect, which we now condemn as war crimes (like the blitz against London, or perhaps the Allied bombing of Dresden).

We must develop new rules of international law that incorporate these parameters. These rules would be used to determine when it is permissible for one state to intervene in another's affairs in order to protect itself or its allies from terrorism (*jus ad bellum*). Similarly, they would govern the ways states may lawfully treat prisoners during war (*jus in bello*). Obviously, the Geneva Conventions<sup>43</sup> apply to all prisoners taken in the war against terror. This is one consequence of designating this conflict as a war. But

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<sup>43</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

just as obviously, we need to amend the Geneva Conventions to deal with the question posed at Guantanamo: What treatment is to be accorded prisoners of the war against terror? They are not combatants in uniform, with a publicly acknowledged chain of command, to whom the status of prisoner of war is accorded. But they are not spies or partisans either. As soldiers, even if unlawful ones, who are captured on the field of battle, they can be held in prisons until the end of the conflict without trial or arraignment.<sup>44</sup> This scarcely makes sense, however, when there is no nation-state with which to agree to end the conflict or to make arrangements for prisoner exchanges—that is, when these prisoners may be held perpetually because the field of battle is everywhere and the conflict is perpetual.<sup>45</sup>

Michael Reisman has observed that international lawyers feel they must rally around existing international rules in order to protect the overall influence of international law.<sup>46</sup> This is precisely what is vitiating that influence. A similar remark might be made of some civil libertarians. Consider for example, the report of the commission on the use of data mining. The majority took the view that more *restrictive* policies regarding the sharing of information than those required by U.S. Supreme Court precedent, should now be put in place<sup>47</sup> even though every report has concluded that our current policies regarding information-sharing were too restrictive to head off the attacks of 9/11.

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<sup>44</sup> See *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) (noting that “law of war” distinguishes between lawful and unlawful combatants, and that both are “subject to capture and detention”).

<sup>45</sup> Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-21 (2004) (noting that “war on terror” is unconventional, and leaving open possibility for shift in law-of-war jurisprudence should circumstances of future conflict necessitate such change).

<sup>46</sup> See W. Michael Reisman, *Manley O. Hudson Medal Lecture: Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. SOC’Y INT’L L. PROC. 290, 293 (2004) (“International lawyers who prioritize state sovereignty have consistently condemned all regime changes.”).

<sup>47</sup> TECH. & PRIVACY ADVISORY COMM., DEP’T OF DEFENSE, SAFEGUARDING PRIVACY IN THE FIGHT AGAINST TERRORISM 43 (2004), <http://www.cdt.org/security/usapatriot/20040300tapac.pdf>.

## VIII. CONCLUSION

We are not winning the war against terror because we do not understand its deep connections to historic changes in the nature of the state. As part of the transition from nation-state to market-state, terrorism will become the continuation of diplomacy by other means, waged by state proxies and by entities that are not controlled by conventional states that seek to influence the politics of states by theatrical killings and atrocities. Strategy and law, which were carefully separated in the twentieth century of nation-states, will have to be reintegrated in the twenty-first century of market-states. Neglecting this task is the reason we are not winning this war, but we have not yet lost the war either. The first step towards winning is to put the war against terror in a larger historical, strategic, and legal context.

We must shatter the complacency that reassures itself that nothing has really changed, that is persuaded that any imposition is too irksome to be justified, and that protests that any concern is trumped-up in order to exploit fear for political purposes. This must be done without at the same time using the new threats as a Trojan horse for the social remedies one always favored, or as a way of discrediting the arguments of adversaries by impugning their motives.

Let me be quite clear about my views, because in the current political climate they are apt to be assimilated into the positions taken by others. I do not believe that we must sacrifice our traditional freedoms to win the war against terror. Indeed, my point is to draw attention to the fact that twenty-first century terrorism poses a dangerous threat to those freedoms. Therefore, claims that the U.S. Constitution does not apply abroad, that habeas corpus is a quaint irrelevance, or that persons can be held incommunicado indefinitely are ones with which I have little sympathy. But neither do I believe that there is a God-given right not to be burdened with carrying an identity card, or disclosing to the government information we have gladly given to private corporations or that they have collected with our consent.

I do not believe that we should abandon the constitutional restraints on the executive that distinguish what I have called



states of consent. Indeed, I have undertaken my most recent work—including this Comment—largely to forestall a situation in which we might be forced to declare martial law because we refused to debate openly and to act through our customary representative processes to write laws that would anticipate a crisis. But neither do I believe that all the post-Watergate reforms have the sanctity of the structures of government that are constitutional in nature.

I therefore do not agree with Carl Schmitt that law does not (or cannot) apply in emergency situations,<sup>48</sup> such as those brought into being by terrorist attacks. Indeed, I strongly believe that the new constitutional order coming into being compels us to provide legal regimes for just such situations.

My principal recommendation is that we pay more attention to our vulnerabilities. That, I take it, is the point of Professor Levinson's Article, and indeed of this symposium. We must build up our immune systems. Right now we are focused on a particular virus—call it the Islamicist flu—and we are tempted to imagine that future conflicts will be, like this one, a clash of cultures. This is unlikely. We must continue our fight against this flu; where possible, we need to get flu shots—like progress in the Israeli-Palestinian conflict—that will prevent the spread of infection. But in the long run, we must prepare for sicknesses from many other quarters, including those of which we have as yet no knowledge.

Much of our attention must be devoted to the future. The new conditions of warfare, terrorism, and proliferation require that we achieve a greater facility in dealing with possible futures. The preemption of terrorism, the preclusion of humanitarian crises brought on by genocide or ethnic cleansing, and the prevention of the proliferation of weapons of mass destruction for compellance all require this. But the greatest of these trials of the imagination will be the war against terror itself. For we can only know an epochal war when it is past, and that past is, for the present, far in our future.

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<sup>48</sup> See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE THEORY OF SOVEREIGNTY* 5 n.1 (George Schwab trans., MIT Press 1985) (1934) ("There exists no norm that is applicable to chaos.").

All history is contemporary history. One might say the same sort of thing about the study of the future, for we cannot escape the impress of current preoccupations and dispositions whether we look backwards or forwards. But the future is a land no one has visited. Like the appointment with Major Major in the satirical novel *Catch-22*,<sup>49</sup> as soon as one steps into the office of the future, it is gone. Our appointments are scheduled that way.

The past also has its iron imperative. We can visit, but never as innocents, and no matter how ingenious or intrepid our efforts, we cannot stay. We must put the war against terror in a strategic and legal context, and though it has many things to say about the past and about our common future, about law, and about war, it is ultimately about our ever-shifting present.

#### IX. CODA

I have often emphasized the theatrical nature of terror, and how a global stage has been seized by terrorists in the twenty-first century through the use of the Internet, satellite television, cable channels, videocassettes, and the globalization of media. For some terror groups, this is how the drama is cast: God is the prompter whispering lines to the actors, who are the political leaders inciting violence, while the world's peoples are the audience. But this arrogates to the leaders the certain knowledge of God's politics that no religious text can provide; it is, in its way, quite secular because it removes God from the scene and keeps him in the wings. This stage setting is the world of states of terror.

Imagine instead this arrangement: It is the political leader who prompts the people, and it is they who are the actors on stage. This is the world of states of consent. God himself is present, and He is everywhere and at all times. As Kierkegaard put it:

In the most earnest sense, God is the critical theatergoer, who looks on to see how the lines are spoken and how they are listened to . . . . The speaker

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<sup>49</sup> JOSEPH HELLER, *CATCH-22*, at 31 (Simon & Schuster 1996) (1961) ("Major Major . . . went jumping out the window of his office each time Yossarian [went] to speak to him . . .").

is then the prompter, and the listener stands openly before God. The listener, if I may say so, is the actor, who in all truth acts before God.<sup>50</sup>

God observes courage in man's defiance of fear—as of the Iraqis who bravely voted at polling stations even minutes after they had been bombed—and He witnesses empathy for those who suffer and ingenuity in our efforts to relieve that suffering. He observes not only our cruelty and ruthlessness, but also our capacity for love and loyalty.

If this is so, then I wish to ally myself with all that is hopeful in mankind, gallant in mankind's adversity, and that which is indomitable and gives life and that leads our sympathy away in recoil from that which acclaims fear and exalts death.

We have time. The deaths and destruction from twenty-first century terrorism have thus far been negligible compared to those of twentieth century conventional wars. We must, however, prepare our defenses. When we finally determine to take up the war against terror in earnest, we will face a threat to mankind that is unprecedented and is potentially measureless in its tragedy. Having prepared, we will act so as to preclude such tragedies; having acted in time, we will prevent the ultimate loss of our liberties despite the historic suffering we could not in the end preempt; having prevented such a loss while enduring such awful pain, we will have prevailed. We must each play our part as though the entire plot depended upon it, because it just might.

Every constitutional order of the state evokes a unique form of terrorism. In Heaven, there will be no terror, and the lion will lie down with the lamb. In Hell, there will be nothing but terror.

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<sup>50</sup> SØREN KIERKEGAARD, *PURITY OF HEART IS TO WILL ONE THING* 181 (Douglas V. Steere trans., Harper Perennial 1956) (1938).