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For God, For Country, For Universalism: Sovereignty as Solidarity in our Age of Terror

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FOR GOD, FOR COUNTRY, FOR UNIVERSALISM:
SOVEREIGNTY AS SOLIDARITY IN OUR AGE OF TERROR

Maxwell O. Chibundu*

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I. INTRODUCTION

“Nations and peoples can lose their heads.”¹

On September 11, 2001, three hijacked jet airliners deliberately were crashed into buildings in New York City and Washington, D.C.² A fourth aircraft, apparently intended for the same purpose, crashed into a field in Pennsylvania.³ The lives of approximately three thousand persons were snuffed out in a matter of barely over an hour,⁴ and another two thousand families suffered direct physical and psychological injuries.⁵ The Pentagon, a building that houses the United States Department of Defense, was significantly damaged. The World Trade Center towers, the tallest structures in the City of New York, the emblems of the commercial and

* Professor, University of Maryland School of Law. I would like to thank my colleagues, Professors Penelope Andrews, Robert Condlin, Lee Hall, and Robert Suggs for their helpful comments and editorial suggestions. I would also like to express my appreciation to the University of Maryland School Library Research Fellow, Ryan Easley, for his research help. I am grateful to the *Florida Law Review* and to its editors for the opportunity to participate in this colloquy, and for making this a much more readable piece than it would have been otherwise. The errors, of course, are mine.

1. Richard Cohen, *Our Forgotten Panic*, WASH. POST, July 22, 2004, at A21.

2. See, e.g., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 108TH CONG., THE 9/11 COMM'N REPORT 1-14 (2004), available at <http://www.9-11commission.gov/report/index.htm> [hereinafter THE 9/11 COMM'N REPORT].

3. *Id.* at 14.

4. *Id.* at 311, 314.

5. See, e.g., David W. Chen, *After Weighing Value of Lives, 9/11 Fund Completes Its Task*, N.Y. TIMES, June 16, 2004, at A1 (reporting that more than five thousand families will receive compensation from the federal government as a result of the September 11 attacks).

financial primacy of that City—if not of the United States—were destroyed completely. These were the acts, we have since learned, of a group known as al Qaeda, a nongovernmental body headed by Osama bin Laden, which, at least at the time of these events, sought as its primary objective to expel the United States military from Saudi Arabia, bin Laden's country of birth.⁶ But this information was not available to the general public on September 11. Rather, in the dark as to the identities of the perpetrators and their motivations, the proverbial “man in the street” could only wonder and otherwise respond to the images of the collisions of these symbols of America's technological prowess by resorting to his primordial instincts: disbelief, awe, shock, and surprise. And beyond these, there was a very important social response: the extension and expression of empathy. Fear and the desire for revenge took a little longer to become generalized.

More than three years removed from September 11, it may be difficult to recall the universal empathy that these tragic events generated. The immediate reaction of people across the United States and in much of the world was to demonstrate their solidarity with the victims.⁷ In gestures that give meaning to the human collectivity as a social one, friends, neighbors, and strangers alike by words, acts, and deeds made the sufferings of New Yorkers, Washingtonians, and the American people theirs.⁸ But while ordinary individuals may be content to react to tragedy by sending e-mails, making donations to relief funds, driving across the country to volunteer in aid centers, and condemning the evil of terror, their political leaders cannot resign themselves to dealing simply with the post hoc effects of terrorism. They not only must punish wrongdoers, but also must prevent future wrongful acts, or at least give the impression that they are doing so.

And so, within an hour of the first aircraft crashing into the World Trade Center and within ten minutes after the President of the United States was informed of the crash into the Pentagon, he reportedly said to his Vice President: “Sounds like we have a minor war going on here We're at war . . . somebody's going to pay.”⁹ This became a

6. See THE 9/11 COMM'N REPORT, *supra* note 2, at 48; see also STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001, at 17 (2004).

7. See, e.g., Jeff Giles, *The Nation's Neighborhood*, NEWSWEEK, Sept. 27, 2001, at 40 (describing examples of both individual and collective showings of empathy and solidarity both in and outside the United States).

8. This sense of solidarity was memorably captured in the headline of a French daily: “Nous Sommes Tous Américains” (“We are all Americans”). Jean Marie Colombani, *Nous Sommes Tous Américains*, LE MONDE, Sept. 13, 2001; see also *What We Think of America*, GRANTA 77, Mar. 28, 2002 (collecting the empathetic views of many well-known international writers who ordinarily are quite unsympathetic to the United States' geopolitical and cultural policies).

9. See THE 9/11 COMM'N REPORT, *supra* note 2, at 39 (alteration in original).

persistent theme of the United States government's response to the events of September 11. But, of course, "war"—whether metaphorical or real—was by no means the sole available response to terror. Indeed, prior to August 20, 1998, when President Clinton ordered the launching of Tomahawk missiles against targets in Afghanistan and Sudan in retaliation for the bombing of United States embassies in Kenya and Tanzania, the standard governmental response to terrorism had been rhetorical and legal.¹⁰ The former approach held fast to the standard refrain "we do not negotiate with terrorists,"¹¹ while the latter saw the adoption of numerous international instruments aimed at suppressing particular types of terrorist acts¹² as well as the massive expansion in municipal law of the concept of protective extraterritorial jurisdiction to encompass the seizure of alleged terrorists both on the high seas and in foreign countries.¹³ The terror attacks of September 11, however, not only elicited a militaristic declaration of "war" against terrorism, but also fundamentally altered both the rhetorical and legal approaches. It is within this convention of an altered landscape¹⁴ that Professor Viet Dinh's Dunwody Lecture should be examined.

Accepting September 11 as an exceptional event, Dinh nonetheless sees it as emblematic of an emerging new order (or, perhaps more accurately,

10. It is sometimes claimed that the military response to international terrorism dates back to the bombing of Libya in 1986. See, e.g., Laurence R. Helfer, *Transforming International Law After the September 11 Attacks? Three Evolving Paradigms for Regulating International Terrorism*, in *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 180, 185 (Mary L. Dudziak ed., 2003). This claim, however, overlooks a crucial fact. United States action in 1986 was based on the attribution of direct responsibility to the conduct of a government, and as Professor Dinh rightly points out, war (or, more accurately, "international armed conflict") is the appropriate terminology to describe the violent response of one government to the acts of another. Viet D. Dinh, *Nationalism in the Age of Terror*, 56 *FLA. L. REV.* 867, 874 (2004). By contrast, in 1998 and 2001, the United States viewed al Qaeda as a distinct and autonomous entity from the governments purportedly hosting it. The military response was to al Qaeda's acts, for which its hosts were only indirectly responsible. The military responses in these latter cases thus genuinely constituted the waging of "a different kind of war." See Richard J. Newman, et al., *A Different Kind of War*, *U.S. NEWS & WORLD REP.*, Oct. 1, 2001, at 30.

11. This became the standard policy of the United States under the Reagan Administration and was invoked constantly by subsequent presidents. David Tucker, *Responding to Terrorism*, 21 *WASH. Q.* 103, Winter 1998; *Out from the Cellar*, *THE ECONOMIST*, Apr. 28, 1990, at A77 (U.K.).

12. See Conventions and Agreements cited *infra* note 37.

13. See, e.g., *United States v. Yousef*, 327 F.3d 56, 86-110 (2d Cir. 2003); *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998); *United States v. Yunis*, 924 F.2d 1086, 1090-92 (D.C. Cir. 1991); *United States v. bin Laden*, 92 F. Supp. 2d 189, 192-203 (S.D.N.Y. 2000) (holding that the court can exercise extraterritorial jurisdiction over Mr. bin Laden and his associates in prosecutions brought for the bombings of United States embassies in East Africa).

14. Since the attacks, the phrase "9/11 changed everything" has become a familiar refrain. See *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?*, *supra* note 10 (evaluating the accuracy of this claim from a multidisciplinary perspective).

of a disorder).¹⁵ September 11, he says, represents an order in which “[n]ation-states no longer possess a monopoly on warfare or war-like violence”¹⁶ but must share that hitherto quintessential attribute of statehood with “terrorists who believe fervently in their cause, but who owe no allegiance to any particular place or polity.”¹⁷ The attack on September 11 was a challenge not only to the United States, but also to the entire international system of states. Furthermore, the challenge to the system, far from being at its peripheries, goes to its very heart: who may legitimately employ force, in what manner, and for what purposes? Professor Dinh’s answers to these questions are simultaneously sober and daring. The old “Westphalian”¹⁸ order of an international society based on a community of states must be defended against the modern barbarians, the terrorists. This is to be done, he contends, by the resuscitation—and indeed elevation—of that most pilloried of attributes of the nation-state: “patriotism” (or “nationalism”).¹⁹ In one of those brilliant paradoxes that only truly agile minds can follow, Dinh argues that the embrace of patriotism, rather than being viewed as promoting the frequently decried tendency towards unilateralism and parochialism, should be seen as providing encouragement for cooperative multilateralism.

Thus, Professor Dinh’s take on September 11 is less descriptive than it is normative. His view is rooted in the apparent belief that the terrorism of September 11 represents a fundamental development in international relations, and the response to it must flow not only from the government—whether in the militarized or criminalization formats—but also through popular arousal and a call to arms. It is around these normative underpinnings of Dinh’s article that I shall weave this response.

I shall structure the response as follows: First, I shall take a closer look at the ways in which September 11 is indeed an exceptional occurrence. Second, I shall reflect on the nature of contemporary terrorism. Third, I shall inquire into the extent to which terrorism is in fact a challenge to both the idea and the practical existence of the nation-state. Finally, I shall explain why nationalism and the nation-state, whatever their merits and whatever values they may share (and I believe strongly in the continuing

15. Dinh, *supra* note 10, at 867.

16. *Id.* at 868.

17. *Id.* at 869.

18. *Id.* at 871.

19. *See id.* at 877 (“[W]e know all so well the atrocities committed in the name of nationalism.”). As early as 1775, Dr. Samuel Johnson famously defined patriotism as “the last resort of a scoundrel,” and, almost two centuries later, Ambrose Bierce would reply: “I beg to submit that it is the first.” AMBROSE BIERCE, *THE COLLECTED WRITINGS OF AMBROSE BIERCE* 323 (1946).

vitality of the nation-state), should not be defended as bulwarks against “international terrorism.” Neither is.

II. THE EXCEPTIONALISM OF SEPTEMBER 11

It is easy enough to point to the exceptional facts of September 11. The most powerful country in the world, with an annual gross domestic production in excess of \$9 trillion,²⁰ annual national defense expenditures well in excess of \$300 billion,²¹ well over a million persons under arms at any given time,²² and over 700 military bases in more than thirty countries,²³ was attacked successfully by a handful of technologically underdeveloped foreign persons on its own contiguous territory for the first time in almost 200 years.²⁴ The country not only sustained the loss of over 3000 innocent lives,²⁵ but also was forced to close down its air space and key commercial and financial institutions for days.²⁶ Above all, the country experienced an unusual sense of vulnerability to persons and events about whom and about which few second-thoughts hitherto had been given.²⁷ These facts, and the scale and complete surprise with which they came, certainly provide explanations as to why an American politician, citizen, or journalist might view the world differently after September 11 than she previously did. They might even provide sufficient grist for the domestic regulation of terrorism, such as that undertaken by

20. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 438 (2003) (indicating a GDP of 9.825, 10.082, and 10.446 trillion dollars for years 2000, 2001, and 2002, respectively), available at <http://www.census.gov/prod/www/statistical-abstract-03.html>.

21. See OFFICE OF MGMT. & BUDGET, BUDGET FOR FISCAL YEAR 2002-2-NATIONAL DEFENSE, at <http://www.whitehouse.gov/omb/budget/fy2002/bud02.html> (last visited Sept. 30, 2004).

22. CHALMERS JOHNSON, THE SORROWS OF EMPIRE 102 (2004).

23. *Id.* at 154.

24. It is commonly noted that the last time any of the continental United States was attacked by foreigners was close to two hundred years earlier. See, e.g., Brian Urquhart, *A Matter of Truth*, N.Y. REV. BOOKS, May 13, 2004, at 8 (book review). But see McAllister Hull, *A Major Attack*, N.Y. REV. BOOKS, July 15, 2004, at 60 (letter) (challenging this common wisdom by pointing to a “raid” by the Mexican civil war general, Pancho Villa, on a New Mexico settlement in 1916).

25. See THE 9/11 COMM’N REPORT, *supra* note 2, at 1-14.

26. *FAA Orders New Safety Measures*, CNN.COM, Travel, Sept. 13, 2001, at <http://www.cnn.com/2001/TRAVEL/NEWS/09/12/faa.airports/index.html> (last visited Sept. 30, 2004).

27. I do not mean to minimize the importance of these factors in shaping the reaction of the United States—its politicians, citizens, and scholars alike—to the events of September 11. See, e.g., JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE (2004) (including a particularly eloquent explanation of the national reaction). What I do intend to distinguish is the reaction of an American *qua* American, from that of a scholar (American or otherwise) writing as a theorist of international law and/or international relations.

the USA PATRIOT Act,²⁸ and they may offer sufficient justification for why a well-known elderly Congressman would be pulled aside at an airport security line and subjected to an intrusive body search.²⁹ For journalists and politicians, these unusual facts may well be all that is needed in order to push for wholesale restructuring of the existing social order. They provide less justification for a legal scholar, particularly when the order in question is international. A politician is entitled to operate solely on the basis of expediency and emotion, and a journalist can afford to be entirely descriptive. The politician's craft requires him or her to be attentive to the visceral demands of the electorate, however whimsical or seemingly illogical those demands might be. The "what, when, where, and how" for the most part will suffice for the journalist, even when the "why" goes begging.

For the legal scholar (at least one who advances prescriptive and normative arguments for a preferred order), more might be expected. At a minimum, the exceptionalism must be shown to be relevant to the ideas and concepts that underpin the preferred order. She is obliged to relate logically observed facts to anticipated behavior. Under this framework, the relevant exceptionalism is not that the United States, a geopolitical entity, was attacked; for, despite its preponderant power and influence (or, however indispensable a nation it may be),³⁰ it remains one, and only one, member of a class of roughly 200 juridically equal sovereign states.³¹ While the damages sustained by the United States doubtless are high, there is no reason to believe that they are so fundamentally different in kind from those that have been experienced by it or by other societies in the past, so as to make them the basis for a paradigm-creating shift in normative thinking.³² We are then left with the possibility that any such

28. See USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, (2001) (codified in scattered titles and sections of the U.S.C.).

29. See, e.g., Margaret Carlson, *The Case for a National ID Card: Big Brother Already Knows Where You Live. Why Not Let Him Make You Safer?*, TIME, Jan. 21, 2002, at 52 (stating that seventy-five-year-old Congressman John Dingell was required to pull down his pants after his artificial hip set off a metal detector at an airport).

30. See, e.g., M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1119 n.177 (1999).

31. Professor Viet Dinh uses 191 or 193 as the number of sovereign states. See Dinh, *supra* note 10, at 872. But this number appears to overlook contested situations such as those of "The Western Sahara" and Taiwan, among others, and of course those continuing claims for self-determination by island groups in the South Pacific and the Caribbean. Nothing of consequence to this discussion rides on the difference between his number and mine.

32. Cf. Jay M. Vogelson, *Multinational Approaches to Eradicating International Terrorism*, 36 INT'L LAW. 67, 67 (2002) (cataloguing prior cases of terrorist attacks on or against the United States). The contention here does not deny that an attack on the United States can, and has, generated different treatment than would attacks on other societies. See Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), at <http://www.nato.int/docu/pr/2001/p01->

shift in intellectual thought is mandated by the identity and behavior of the perpetrators of the September 11 atrocities. This is an argument extensively developed by Dinh.³³ At its core is a claim about the uniqueness of terrorism, which makes terrorism a particularly potent challenge to the international order. I shall address the specifics of the claim in a moment, but it should be borne in mind that under this argument, reliance on the events of September 11 is no more than coincidental and symbolic, and the challenge to the international system could have been triggered by terrorist events occurring outside of the United States.

III. THE CHALLENGE OF TERROR

We do live in an age in which concerns over terrorism have become dominant preoccupations of the elites and policy-makers of the West,³⁴ as well as those of a handful of wealthy non-Western societies—in short, of those who decide (inasmuch as human beings can) the destiny of the globe. What constitutes “terrorism” is far from uniformly agreed upon.³⁵

124e.htm (last visited Sept. 30, 2004) [hereinafter NATO Press Release] (asserting that if it were determined that the September 11 attack was directed against the United States from abroad, it would be covered by Article V of the Washington Treaty, which states that “an armed attack against one or more [members] shall be considered an attack against them all”); *see also* S.C. Res. 1373, U.N. SCOR, 56th sess., U.N. Doc. SC/7158 (2001). But these responses should be seen for what they are: political gestures, rather than the articulation of normative rules of behavior. This Commentary, like that to which it responds, addresses a normative concern: whether the September 11 attack should be seen as so qualitatively different from these other attacks to merit a normative shift in policy approaches to the issue of terrorism. *See, e.g.*, Helfer, *supra* note 10, at 180 (discussing the September 11 terrorist attacks as compared to other “watershed events”).

33. As Professor Dinh lyrically frames it, this is the “phenomenon of ideology unmoored from geography, coupled with the means to inflict mass destruction.” *See* Dinh *supra* note 10, at 869.

34. I use the term in the geopolitical sense in which it has been employed since the division of Europe following the Yalta Conference. The end of the Cold War has seen, of course, an eastward shift of the West as the European Union, for example, has come to embrace much that used to be in the East. The term, however, continues to serve as a useful proxy for differentiating between wealthy societies and the rest, as well as among world views.

35. *See, e.g.*, Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L L.J. 491 (2004) (examining various interpretations of terrorism and discussing the need for a clear definition that includes all forms of terrorism); Helfer, *supra* note 10, at 182. But even within a single political entity, the definitions of “terrorism” and “terrorist acts” may differ. Indeed, a single United States statute, 8 U.S.C. § 1189 (2000), incorporates two quite distinct definitions of what it means to engage in terrorism. On the one hand, it refers to 22 U.S.C. § 2656f(d)(2) (2000), which defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” It also refers to 8 U.S.C. § 1182(a)(3)(B)(iii) (2000), which appears to define terrorism in terms of specific acts, including among others: the “hijacking . . . of any conveyance”; “[t]he seizing or detaining, and threatening to kill, injure, or

Despite the existence of several international treaties and pronouncements that seek to regulate “international terrorism,” there is in fact no all-encompassing definition of the term.³⁶ Indeed, the international system has opted for case-by-case regulation.³⁷ This is because it has proved to be

continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained”; “a violent attack” on the person or liberty of an internationally protected person; “an assassination”; the use of any “biological agent, chemical agent, or nuclear weapon or device, or . . . explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property”; and, of course, conspiracy to do any of the above. Thus, while the first directly defines terrorism in terms of the underlying political motivation of the conduct in question, the second does so only circumspectly.

36. See, e.g., Vogelson, *supra* note 32, at 73-74. Of note is the work of the Sixth Committee of the U.N. General Assembly, which has been attempting to unify the various definitions of terrorism and to provide a blueprint for controlling it. See, e.g., *Measures to Eliminate International Terrorism: Report of the Working Group*, U.N. GAOR 6th Comm., 56th Sess., Agenda Item 166, U.N. Doc. A/C.6/56/L.9 (2001).

37. For example, because early forms of contemporary international terrorism involved the hijacking of airplanes and/or the seizure of hostages, especially diplomats, international agreements addressed these means rather than those who employed them or the objectives for which they were employed. See, e.g., Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 222; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19; International Convention Against the Taking of Hostages, *opened for signature* Dec. 18, 1979, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 137; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219. More recently, concerns over international terrorism have focused on how it is financed and the possible acquisition by the terrorists of so-called “weapons of mass destruction,” namely biological, chemical, and nuclear agents. The international regulatory framework has also thus shifted to the specific regulation of these means. See, e.g., Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 124; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8; *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th plen. mtg., Agenda Item 160, U.N. Doc. A/RES/54/109 (2000); and the *International Convention for the Suppression of Terrorist Bombings*, G.A. Res. 52/164, U.N. GAOR, 52d Sess., 72d mtg., U.N. Doc. A/RES/52/164 (1997). Notably, the United States had not ratified either of these last two Conventions as of September 11, 2001. The September 11 attack did prompt dramatic responses from the United Nations Security Council, but even these fall short of providing comprehensive responses to international terrorism. See, e.g., S.C. Res. 1390, U.N. SCOR, 57th sess., U.N. Doc. S/RES/1390 (2002); S.C. Res. 1373, *supra* note 32; S.C. Res. 1368, U.N. SCOR, 56th sess., U.N. Doc. S/RES/1368 (2001); and S.C. Res. 1269, U.N. SCOR, 56th sess., U.N. Doc. S/RES/1269 (1999). *But see Declaration on Measures to Eliminate International*

much easier to agree on specific actions that should be condemned than on motivations. As the saying goes, one man's terrorist is another's freedom fighter.³⁸

Whatever may be the semantic and rhetorical differences in the definition of "international terror," Dinh's conception of the term as embracing the systematic use of violence for "ideological"³⁹ ends by an organized non-state group⁴⁰ falls well within conventional definitions,⁴¹ and it is this quite narrow definition that I have in mind for the purposes of this response.⁴² A much more contestable proposition is Dinh's apparent additional requirement that the violence be externally directed.⁴³ I shall, for the moment, ignore this element, but I will return to it.⁴⁴

Whatever disagreements existed as to what constitutes "terrorism," the international system, at least prior to September 11, 2001, was united as to how to deal with terrorism once it was identified. Common themes can be found in the multiplicity of agreements on the subject.⁴⁵ At core, the

Terrorism, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., Annex, 84th plen. mtg., Agenda Item 142, U.N. Doc. A/RES/49/60 (1994). But this last document, despite its broader sweep, is neither law, nor does it purport to regulate international terrorism simpliciter. For an exhaustive catalog of relevant international agreements, see M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 91-92 nn. 25-40 (2002).

38. See, e.g., James Pfander, *Charles Was First*, LEGAL AFF., 20, 20 May-June 2004.

39. Others might prefer "political," "religious," "philosophical," and similar terms. I use the term "ideology" to embrace any and all of these "forms" or "manifestations" of what might pull a group to employ systematic violence in the service of a stated objective.

40. Terrorist acts can be and frequently are perpetrated by individuals, but for the purposes of this Commentary, such acts must be pursuant to or implied from instructions issued on behalf of a group.

41. Two clarifications of this definition are worth noting. First, to speak of the systematic use of violence is not to deny the randomness of its victims. It is simply to state that the choice of means is not arbitrary, but is rather the product of considered decisions. Secondly, this definition applies even in the context of so-called state-sponsored terrorism. See, e.g., W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 55-56 (1999). Whatever else these instances of the use of force may entail, the agents of terrorism here do not act explicitly in the name of the state. Indeed, "plausible deniability" by the state is the hallmark of the use of violence in these situations. The definition therefore also rejects the highly subjective approach of terming any use of violence by the state that one finds objectionable "state terrorism." Cf. Bassiouni, *supra* note 37, at 84-85 ("State terrorism . . . is carried out by state actors and is usually characterized by extensive, widespread, or systematic use of violence in violation of international humanitarian law and human rights law. It includes genocide, crimes against humanity, war crimes, and torture." (footnote omitted)). If this view is correct, then the explicit rejection in the Rome Treaty of a crime as "terrorism" is pointless.

42. Aside from its straightforwardness, this definition, to my mind, has the added advantage of limiting the subjectivity inherent in definitions that inquire into the specific motive for the particular conduct in question.

43. See Dinh, *supra* note 10, at 874.

44. See *infra* notes 150-68 and accompanying text.

45. See Conventions and Agreements cited *supra* note 37.

focus on terrorism was about the lawfulness of the means employed by terrorists to achieve their ends. With each state as the primary enforcer of its own laws, the standard approach was that as each means was identified, the state was required to render the means unlawful within its domestic laws and to use the instruments of municipal law enforcement to render the consequent criminalization of terrorism effective.⁴⁶ States were urged to cooperate with each other through such measures as exchange of information,⁴⁷ the prosecution or extradition of terrorists,⁴⁸ and the rendering of mutual assistance.⁴⁹ In other words, the international system approached control of terrorism in much the same way as it treats the vast majority of issues of transnational legal concern. Reliance was vested primarily in self-interested (and often self-induced) cooperation among states, both bilaterally and multilaterally, and on limited coordination, rather than in a rigidly centralized, undifferentiated, and supranationally harmonized set of substantive rules.

The events of September 11 (or, more accurately, the United States' response to those events) dramatically and radically altered the landscape. As I have already indicated, barely had the President of the United States become aware of the crash of jetliners into buildings in the United States when he announced that these events constituted the declaration of war on the United States and that the perpetrators would be dealt with accordingly.⁵⁰ That this was not simply the overblown rhetoric of a politician was made abundantly clear over the ensuing days and weeks. Aside from the understandable exigent measures of completely closing down United States air space with orders to shoot down without questions any infringing civil aircraft⁵¹ and the instituting of dragnets, other steps, coupled with several pronouncements by the President, made plain that the United States' response would not merely be somewhat militaristic, but almost exclusively so. This would be a "crusade," President Bush informed the world,⁵² in which any country that was not with the United States was automatically with the terrorists.⁵³ Osama bin Laden, the al

46. See, e.g., S.C. Res. 1373, *supra* note 32 (directing member states to criminalize the use of funds for terrorism and to assist each other in criminal investigations regarding such crimes). See generally Helfer, *supra* note 10, at 183.

47. See, e.g., S.C. Res. 1373, *supra* note 32, at ¶¶ 2(b), 3(b).

48. See, e.g., *id.* at ¶ 2(e).

49. See generally Bassiouni, *supra* note 37, at 94-95.

50. See *supra* note 9 and accompanying text.

51. THE 9/11 COMM'N REPORT, *supra* note 2, at 31, 42-43.

52. President George W. Bush, Remarks upon Arrival at the White House South Lawn (Sept. 16, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html>) ("This crusade, this war on terrorism is going to take a while.").

53. The President declared:

Qaeda leader who reportedly masterminded the attacks on the United States, was to be hunted down with a multi-million dollar bounty on his head, regardless of whether he was killed or captured.⁵⁴ Bin Laden's hosts, the Taliban leaders of Afghanistan, were given a non-negotiable ultimatum: surrender him to the United States or face annihilation.⁵⁵ The country rallied around the call to take up arms. In virtually no time, Congress, with a sole dissenting vote, gave the President completely unrestricted power in the use of military force as a response to September 11.⁵⁶ And in time, a war was fought in Afghanistan resulting in the overthrow of the Taliban Government and the reconstitution of the Afghan state.⁵⁷

Just as important as the resort to military force in dealing with international terror was the readiness with which the United States

[W]e will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

President George W. Bush, Address to a Joint Session of Congress and the American People at the Capitol Building in Washington, D.C. (Sept. 20, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>) [hereinafter Bush, Address to a Joint Session]; see also President George W. Bush, Remarks at a Reception for Senatorial Candidate John Cornyn in Houston, Texas (Sept. 26, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/09/print/20020926-17.html>) [hereinafter Bush, Remarks at a Reception] ("It's important for you to know the doctrine I laid out still stands: you're either with us, or you're with the enemy. That's clear.").

54. See Deborah Orin, *Experts: Bounty \$ Worked Before*, N.Y. POST, Sept. 23, 2001, at 6.

55. Bush, Address to a Joint Session, *supra* note 53 ("[T]he United States of America makes the following demand[] on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. . . . Th[is] demand[] [is] not open to negotiation or discussion. . . . They will hand over the terrorists, or they will share in their fate."). The accepted international law doctrine is that a state harboring a fugitive accused of crime may elect either to surrender (i.e., "extradite") the fugitive, or to put the fugitive on trial. See, e.g., Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 496-500 (2003). See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (examining the variety of international instruments that impose a duty to prosecute or to extradite).

56. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C.A. § 1541 (West 2004)). So broad was this authority that the United States Supreme Court has interpreted it as permitting the United States President to declare a United States citizen found in Afghanistan an "enemy combatant," who can be held in detention indefinitely (or at least for the duration of the war), subject only to minimal procedural safeguards. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635-36 (2004).

57. See Ivo H. Daalder & James M. Lindsay, *The U.S. Obligation in Afghanistan*, SAN DIEGO UNION-TRIB., Nov. 26, 2001, at B-7.

abandoned “law” as a tool in that fight. The President repeatedly spoke of American justice in terms of the extrajudicial killings of alleged terrorists.⁵⁸ He measured success in the “war against terrorism” less by enumerating how many attempts had been foiled, or how many perpetrators effectively were prosecuted and imprisoned, but more by counting up how many were “no longer around” to trouble us.⁵⁹ At home, such laws as those adopted to assure the availability for fact-gathering of “material witnesses” and to regulate “immigration” were diverted from their intended purposes and used extensively to detain persons indefinitely under atrocious conditions.⁶⁰

Abroad, the seeming irrelevance of law was made even starker. Aside from being read as permitting presidentially sanctioned extrajudicial killings,⁶¹ the “war on terrorism” was employed to justify the sweeping-up and the indefinite and clandestine detention of anyone anywhere in the world, without accountability to anyone but the Executive Branch of the United States government.⁶² Within the Executive Branch, the accountability was not to flow from compliance with legal rules. The President’s legal advisers assured him that as “commander-in-chief,” he was subject neither to the domestic laws of the country forbidding the use of torture,⁶³ nor to the international law rules that, at least over the last

58. See, e.g., *Bush: Osama, Saddam Will Be Caught*, CBS/AP NEWS, June 24, 2003, at <http://www.cbsnews.com/stories/2003/06/24/attack/main560134.shtml> (last visited Sept. 30, 2004); see also David Johnston & David E. Sanger, *Threats and Responses: Hunt for Suspects: Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at 16; James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, § 1, at 1.

59. See, e.g., Bush, Remarks at a Reception, *supra* note 53.

60. See, e.g., Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 40 (2004); see also OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 6 (2003), available at <http://www.usdoj.gov/oig/special/0307/final.pdf>; OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 n.2 (2003), available at <http://www.usdoj.gov/oig/special/0306/chapter1.htm#7>; OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 1 (2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees1203.pdf>. For a discussion and evaluation of the post-September 11 treatment of persons caught up in the United States Immigration Law dragnet, see Lee Hall, *Nomads Under the Tent of Blue: Migrants Fuel the U.S. Prison Industry*, RUTGERS RACE & L. REV. (forthcoming 2004).

61. See *Rights Group Questions Attack: Amnesty Says U.S. Missile Strike in Yemen May Be Illegal*, WASH. POST, Nov. 9, 2002, at A21; Howard Witt, *U.S.: Killing of Al Qaeda Suspects Was Lawful*, CHIC. TRIB., Nov. 24, 2002, at C1.

62. See Oral Arguments at 23-25, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf.

63. See, e.g., Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J.,

century, have regulated the waging of war, and to which the United States hitherto had been a consistent adherent.⁶⁴ In the waging of the “war on terrorism,” these laws were deemed “obsolete” and “quaint.”⁶⁵ The logical extension of this mindset ultimately was the adoption of a doctrine of “preventive war,”⁶⁶ in contravention of accepted international law rules,⁶⁷ and the extension of that doctrine to the occupation of Iraq.⁶⁸

The United States is, of course, a *constitutional democratic republic*. The shunting aside of legal constraints would not have been contemplated—let alone undertaken—by the President without the assurance of support (or, at a minimum, tacit acquiescence) from the people and their representatives. In the immediate aftermath of September 11, the general population applauded the war-like measures taken by the President. His popularity, as measured in one poll, rose from 55% just before the terrorist attack, to 86% four days later and to 92% shortly thereafter.⁶⁹ The secret lock-ups of anonymous persons both at Guantanamo Bay, and of so-called “high value targets” at unknown (and still undisclosed) places,⁷⁰ and the reported “rendition” of persons to countries where they could be tortured (if not the outright use of torture by United States intelligence and law enforcement personnel⁷¹) elicited indifference in the public and among its legislative representatives. And

June 7, 2004, at A1; David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, § 1, at 1.

64. See Draft Memorandum from Alberto R. Gonzales, White House Counsel, to President George W. Bush 3 (Jan. 25, 2002) (discussing the application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban), available at <http://www.msnbc.msn.com/id/4999148/site/newsweek>.

65. *Id.* at 2.

66. See NAT’L SEC. COUNCIL, WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13-17 (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

67. See, e.g., Mary Ellen O’Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENV. J. INT’L L. & POL’Y 43, 53-54 (2002); Miriam Shapiro, *Agora: Future Implication of the Iraq Conflict: Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 599 (2003). But see William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 319-20 (2003).

68. See generally BOB WOODWARD, PLAN OF ATTACK (2004) (discussing how and why President George W. Bush, his war council, and his allies launched a preemptive war in Iraq).

69. See, e.g., *Polling Percentages High for Americans’ Support of President Bush and Their Confidence That US Will Be Safe*, ABC NEWS: WORLD NEWS NOW, Oct. 11, 2001, 2001 WL 22700074. Other polls concurred with the trend. See, e.g., Deborah L. Acomb, *Poll Track for September 29, 2001*, NAT’L J., Sept. 29, 2001, 2001 WL 25926169.

70. See, e.g., Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A01.

71. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01.

so, a Senate which rose up with virtual unanimity to denounce an internet-based game that modeled the probabilities of a future terrorist attack⁷² could not, at least prior to April 2004, muster enough support to investigate, let alone condemn, the obvious lawlessness with which the Executive Branch was waging the “war on terrorism.”⁷³ Nor did the courts prove themselves to be stalwart defenders of individual rights or civil liberties. With very few exceptions, the judiciary invoked the passive virtues—notably *stare decisis* and judicial deference (especially that due the “commander-in-chief”)—to forestall any inquiry into the merits of these blatant denials of legal protections.⁷⁴

It is thus beyond cavil that in the post-September 11 era, the approach of the United States both as a country and as a society has been to view the struggle against terrorism in militaristic rather than legal terms. This approach cannot help but be significant in the international system’s conceptualization of the issue. The United States is not a *primus inter pares* within the international system solely by virtue of the overwhelming military, economic, and political might (so-called “hard power”)⁷⁵ that it wields. Beyond these, its status as the principal purveyor of cultural and intellectual fads may well be even more important in assuring its hegemonic grip over the system. Its approach thus influences and modifies international law both by commanding adherents and by inducing acquiescence, if not outright acceptance. In the immediate aftermath of September 11, the North Atlantic Treaty Organization (NATO) allies unanimously concurred in the view that the appropriate response to September 11 was war. For the first time since the founding of the organization, NATO invoked the singular article of joint military defense, which stated that an attack on one member is an attack on all.⁷⁶ The

72. See David Ballingrud, *Wanna Bet?*, ST. PETERSBURG TIMES (Florida), Sept. 14, 2003, at 1D; Carl Hulse, *Threats and Responses: Plans and Criticisms: Swiftly, Plan for Terrorism Futures Market Slips into Dustbin of Idea Without a Future*, N.Y. TIMES, July 30, 2003, at A10.

73. See *supra* note 56 for a discussion of the significance of this later development.

74. See, e.g., *Al Odah v. United States*, 321 F.3d 1134, 1140-45 (D.C. Cir. 2003) (holding, on the basis of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that foreigners detained on territory controlled by the United States could not seek habeas corpus relief in the United States because territory was not “sovereign territory” of the United States), *rev’d sub nom. Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 316 F.3d 450, 471-72, 476 (4th Cir. 2003) (holding that presidential war-making powers include an essentially unreviewable authority to classify a person detained in a war theater as an “enemy combatant”), *vacated*, 124 S. Ct. 2633 (2004); *N.J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219-21 (3d Cir. 2002) (holding that newspapers can completely be denied access to a deportation hearing where the Attorney-General determines that access to such a hearing presents “national security concerns”).

75. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 14 (2004).

76. See NATO Press Release, *supra* note 32.

Organization of American States took much the same position.⁷⁷ Moreover, the international system, as a whole, appears to have acquiesced in this militarization of the response to international terror when it remained entirely silent even in the face of a seeming violation of a longstanding customary international legal norm: that ships flying the flags of non-belligerents cannot be boarded on the high seas. Thus, when a Spanish warship, acting at the request of the United States, boarded a Cambodian-registered ship, reportedly because the ship was suspected of ferrying terrorist-related contraband from North Korea, only Yemen protested.⁷⁸

The international system similarly abetted the undermining of legal rules in the fight against world-wide terror. Several countries radically revised (or reinterpreted) their laws and practices to denude procedural protections for those, especially non-citizens, who might be suspected of being (or otherwise being in a position to assist) terrorists.⁷⁹

77. See ORG. OF AM. STATES, TERRORIST ATTACKS ON UNITED STATES ARE AN ATTACK ON ALL COUNTRIES OF THE AMERICAS, FOREIGN MINISTERS DECLARE (Sept. 21, 2001), at <http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm> (last visited Oct. 15, 2004).

78. See Bradley Graham, *Gaps in Plan to Halt Arms Trade: Legal Authority for Intensified Interdiction Is Questioned*, WASH. POST, Aug. 3, 2003, at A23. For statements of the applicable international law doctrines, see, for example, United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397; *The S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 7).

79. The United Kingdom, under its "Antiterrorism Act," permits the indefinite detention of foreigners without judicial intervention. See, e.g., *Scrap Anti-Terror Detention Law*, (BBC News, Dec. 18, 2003), at http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/3330221.stm (last visited Oct. 15, 2004). Moreover, this power has been used extensively by the United Kingdom's "Special Branch." See, e.g., John Upton, *In the Streets of Londonistan*, LONDON REV. BOOKS, Jan. 22, 2004, at 3 (reporting that under Britain's anti-terror legislation, 529 persons have been arrested, only eighty-one of whom were charged with violations of law, and sixteen foreigners have been detained under its indefinite detention provision). The British government, which has been highly critical of the use of Guantanamo Bay, distinguishes its practice on the ground that foreigners detained under the United Kingdom's antiterror laws can always end their detention by voluntarily leaving the United Kingdom, although in practice, no mechanism exists for exercising this theoretical right. See, e.g., Lucy Scott-Moncrieff, *Suspicion of Terrorism*, LONDON REV. BOOKS, Aug. 5, 2004, at 22; see also John Carreyrou, *Fighting Words: France Moves Fast to Expel Muslims Preaching Hatred*, WALL ST. J., Aug. 9, 2004, at A1. Carreyrou writes:

If Mr. Guler had been French, he would have had the chance to defend himself at a trial. But as a foreigner, he fell under a 1945 law that allowed the government to deport him as an urgent security threat.

France has taken one of the hardest lines of any Western country in fighting Islamic extremism. Other democracies, including the U.S., have been criticized for excessive methods, . . . [b]ut few have been as systematic and zealous as France in attempting to stamp out Islamic militancy.

Id.; see also Craig S. Smith, *France Is Struggling to Suppress Extremist Muslim Clerics*, N.Y.

Additionally, in the wake of September 11, virtually all countries readily agreed that an effective tool in combating terrorism lies in denying funding to it. There was thus the need for adopting and enforcing strict regulations on financial transfers, especially those that flow across borders.⁸⁰ The ensuing practice was to take a non-discriminatory approach toward the regulation of non-traditional Western financial institutions. In particular, informal institutions employed by Muslims, such as the al Barakaat Bank, were closed down en masse, depriving those who ran them of the most minimal protections against wrongful deprivation of property.⁸¹ Overnight, hitherto legitimate institutions of finance were rendered suspect and subject to arbitrary closure solely on the ground that they could not easily be supervised by governments in the West.⁸² And, as already pointed out, many countries within the international system appear to have been willing to accept renditions of persons suspected by the United States of being terrorists and to torture such persons.⁸³

This, then, is the post-September 11 world within which Dinh's norm of "patriotism" as a response to international terrorism will have to function. It is an age marked by pervasive national and personal insecurities that have been generated by the overriding fear of terrorism; an era in which the standard response by governments and the population at large has been to see law, at worst, as irrelevant and, at best, as a back-up to the military response. The obvious question with which we are thus

TIMES, Apr. 30, 2004, at A3 (discussing France's use of its immigration and antiterrorism laws to control religious speech by Muslim imams); Pankaj Mishra, *India: The Neglected Majority Wins!*, N.Y. REV. OF BOOKS, Aug. 12, 2004, at 30 (pointing out that the outgoing BJP party enacted an Indian analog, the Prevention of Terrorism Act, to the USA PATRIOT Act.).

80. See, e.g., S.C. Res. 1373, *supra* note 32, ¶¶ 1(d), 2(d).

81. See, e.g., Paul Beckett, *Money-Transfer Firm's Closure Cuts Somali Lifeline*, WALL ST. J., Dec. 4, 2001, at A4; Paul Beckett, *Informal Money-Movement System in UAE Is Likely Uncontrollable*, WALL ST. J., Nov. 12, 2001, at A6; *Leaders of the Somali Factions Call on Washington to Release Al-Barakat Bank Assets*, ARABIC NEWS, Nov. 12, 2002, at <http://www.arabicnews.com/ansub/Daily/Day/021112/2002111215.html> (last visited Oct. 15, 2004); see also *Aaran Money Wire Serv., Inc. v. United States*, No. 02CV789JMR/FLN, 2003 WL 22143735, at *13 (D. Minn. Aug. 21, 2003) (applying the mootness doctrine to avoid ruling on the merits of a challenge to the Executive Order and enforcement actions that resulted in the raid on and judicially unsanctioned seizure of the assets of the plaintiffs).

82. The Hawala financial exchange system is a quintessential example of this culturally myopic approach of the international system to the war on terrorism. See, e.g., MOHAMMED EL QORCHI ET AL., *INFORMAL FUNDS TRANSFER SYSTEMS: AN ANALYSIS OF THE INFORMAL HAWALA SYSTEM* 13 (2003).

83. Of course much of this practice was undertaken surreptitiously. Yet, there is evidence that it did go on. See, e.g., Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A01; Thomas Walkom, *New Torture Claim Shows Arar's Case Isn't Unique*, TORONTO STAR, Feb. 26, 2004, at A01.

confronted is how a reinvigorated patriotism, as suggested by Dinh, fits into this milieu. To give a meaningful answer, it is helpful, if not essential, to explore—however cursorily—the contemporary concept of patriotism.

IV. NATIONALISM IN THE AGE OF GLOBALIZATION

“Nationalism” (or, as Dinh prefers, “patriotism”),⁸⁴ as Liah Greenfeld, among others, has ably and exhaustively demonstrated, is a protean term that has eluded being fixed in time or place.⁸⁵ At core, it is certainly about creating or maintaining an identity by invoking or shrouding oneself in a shared loyalty among a likeminded group.⁸⁶ Nationalism is thus built on the solidarity of the group whose interests are seen as distinct from those outside of it. Thus, the nature of the shared common interest and the means by which they are furthered vis-à-vis the outsider are highly relevant in

84. See Dinh, *supra* note 10, at 869 (stating that “nationalism” is a blunt synonym for “patriotism”); cf. Minxin Pei, *The Paradoxes of American Nationalism*, FOREIGN POL’Y, May-June 2003, at 30-31:

Nationalism is a dirty word in the United States, viewed with disdain and associated with Old World parochialism and imagined supremacy. Yet those who discount the idea of American nationalism may readily admit that Americans, as a whole, are extremely patriotic. When pushed to explain the difference between patriotism and nationalism, those same skeptics might concede, reluctantly, that there is a distinction, but no real difference. . . . In reality, however, the psychological and behavioral manifestations of nationalism and patriotism are indistinguishable, as is the impact of such sentiments on policy.

My own preference (at least in the context of social science scholarship) is for the “blunter” term, “nationalism,” but in deference to Prof. Dinh, I shall strive to employ the term “patriotism” when discussing his views. These two terms, in turn, should be distinguished from others with which they are sometimes pejoratively associated: “jingoism,” “chauvinism,” and “xenophobia.” These latter terms find the supremacy of national identity as essential to their articulation, but the former, while expressive of national pride, do not necessarily connote a supremacist ideology.

85. See LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 3-4 (1992); see also E. J. HOBBSAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 5-6 (2d ed. 1992).

86. See GREENFELD, *supra* note 85, at 3-4; see also BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 4 (Rev. ed. 1991). Anderson explains it thus:

[N]ationality, or, as one might prefer to put it in view of that word’s multiple significations, nation-ness, as well as nationalism, are cultural artefacts [sic] of a particular kind. To understand them properly we need to consider carefully how they have come into historical being, in what ways their meanings have changed over time, and why, today, they command such profound emotional legitimacy.

ANDERSON, *supra*, at 4.

determining how benignly one ought to view a particular claim of patriotism.⁸⁷

Contemporary claims of nationalism associate it indelibly with fidelity to the nation-state. The idea of a state—the Montevideo Convention, notwithstanding⁸⁸—is by no means a fixed or rigid one.⁸⁹ Thus, one of the hallmarks of contemporary nationalism has been that when dissatisfied with an existing state, nationalists have sought, through secession or “self-determination,” to carve out a new state to which they might extend their unalloyed loyalty. This has been a predominant feature of the post-World War II order⁹⁰ and one which became particularly dominant in the 1990s.

Dinh’s approved conception of patriotism, he readily admits, is one that harkens back to the early part of the nineteenth century and finds its mooring in the clarion call of Stephen Decatur’s frequently quoted toast: “Our country! In her intercourse with foreign nations, may she always be in the right; but our country, right or wrong.”⁹¹ Juxtaposed against this “unyielding love that dares not speak its name” is an alternative vision of patriotism; one that has come to be referred to as “cosmopolitanism.”⁹²

87. Cf. John Schaar, *What Is Patriotism?*, NATION, July 15, 1991, at <http://www.thenation.com/doc.mhtml?i=19910715&s=forum> (last visited Oct. 15, 2004). Schaar distinguishes between two forms of patriotism: Those who see “[t]he new god, . . . [as] *la patrie*, the nation, and the new commander [as] the state,” and patriotism that is “rooted in the love of one’s own land and people, love too of the best ideals of one’s own culture and tradition.” *Id.* The former “is the worship of national power, of national greatness, nearly always expressed as power over other peoples and qualities, and as power that acknowledges no limits on its own assertion.” *Id.* The latter “finds no glory in puffing their country up by pulling others’ down,” but rather “is profoundly municipal, even domestic. Its pleasures are quiet, its services steady and unpretentious.” *Id.*; see also *infra* note 97 and accompanying text (discussing American patriotism in the post-September 11 political environment).

88. See Dinh, *supra* note 10, at 872. The Latin American countries, of course, were speaking only for themselves, and their position does not conclusively dispose of one of the most debated issues regarding the nature of the state: whether it exists on the basis of objective facts and the assertion of its citizens (the so-called “declaratory” view) or whether a state only comes into being when it has been extended recognition by other members of the international society (the so-called “constitutive” view).

89. See, e.g., DAVID G. RUNCIMAN, *PLURALISM AND THE PERSONALITY OF THE STATE* 3 (1997).

90. See generally Maxwell O. Chibundu, Book Review, 11 L. & POL. BK. REV. 145 (2001) (reviewing GNAPALA WELHENGAMA, *MINORITIES’ CLAIMS: FROM AUTONOMY TO SECESSION, INTERNATIONAL LAW AND STATE PRACTICE* (2000)).

91. See Dinh, *supra* note 10, at 877 (citing Commodore Stephen Decatur, Toast at a Dinner in Norfolk, Virginia (Apr. 1816), in ALEXANDER SLIDELL MACKENZIE, *LIFE OF STEPHEN DECATUR* 295, 295 (1848)).

92. See Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in MARTHA C. NUSSBAUM, *FOR LOVE OF COUNTRY?* 3, 4 (Joshua Cohen ed., 2002). Although Professor Nussbaum frames the issue in terms of the community to which we should owe our primary moral duties, both as a practical and as an ontological matter, this is not a fundamentally different question from the identification of a community to which our primary political loyalties are owed.

Under this outlook, “our highest allegiance must be to the community of humankind, and the first principles of our practical thought must respect the equal worth of all members of that community.”⁹³ Cosmopolitanism thus places loyalty to the nation-state behind loyalty to humankind.⁹⁴ Dinh finds this conception of loyalty to be in conflict with his conception of patriotism—or, perhaps more accurately, in conflict with his proposal of a reinvigorated patriotism.⁹⁵ He correctly contends that proponents of cosmopolitanism “underestimate the value of the nation-state as the basic political unit of international order,”⁹⁶ but he wrongly posits that “loving one’s country allows one to love others more.”⁹⁷ It is in this conflation of the importance of the nation-state to the maintenance of international order with the insistence of primary devotion to it that Dinh’s enterprise falters.

To explain why patriotism is not (and would not be) merely an inadequate—but rather, a thoroughly dangerous—response to international terrorism, it may be helpful at the outset to make explicit a dichotomy in

93. See Joshua Cohen, *Editor’s Preface* to NUSSBAUM, *supra* note 92, at vii-viii.

94. It is worth emphasizing that in this Commentary, I use the terms “patriotism” and “cosmopolitanism” in the very narrowly confined senses that I understand Professor Dinh to mean when he deploys them in his Dunwody Lecture; that is as more or less polar opposites. Thus, the interpretation of cosmopolitanism that I employ here, as a conceptual matter, would exclude Professor Appiah’s claim (with which I happen personally to agree) that “[w]e cosmopolitans *can* be patriots, loving our homelands (not only the states where we were born but the states where we grew up and where we live).” Kwame Anthony Appiah, *Cosmopolitan Patriots*, in NUSSBAUM, *supra* note 92, at 21, 26.

95. See Dinh, *supra* note 10, at 877-78. Professor Dinh is by no means alone in believing that Americans, notwithstanding public displays of allegiance to the country (e.g., the pervasive pledging of allegiance, chants at sporting activities, and national flag wavings) have been insufficiently patriotic. See, e.g., ANDREW J. BACEVICH, *AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY* 80 (2002) (“To the extent that some vestige of patriotism survived into the post-Cold War era, it did so as nostalgia, sentimentality, martial exhibitionism, and a readily exploitable source of entertainment.”).

96. See Dinh, *supra* note 10, at 877.

97. *Id.* at 878. Professor Dinh asserts that:

[L]oving our country—loving this country—allows us (indeed requires us) to love others more. As President George W. Bush expounded: “Unlike any other country, America came into the world with a message for mankind, that all are created equal, and all are meant to be free. There is no American race. There’s only an American creed: We believe in the dignity and rights of every person”

Id. (footnote omitted). It may be that American patriotism is unique in its virtuousness—surely at least a debatable proposition—but for the purposes of my Commentary, I shall not assume so intensely particularistic a form of American exceptionalism. My views are intended to be of more general application, and I shall treat the concept of patriotism as one that is capable of being molded by a prototypical society at a stated time and in a given place. Thus, in the absence of the complete Americanization of the world, American patriotism, however benign, if it is to be the basis for a norm in international relations, must be capable of replication by other societies.

analytical methods. At one level, all analysis depends on description or interpretation of reality. At another level, we seek to make reality conform to our preferences or norms. The two approaches clearly are not unrelated. Our perception of the reality that we seek to describe is shaped significantly by our norms and principles, and the latter, far from being fixed and permanent, respond to our understanding of reality. But the relationship of the two planes of thought to each other is not ineluctable. Evaluating the extent to which patriotism or cosmopolitanism (or some third ideology) offers the better response to the challenge of international terrorism requires conscious awareness of these distinctions and relationships.

As a historical fact, Dinh has company in placing patriotism and terrorism within a single milieu. As is widely accepted, the modern antecedents of both—their systematization into the forms with which we are now familiar—are to be found in the immediate aftermath of the French Revolution. The extensive use of violence in the service of political ideals—notably in the interest of the “rights of man and the citizen” and of “liberty, equality and fraternity”—we all recall as being integral to the revolution.⁹⁸ Perhaps less well-known is that modern patriotism is also an offspring of the same revolution, and it is so in two seemingly contradictory ways. First, as John Schaar points out,

Abbé Sieyès named the new god: “The nation exists before all. It is the origin of everything. It is the law itself.” By 1792, in a petition addressed to the National Assembly, the ferociously jealous claims of the new god were made chillingly clear: “The image of the *patrie* is the sole divinity which it is permitted to worship.”⁹⁹

In short, having dethroned subjugation to King and Religion, revolutionary France replaced it with unquestioning loyalty to “nation” and to “reason.” But in the wake of the 18th Brumaire, Citizen France became imperial France, and what was good for it was seen by Frenchmen as automatically and unquestionably good for all of mankind. But neither the Spaniards, nor the Portuguese, nor the Germans, let alone the English

98. See, e.g., Geoffrey Nunberg, *The -ism Schism: How Much Wallop Can a Simple Word Pack?*, N.Y. TIMES, July 11, 2004, § 4, at 7 (“The modern senses of ‘terror’ and ‘terrorism’ reach back to a single historical moment: ‘la Terreur,’ Robespierre’s Reign of Terror in 1793 and 1794.”). Charles Dickens’s *A Tale of Two Cities* permits us to swallow this bitter pill with some pleasure. But see Pfander, *supra* note 38, at 20 (arguing that the origins of modern political terrorism are better laid at the feet of King Charles I of England).

99. Schaar, *supra* note 87. Indeed, Robespierre is reported to have said of terror that it “‘is nothing other than justice, prompt, severe, inflexible; it is therefore an emanation of virtue.’” Nunberg, *supra* note 98, § 4, at 7.

or the Russians, agreed. French enlightenment in the abstract might be good for humanity, but when imposed under the jackboots of Napoleon's armies, it was to be resisted. And so, secondly, "patriotism" ("my country, right or wrong") proved to be as useful a gathering cry for the non-metropolitan subjects of imperial France as it had been for the nascent revolutionaries yearning to be free of Louis XVI.

Early encounters with modern patriotism thus teach at least three lessons. First, it was born out of idealism. Second, idealism could not contain it; rather, patriotism swallowed up the parent, and promoted its narrow conception of national interest by a vacuous appeal to that ideal. Third, the rest of humanity was not fooled. In reaction, they adopted their own nationalisms. But, as subsequent history also teaches, this defensive patriotism proved no more susceptible of being confined to benign and limited objectives than was French revolutionary nationalism.¹⁰⁰ The history of Europe between 1870 and 1945 is primarily the history of defensive nationalism; that is, of "patriotism" as a response to external aggression.¹⁰¹ Love of country and of kinsfolk required France to go to war to recapture Alsace-Lorraine, which Germany had seized following her victory in the war of 1870, and it was love of the "fatherland" that buttressed Germany's wars of the 1930s to remove the stain of Versailles. And, of course, it should not be forgotten that the "first great war" commenced with the terrorist assassination of an archduke, which in turn precipitated "patriotic" responses even among those socialists who had hitherto subscribed to the "withering away of the state."

To all of these, Dinh's response doubtless will be that "American patriotism is different." And he may be right.¹⁰² But if so, it will not be because American patriotism recalls the classical formulation as stated in Stephen Decatur's toast.

But disagreeing with belief in the corrective value of patriotism does not entail accepting the cosmopolitan outlook.¹⁰³ If historical experiences demonstrate the dangers of idealizing patriotism, the flaws of the cosmopolitan outlook flow from its lack of grounding in reality. Cosmopolitanism has been presented as a foil to patriotism because it is seen as transcending loyalty to the nation-state. As an aspiration, it may be

100. See, e.g., HOBSBAWM, *supra* note 85, at 19-20.

101. This mindset is powerfully captured by a contemporary of that period. See generally VICENTE BLASCO IBAÑEZ, *THE FOUR HORSEMEN OF THE APOCALYPSE* (Charlotte Brewster Jordan trans., 1919) (depicting patriotism in Europe during World War I).

102. See *infra* note 117 and accompanying text (discussing the private character of American patriotism).

103. It may be worth reminding the reader that the "cosmopolitan outlook" (which I shall use interchangeably with "cosmopolitanism") posits as the proper form of identification the loyalty of persons to or identification with humanity, which is unmediated through the state. See *supra* notes 92-94 and accompanying text.

lauded and accorded sympathetic scrutiny; as a statement or description of the facts on the ground, it is both incorrect and unrealistic.

As Dinh correctly points out, the international system, for at least the last three-and-a-half centuries, has been organized around the idea of the nation-state as the primary actor within the international system.¹⁰⁴ At core, the system regulates behavior by assigning primary responsibility to the state and then seeking to coordinate state behavior. This has given the nation-state the preeminent role within the system—a role that the concept of sovereignty merely confirms. The ascendancy of the state to this role was not accidental, nor has its perpetuation been a mere matter of chance. The European state system emerged from centuries of conflict and compromise within religious institutions and among religious leaders, between religious and secular leaders, and among secular feudal barons and emerging commercial and technocratic bourgeoisie. In these multifaceted struggles, the state emerged as the institution best able to provide personal security and effectively distribute resources among the competing social groups.¹⁰⁵ It proved remarkably adept in harnessing and using violence both within and without the national society and, just as importantly, in employing law, legal technocrats, and civil administrators as ameliorative forces to the use of violence. The state thus guaranteed safety and predictability in the here and now, and membership in it remained open and flexible.

Reflexive loyalty to the state and uncritical pride in it were simply the reciprocal responses that followed from the state's discharge of these functions. In the early stages of statehood, that loyalty in large part reflected the effectiveness of the state in discharging the obligations that it had undertaken. Thus, patriotism, as an instinctive manifestation of loyalty, did not become an integral aspect of statehood for about a century-and-a-half after the contours of the modern European nation-state were more or less delineated.¹⁰⁶ The European state system was, of course, exported to the rest of the world along with European commercial intercourse and imperial and colonial rule. In these other lands, its capacity to effectively mold military force and administrative institutions into an efficient organism again proved its efficacy, so much so that even when *de jure* imperialism and colonialism were abandoned, the inheritors of power in the new societies unanimously embraced the state structure and became

104. See Dinh, *supra* note 10, at 871.

105. Thomas Hobbes's *Leviathan*, published three years after the Treaty of Westphalia, remains the most powerful philosophical account of the rise of the European state. THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL* 11 (Michael Oakeshott ed., 1962) (1651).

106. See *supra* note 98 and accompanying text (explaining the origins of patriotism in the French Revolution).

some of its strongest proponents.¹⁰⁷ Indeed, the principle of self-determination, surely one of the strongest international law norms of the twentieth century, essentially became synonymous with the right of a group to form its own state. It is against this backdrop that the viability of the cosmopolitan ideal must be gauged.

To be sure, on the face of it, cosmopolitanism appears to be against the state. But this is a superficial reading. There is, in fact, nothing in cosmopolitanism that dismisses pride in or loyalty to the state.¹⁰⁸ What cosmopolitanism asks is for loyalty to the species to be seen as more important than loyalty to the state. There is a specific program behind this demand. The driving concern behind cosmopolitanism is the protection of human rights. And, as many proponents of human rights increasingly acknowledge, human rights are not merely claims against the state, but they depend on the state for their enforcement.¹⁰⁹ Cosmopolitanism and nationalism can thus coexist, provided, of course, that nationalism does not entail the hard-edged exclusivity that Dinh's patriotism appears to contemplate.¹¹⁰

And yet, although Dinh fails to acknowledge it, there is a fundamental sense in which his prescription of patriotism as an effective response to international terrorism derives from an understanding of reality that is similar to the cosmopolitan outlook. Cosmopolitanism is a product of the globalization process that became markedly pronounced following the disintegration at the end of the 1980s of the Soviet Union as a credible competing center of power. Francis Fukuyama, in his seminal work, captured the zeitgeist when he called the period "the end of history."¹¹¹ By triumphing over communism, liberalism had demonstrated that it was the culturally determined secular religion of not only the advanced industrial countries of Western Europe and North America, but of all societies. Both Dinh and the cosmopolitans take it as a given that their ideals will operate and be guided by this zeitgeist. Dinh's patriotism simply names the reality for what it is: a regime of American exceptionalism within an ostensibly international order. The cosmopolitan outlook would prefer to avoid

107. See, e.g., ANDERSON, *supra* note 86, at 109-10; HOBBSAWM, *supra* note 85, at 136.

108. See, e.g., Nussbaum, *supra* note 92, at 9.

109. See, e.g., Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 7 (1999); Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 THEORETICAL INQUIRIES L. 199, 211-12 (2004); Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1543-44 (1991).

110. See *supra* note 91 and accompanying text.

111. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (arguing that liberal democracy and free market capitalism, as the most fundamentally satisfying form of government and economy, represent the final stage of human government).

explicit acknowledgement of that reality by cloaking it in much more neutral sounding terminology.¹¹²

This is not a new dilemma. In more ways than Professors Dinh and Nussbaum might care to admit, the patriotism/cosmopolitanism dichotomy is reminiscent of the split among international communists in the 1930s. “Liberal democracy” assumed in the 1990s the sort of universalist moral and intellectual iconography¹¹³ that has been rivaled only by the sway that international communism held over elites in the 1930s. Just as international communism during that decade was split between those who, on the one hand, saw it simply as a tool for extending the hegemony of the Soviet Union and the defense of the “motherland” Russia, and those who, on the other hand, viewed it as a vehicle for spreading the “proletarian revolution” and the entailed ideal of “universal egalitarianism,” “liberal democracy” (and the frequently associated norms of “rule of law,” “human rights,” and even “the free market”) came to serve the mutual interests of the American patriots and the cosmopolitan internationalists. The result is what has come to be known as “liberal internationalism,” by which is meant the governing of the international system by self-proclaimed “liberal” intellectuals.¹¹⁴ The ultimate difficulty with cosmopolitanism is that, as followers of Trotsky and the Comintern found out in the 1930s, it is the realists who get to have the last laugh.

Realists are bound to win out for a simple reason: human nature, especially its perception of “self-interest,” whether rational or sentimental. Loyalty may be driven as well by fear as by love, and by greed as by selflessness; what is indisputable is that loyalty is owed to some tangible thing or person. For unquestioning loyalty to transcend an immediate temporal exigency, it must be institutionalized—almost always through

112. Cf. Benjamin R. Barber, *Constitutional Faith*, in NUSSBAUM, *supra* note 92, at 31-33. Barber notes:

American national identity has from the start been a remarkable mixture of cosmopolitan and parochialism.

. . . .

. . . [Nussbaum] seems diffident in the face of the actual ideals that animate American patriotism—however little realized they may be. Yet it is precisely these ideals that give parochial America its global appeal, these ideals that afforded Lincoln the opportunity to claim that America might yet be the “last best hope” for people everywhere, these ideals that draw peoples damaged by toxic patriotisms elsewhere to American shores.

Id.

113. See, e.g., BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1993).

114. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (discussing the New World Order as governance through a complex global web of government networks).

lifelong subliminal indoctrination.¹¹⁵ Humanity is an abstraction, not an institution. The state, the family, the school, or the next-door-neighbor, on the other hand, represent tangible institutions. These can command loyalty over time because they have particular meaning for the individual from whom loyalty is demanded. Reciprocity—whether direct or indirect, contemporaneous or “banked for the future”—is the primary driving force behind loyalty,¹¹⁶ and reciprocal relationships can only be established with institutions or persons—with those capable of reciprocating with incentives or disincentives. The relationship of the individual to the state is readily a forum for the reciprocal exchange of protection and loyalty—a relationship that is not easily approximated in the context of dealings between the individual and humanity at large.

V. TERRORISM AND THE POST-MODERN LIBERAL STATE

Thus far, in arguing that neither reversion to “patriotism” nor acceptance of the “cosmopolitan outlook” constitutes an appropriate response to the challenges of contemporary terrorism, I have gone along with Dinh’s basic premise that terrorism threatens the nation-state in fundamental ways. He adduces little evidence for this assertion. Here, I shall explain why that premise is wrong.

Preliminarily, it may be worth stating what the arguments that follow are not about. This response does not contest the right of a state to identify and strike back at the identified terrorists, nor of the citizens of the state to revel in and use whatever force they may have at their disposal in doing so. While my own preference may be for the use of law and legal proceedings, that preference is not what I seek to defend here. The issue that I seek to develop is the extent to which a society—and, more particularly, the American polity—in the name of a generalized “threat” posed by terrorism to its identity and constitution as a state, is free to employ whatever means it determines to be appropriate to maintain its status as a state. I contend first that “terrorism” as a concept poses no fundamental challenge to the modern liberal state and secondly, that the two suggested cures of militarism and patriotism do more harm than good.

115. Professor Nussbaum argues that public education can be successfully employed to inculcate primary loyalty to the human being. See Nussbaum, *supra* note 92, at 11-12. For the reasons that follow, I doubt that abstract classroom learning can overcome the lessons of daily experienced, interdependent relationships between individuals and the concrete institutions with which they routinely interact.

116. I have explored these points in the context of the development of the state in Africa. See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 CASE W. RES. J. INT’L L. 167, 247-48 (1997).

It is a commonplace observation—one that hardly requires citation to authority¹¹⁷—that for Americans, an event or an idea almost always becomes significant only when it is felt or otherwise perceived as being relevant to the life of the country.¹¹⁸ Whether this is an expression of innocence or of hubris is inconsequential for the purposes of this Commentary. What matters is that as in much else, the insularity of Americans to the problem of transnational terrorism was shattered on September 11, 2001. That experience transformed a problem hitherto barely acknowledged into one of transcendent importance, in the mastery of which all other priorities had to be set aside.¹¹⁹ The observer is thus confronted with two issues. First, identifying with some precision what is distinctive about the challenge to the nation-state posed by international terrorism as carried out on September 11, and second, the extent to which the total mobilization of a national population is the optimal response to the challenge.

We may start with an observation. Because international terrorism, like all terrorism, involves the use of violence, it presents a challenge to the nation-state's desire to monopolize or otherwise be the sole arbiter of the appropriate use of violence. But this challenge is not unique to international terrorism. All violent criminals and vigilantes, let alone domestic terrorists, unofficial paramilitary organizations, and guerrilla groups, routinely present this challenge. What counts has never been the mere presence of the challenge, but rather the capacity and efficacy of the state successfully to meet the challenge, preferably without the sort of full-scale popular mobilization that wearing patriotism on one's sleeve entails. Moreover, in measuring the scope of the threat, the yardstick cannot be whether the state can completely eradicate international terrorism,¹²⁰ but rather whether the state is capable of keeping the threat of international terrorism to that of an occasional event, so that the nationals of the state

117. But if one is really needed, then take a look at Ronald Steel, *Fight Fire with Fire*, N.Y. TIMES, July 25, 2004, § 7, at 13 (book review) (“[Terrorism] is new to Americans because nothing is truly real until it happens to us.”). This communal self-centeredness, it should be said, may well be the essence of patriotism, and so understood, Americans are extremely patriotic. See generally Pei, *supra* note 84 (rightly pointing out that if “patriotism” is properly understood as socially ordered rather than state-sponsored, Americans are as patriotic as any national group); Martha C. Nussbaum, *Introduction* to NUSSBAUM, *supra* note 92, at xi (describing the ubiquitous chant of “U-S-A U-S-A” at sporting activities). Few other societies require their children to pledge allegiance to the flag every school day.

118. President Bush was reflecting the national character when he informed the United Nations on Sept. 12, 2002 that if the international body did not act in accordance with the prescriptions of the United States, the United Nations would become “irrelevant.” See President George W. Bush, Remarks by the President in Address to the United Nations General Assembly in New York, New York (Sept. 12, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>).

119. See *supra* notes 53-59 and accompanying text.

120. The state has not eradicated either bank robbery or piracy on the high seas.

view its occurrence as an aberration subject to effective policing. And, of course, we must inquire into the effectiveness of suggested state actions—warfare, law enforcement, and/or patriotic mobilization—which are best calculated to yield this result at minimal socio-political and economic costs to the system.

There are three identifiable ways in which the events of September 11 have been seen as presenting unique challenges to the nation-state generally and to the United States in particular. First, because modern terrorists now have at their disposal such phenomenal technological capacity to inflict destruction on contemporary nation-states, they should be seen as posing a challenge different in kind from that of their predecessors¹²¹ and comparable only to the challenge that one state has always posed to another, namely that of annihilation, or at least significant alteration, of the boundaries of their relationships.¹²² Second, modern terrorism (or, at least, that presented by al Qaeda), is driven by so implacable a hatred of the values of liberal democracy that no coexistence between the two is possible. The liberal democratic state is thus faced with a simple choice: its own annihilation or the annihilation of the terrorist.¹²³ Third, the terrorism that is of special concern to the state is that from without.¹²⁴ This may be because under the liberal democratic rules of the game, outsiders should have no say in how politics is practiced within a liberal society and/or because the foreign terrorist is always a willing tool of a foreign state. If these are meritorious claims, then a response that seeks to heighten national self-consciousness may well prove to be appropriate. But they are hardly meritorious.

At a basic level, it might be observed that none of these claims directly challenges the idea of the state, even as defined under the Montevideo Convention.¹²⁵ Terrorism in and of itself does not speak to the existence

121. Cf. Bassiouni, *supra* note 37, at 83 (“The differences between [terrorism’s] various manifestations, however, have been as to methods, means, and weapons. As the means available to inflict significant damage to society improve, the harmful impact of terrorism increases. And as weapons of mass destruction become more accessible, the dangers to the world community increase.”).

122. See Dinh, *supra* note 10, at 869. It is worth pointing out, however, that the claim that the consequence of victory by one state over another must be the dismemberment of the latter is one of those conventional wisdoms that close factual investigation disproves. See, e.g., Peter Gowan, *A Calculus of Power*, 16 NEW LEFT REV. 47, 52-53 (2002) (stating that in the modern (as opposed to the feudal) era, Germany is about the only case in which a defeated great power has been disembodied, and even this has proved to be temporary).

123. Dinh, *supra* note 10, at 868 (“[T]here are people out there who would not only reject our institutions, ideals, and values, but who also find them so offensive that they would give up their lives to take the lives of innocents and to upend all that we hold dear.”).

124. See *id.* at 869. The extensive use of immigration laws as an anti-terror weapon in both the United States and the United Kingdom makes the same point. See *supra* note 79.

125. See Dinh, *supra* note 10, at 871-72.

(or right of existence) of a population within defined territorial boundaries under a government capable of establishing and maintaining international relationships with other states. The reason is quite simple. Terrorism is neither an ideology, an entity, nor a movement. It is simply a means or a tool that is wielded for highly diverse purposes, including sometimes furthering the asserted objectives of a state.¹²⁶ Terrorism is no more entitled to being assigned an animating cognitive existence than a gun or a knife is. It is one thing to declare communism or fascism an enemy and quite another thing to view terrorism as possessing the same sort of independent substantive existence. Nonetheless, let us play along with the rhetoric and see what can be said about terrorism as an enemy of the state.

There is no caviling the potency or easy availability of the modern technologies of destruction. Occurring in Washington and New York, centers of the global media networks, the September 11 attacks and the coverage that they received illuminated a reality that persons in as diverse societies as those of East Africa, the Middle-East, South-East Asia, and Western Europe had experienced quite a few times. Indeed, the massive injuries that terror attacks can inflict on a society were not unknown even in the United States. Six years earlier, Oklahoma, in the heartland of the country, witnessed a massive terrorist attack, admittedly locally grown rather than external. Moreover, beyond the fear of the injuries actually wrought by these modern technologies is the fertile imagination as to the devastation they are capable of inflicting. If nineteen relatively unsophisticated, knife-carrying and box cutter-wielding Arabs could cause the damages of September 11, then is there any limit to the capacity of haters of America armed with nuclear, biological, chemical, or radiological weapons to disable the country? The answer surely is “no.” It is thus better to confront such persons and their sponsors on their own streets and in their own caves than to have to confront them in the streets, malls, or sporting stadia of this country.¹²⁷ On its face, this would appear to be a

126. As Caleb Carr has pointed out, it is difficult to call the deliberate targeting of civilians—even in a time of war—as anything but terrorism. See CALEB CARR, *THE LESSONS OF TERROR* 6 (2002).

127. See, e.g., President George W. Bush, Address to the Nation (Sept. 7, 2003) (transcript available at <http://www.white.gov/news/releases/2003/09/print/20030907-1.html>). The President stated:

We have learned that terrorist attacks are not caused by the use of strength; they are invited by the perception of weakness. And the surest way to avoid attacks on our own people is to engage the enemy where he lives and plans. We are fighting that enemy in Iraq and Afghanistan today so that we do not meet him again on our own streets, in our own cities.

Id.

powerful motivation for patriotism. The need to wage a “war” is not here metaphorical, but literal. Because terrorists supposedly are likely to be armed with weapons of mass destruction, the state must confront them with as lethal an arsenal that it can bring to bear as it would in any total war.

But this response obscures the lessons of history and the fact that above all else, the state is a social institution that is also regulated by legal concepts. While we may viscerally recoil at the level of damage caused by the September 11 attacks, the use of modern technologies in causing those injuries did not itself present a novel challenge to society at large or to the state. In fact, terrorists at all times have availed themselves of the most advanced technologies of their time.¹²⁸ Similarly, societies at all times have countered by identifying and developing effective technological countermeasures.¹²⁹ Policing, rather than warfare or mass arousal of passions, has proved to be the more appropriate response,¹³⁰ and there is nothing in the modern technologies likely to be employed by terrorists that indicates that the state ought to respond any differently. To the contrary, it is precisely in the efficacy of its policing function—legitimation of power and morals through the adoption, interpretation and enforcement of laws—that the state establishes its preeminence over competing social institutions.

Contrary to the revisionist theorizing in the 1990s on the pacific proclivities of liberal democratic societies,¹³¹ it is quite common—in fact,

128. Thus, for example, in 1605, Guy Fawkes and his fellow conspirators sought to employ gunpower (at that time a technological novelty) in what today would be termed an act of terror against King James I and British parliament. See, e.g., ANTONIA FRASER, *FAITH AND TREASON: THE STORY OF THE GUNPOWDER PLOT* (1996). Similarly, the “Anarchists,” who were the quintessential terrorists of the late 19th and early 20th centuries employed the advanced technologies of their time, including the bomb and the rifle. And, of course, our own age of terror—9/11 notwithstanding—readily can be said to have commenced with the multiple hijackings in 1970 of Boeing 747s (then the epitome of modern technology) by Palestinian guerrillas.

129. The leitmotif of two works of fiction written at a time when the scourge of terrorism last commanded the sort of mass fear that it does today is instructive on this point. See G. K. CHESTERTON, *THE MAN WHO WAS THURSDAY* (American House 1908); JOSEPH CONRAD, *THE SECRET AGENT* (Random House modern library paperback ed. 1998). Both highlight the simple but eternal verities that our contemporary “war” on terrorism wantonly overlooks: the misguided tendency to equate passion with information, the importance of investigation over assumption, and the reality of the human costs that precipitous action invariably imposes on the not-so-privileged members of the community. For an exchange on the possible contours of legal responses to September 11, see, for example, Bruce Ackerman, *This Is Not a War*, 113 *YALE L. J.* 1871, 1871-74 (2004); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 *YALE L. J.* 1753, 1758-59 (2004).

130. See *supra* note 37 and accompanying text.

131. I have evaluated the cogency of this theorizing elsewhere. See Maxwell O. Chibundu, *The Other in International Law: ‘Community’ and International Legal Order*, U. of Md., Pub. Law Research Paper No. 2004-03 (draft, 2004) (especially nn. 29-31 and accompanying text); see also

all-too-frequent—for the United States to resort to war as a standard problem-solving tool.¹³² The costs of warfare, however, make its use a maximalist policy. It can only be sustained for a comparatively short period of time. But while democratic institutions do not effectively check the tendency to make war, they are quite powerful checks on the capacity of the state to sustain that war for an extended period of time.¹³³ The nature of terrorism—its systemic reliance on stealth, the diffuseness of the weaponry at its disposal, and its willingness to strike indiscriminately at the weak points of a society—assure that conflicts with it are likely to be long-lasting.¹³⁴ This demands patience and a resort to those social institutions that can be sustained over a long period of time. Neither war nor a heightened sense of patriotism survives manipulation over extended periods of time. The administration of law and of policing are more tailored to such undertakings, and they are singularly within the control of the state.

Integrated into the shock felt by Americans following September 11 was the desire to frame the victimization of the country by asking and answering the question: “Why do they hate us?” But while the politician and the proverbial American people might derive solace from the assurance of such bland responses as that “they” envy our power, wealth, pursuit of happiness, easy-going life-style, freedom of consumption and religion, equality of the sexes, constitutional protections, and civilization, crafting a reasoned response to this inquiry presents a genuine dilemma for the liberal internationalist. First, neither terror nor terrorism represents a substantive ideology. Rather, they are means for realizing substantive ends. To ask and answer the question why those who employ them “hate us” is to inquire into substantive motivations, which, for the liberal internationalist (as for liberalism, generally), opens the Pandora’s box of judgment-making about substantive values. Second, even the most cursory evaluation of these virtuous answers reveals them as being at best banal,

JOANNE GOWA, *BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE* (1999) (arguing that, as an empirical matter, the claim that “democracies” do not go to war with each other holds true only for the short period of the Cold War and is attributable not to any inherent characteristics of democracy, but to a coincidence of interest that may or may not persist in the post-Cold War international relations environment).

132. See, e.g., MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* (2002) (discussing the American tradition of fighting small wars to resolve conflicts). There is no American exceptionalism at work here. See generally JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2003) (illustrating the different strategies that the “great powers” use to advance their interests).

133. See Chibundu, *supra* note 131, at nn. 42-46.

134. And so, we are routinely and believably told that this “new kind of war” with terrorism is one of indefinite duration against uncertain targets and unknown persons and with no yardstick for measuring success.

and quite likely, dangerously solipsistic. These answers say a good deal more about our perception of ourselves than they do about our understanding of the terrorist, let alone the terrorist's understanding of our society. In any event, their focus is not on the terrorist's relationship or challenge to the state but on our imagination of the driving ideology behind a particular group of terrorists, those whom we conveniently classify as "al Qaeda."

It is now uniformly asserted that the September 11 attacks were perpetrated by al Qaeda, an entity having transnational reach. In many minds, al Qaeda has become synonymous with international terrorism. But explaining who or what constitutes al Qaeda is a much more problematic undertaking.¹³⁵ Beyond the association with one of its purported founders, Osama bin Laden,¹³⁶ there is little agreement as to what constitutes al Qaeda. Is it an organization, a network of organizations, or simply an ideology, i.e., a way of looking at the world? Who or what funds it? Who, if anyone, determines its policies? And, indeed, what are its objectives and policies? Reasonably concrete answers to these questions are essential if one is to decide whether al Qaeda poses more than a transient threat to the United States. In other words, is the conflict with al Qaeda any different in kind from the quite ubiquitous conflicts that governments have had (and continue to have) with violent outlaw organizations such as the Mafia and drug cartels, or such ideologically driven revolutionary groups as the Weather Underground, Red Army, Red Brigade, the Baader-Meinhoff Group or even the provisional IRA? Whatever their propensities and capabilities for violence may be, these organizations have not been seen as representing fundamental challenges to the state, certainly not sufficiently so to compel the sort of total mobilization of state resources and peoples that the "war" metaphor or the call to patriotism demand.

We can, of course, try to elide having to quantify the particularities of the threat that al Qaeda poses by focusing not on al Qaeda, but abstractly on that for which it purportedly stands. Here, the handy invocation of terms such as "Jihadists," "militant," "fundamentalist," or "radical" Islam superficially comes to the rescue.¹³⁷ Aside from their association with the religion of Islam, however, these terms hardly convey more information

135. For a quasi-official description of al Qaeda, see THE 9/11 COMM'N REPORT, *supra* note 2, at 47-70.

136. *See id.* at 55-57.

137. *See, e.g., id.* at 362 (asserting that the war is against "extremist Islam"); *see also* YOSSEF BODANSKY, *BIN LADEN: THE MAN WHO DECLARED WAR ON AMERICA* (2001) (examining the relationship between the extremist elements in the Muslim world, their leaders, and the more visible figures, such as Osama bin Laden); BERNARD LEWIS, *THE CRISIS OF ISLAM* (Modern Library ed., 2003) (discussing different forms of Islamic extremism).

than the term “al Qaeda”—or terrorism, for that matter.¹³⁸ The easiest way to avoid the ambiguities and amorphousness of these terms would be to ignore the adjectives and simply charge terrorism as the product of Islam, a religion whose fundamental tenets and beliefs are well-known.¹³⁹ And occasionally, some prominent and not-so-prominent Americans have done so.¹⁴⁰ If Islam were equated with international terror, or if international terror were seen as a scimitar in the service of Islam (a proposition not infrequently subliminally conveyed in the rhetorical references to “Islamic fundamentalism”),¹⁴¹ then the Islamic of Ummah (that is, of a community of believers) might be seen genuinely to pose a threat to the nation-state, at least as classically understood and developed in the West.¹⁴² Such an equation of Islam with terrorism is not only factually difficult to sustain, but also poses difficult intellectual and political dilemmas for the intelligentsia of liberal internationalism and of Western democratic societies.

Putting aside the profound practical and geopolitical problems inherent in waging a war of whatever kind against over one billion people for whom Islam is no less important than Judaism, Christianity, or secularism is for many Americans, and despite the willingness of some American intellectuals to speak of the clash of civilizations,¹⁴³ defining the terrorist threat along such a blunt religious or cultural cleavage contradicts a

138. See, e.g., Caleb Carr, *Wrong Definition for a War*, WASH. POST, July 28, 2004, at A19.

139. This assertion of course does not deny the existence of differences within Islam, nor is it intended to overlook the complexities of a religion and civilization that embraces Black Africans as readily as Iranians, and which has followers on all the continents. But notwithstanding nearly a millennium and a half of history, there are basic tenets of the faith that have transcended time, space, and language, and which are unique to it. See generally MARSHALL G. S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION* (1974) (discussing Islamic cultures and ideals).

140. See, e.g., *Notebook*, NEW REPUBLIC, Jan. 21, 2002, at 8 (reporting that the prominent Christian evangelists, the Reverends Jerry Falwell and Pat Robertson, had viewed the September 11 attacks and their provoked responses in Messianic terms); see also Seymour M. Hersh, *Moving Targets: Will the Counter-Insurgency Plan in Iraq Repeat the Mistakes of Vietnam?*, NEW YORKER, Dec. 15, 2003, at 48 (reporting that a senior Pentagon official in whom Defense Secretary Rumsfeld continues to have confidence had equated the Muslim world with “Satan,” and that Satan wants to destroy this nation as a “Christian army”).

141. See, e.g., BODANSKY, *supra* note 137, at 104 (examining how fundamentalist Islam shaped bin Laden as the supreme ideologue).

142. Cf. THE 9/11 COMM’N REPORT, *supra* note 2, at 562 n.4.

143. See, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996). As Samuel Huntington’s later book demonstrates, there is in fact an intellectual connection between narrow patriotism and subscription to the belief in the likelihood of “a clash of civilizations.” SAMUEL HUNTINGTON, *WHO ARE WE?* (2004). Both concepts rely heavily on cultural differentiation as the building block of a national community. Sources of culture, of course, can range widely, varying from language to religion, to socio-political beliefs, and to ideologies.

mainstay of liberalism. Since at least the Enlightenment era, the need for the state to remain neutral in the religious beliefs and practices of those over whom it rules has been a cornerstone of liberal thought.¹⁴⁴ The need to maintain this distance is particularly acute in an environment in which the same intelligentsia increasingly argues for universal human rights.¹⁴⁵ However much virtue may be found in secular humanist or “Judeo-Christian” norms, the liberal internationalist is uncomfortable with the appearance of Western hegemonic power being employed against Islam, and this is especially so in view of the sizeable population of Muslims whose citizenship and loyalty are claimed by Western countries. Moreover, Islamic societies have demonstrated as much unalloyed commitment to the organizational role of the state as have any other group of peoples. The concept of the ummah proved to be ineffectual in attempts to merge Egypt and Sudan or to create a United Arab Republic of Syria and Egypt.¹⁴⁶ Kuwaitis proved to be just as resistant to having their state absorbed by Iraq as Bangladeshis were to becoming part of Pakistan.¹⁴⁷ A common religious faith has not rendered the likes of Afghanistan and Algeria any more or less of a state than Roman Catholicism has Spain or Italy. Religion in these cases is only one component of the glue that seeks to bind societies into states. Sometimes it works; sometimes it is overridden by other forces including language and ancestral family ties.

In short, to equate international terrorism with Islam has the potential for presenting a paradoxical challenge to liberal societies. It is a challenge

144. The First Amendment of the United States Constitution captures the essence of this liberal doctrine. U.S. CONST. amend. I. Of course, the “separation of church and state” is not a pristine doctrine, and its application in particular cases continues to generate substantial debate, as evidenced by the recent litigation in the United States over whether the state can require impressionable children to recite the “Pledge of Allegiance” which includes the word “God,” and in France whether the state can bar Muslim girls from wearing the “hijab” in public schools. See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2305 (2004); cf. Pierre Tévanian, *BANNING THE HIJAB: Say No To Racial Discrimination*, LE MONDE DIPLOMATIQUE (Eng. Ed.), Feb. 2004 (arguing against exclusion of Muslim girls from French schools because of their wearing of the hijab); Henri Peña-Ruiz, *BANNING THE HIJAB: Say Yes to a Secular France*, LE MONDE DIPLOMATIQUE (Eng. Ed.), Feb. 2004 (arguing that the prohibition of the wearing of the hijab is central to French secularism, which in turn is essential to the functioning of law and freedom in French society).

145. See, e.g., *The Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, art. 18, U.N. Doc. A1810 (1948); *The International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, art. 18, U.N. Doc. A/6136 (1966).

146. See, e.g., ALBERT H. HOURANI & MALISE RUTHVEN, *A HISTORY OF THE ARAB PEOPLES* 401-15 (2d ed. 2002).

147. See BADRUDDIN UMAR, *THE EMERGENCE OF BANGLADESH: CLASS STRUGGLES IN EAST PAKISTAN, 1947-1958* (2004) (documenting a broad range of Bangladeshi resistance to becoming part of Pakistan).

less of physical violence to the state from without than it is to the intellectual coherence of liberal thought.¹⁴⁸ Indeed, that challenge and the increasing failure with which it has been met are evident in the increasing derogation by Western societies from hitherto unquestioned civil and human rights practices such as suppression of speech, framing of guilt by association, mass roundups of “suspects,” indefinite and unexplained detentions, denial of counsel, secret trials, and even resort to the use of extrajudicial killings.¹⁴⁹ To the extent that the modern liberal state is supposed to reflect a bargain between accountable governmental power and communal loyalty or patriotism, the tradeoff is now greatly in favor of state authority.

Faced with these challenges to the soul of liberalism, one way to avoid the import of the shift in power relationships has been to draw a distinction between the citizen and the non-citizen. Professor Viet Dinh does as much when he invites us to view terrorism in bifurcated terms. The terrorism that counts, he tells us, is that perpetrated by the foreigner, which may legitimately be countered, therefore, by the arousal of patriotism.¹⁵⁰ He is not alone in these sentiments. In litigating the propriety of employing arbitrary and indefinite detention as a tool in the war against terrorism, the United States government, its British ally and indeed their human rights opponents saw as a basic and necessary distinction the citizenship of the Defendant. The foreign citizen, argued the United States government, could be detained indefinitely and subjected to whatever minimal procedure (if any) the President deemed appropriate,¹⁵¹ while conceding that a United States citizen might be entitled to test the legality of his detention through a habeas corpus proceeding.¹⁵² Similarly, the British government authorized the indefinite detention of foreigners under its “Antiterrorist Act”¹⁵³ while readily acknowledging that British citizens could not be detained indefinitely, but must be accorded a prompt judicial

148. See, e.g., GEORGE P. FLETCHER, *ROMANTICS AT WAR* (2002).

149. See *supra* note 58 and accompanying text.

150. Dinh, *supra* note 10, at 881-82.

151. See, e.g., President George W. Bush, President Issues Military Order, (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

152. See Oral Arguments at 21, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html. That the United States Supreme Court ultimately rejected this position does not detract from the argument in the text. *Rasul v. Bush*, 124 S. Ct. 2686, 2693-98. *But see id.* at 2701-11. (Scalia J., dissenting) (contending that the government is entitled to make this distinction.) And indeed, notwithstanding *Rasul*, the Government continues to claim that whatever right to habeas corpus aliens may have, it does not include the right to counsel in such proceedings. See Neil A. Lewis, *New Fight on Guantánamo Rights*, N.Y. TIMES, July 31, 2004, at A18.

153. See *supra* note 79.

hearing.¹⁵⁴ And, in litigating the scope of presidential power to deprive a detainee of the right to counsel, civil rights proponents in the United States relied heavily on a purported distinction between the citizen whose right to counsel was argued to be unalienable, and the non-citizen whose right presumably could be dispensed with at the whim of the government.¹⁵⁵

But accepting the invitation to view terrorism through the prism of the citizen and the outsider is just as detrimental to “liberal international order” as is one founded on exploiting religious fissures. In the first place, the double standard inherent in the approach¹⁵⁶ undercuts yet another cornerstone of modern liberalism and indeed of international law norms. The idea of equal treatment, it is fair to say, has as much a claim to being at the core of contemporary liberalism as any other concept.¹⁵⁷ Of course,

154. See Upton, *supra* note 79. Upton notes:

This Government has added a further dimension to the UK’s anti-terror legislation. Instead of using the criminal law as its basis, it has arrived at the solution of grafting anti-terrorist provisions onto immigration law. This means that there is no duty of disclosure, no legal aid available to the accused—and none of the safeguards provided by the Police and Criminal Evidence Act apply. The checks to the power of the state in the form of due process, available in the criminal justice system, weakened though they might be in the case of terrorist legislation, do not exist at all under immigration law

“The flaw in the legislation is that it only applies to foreign nationals. UK nationals cannot be detained under it. What has happened is the same as has happened at Guantanamo Bay—a ‘Brit Cit’ cannot be detained but a foreigner can be interned.”

Id. at 6-7 (quoting Shami Chakrabarti).

155. See, e.g., Oral Arguments at 7-8, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html; see also Oral Arguments at 28-33, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html. The United States government is in accord:

The Justice Department said in a federal court filing on Friday that prisoners at Guantanamo Bay, Cuba, who were seeking to file petitions challenging their detentions were not entitled to access to their lawyers to do so.

The department said the prisoners were not entitled to see their lawyers because they were foreigners held outside the jurisdiction of the United States.

Lewis, *supra* note 152, at A18.

156. See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003) (arguing that, in balancing liberty and security, the United States has consistently relied on a double standard by imposing measures on foreigners that United States citizens would not tolerate if applied to all persons equally).

157. See, e.g., MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (critiquing the proceduralist bent in liberal democratic theory).

this conclusion does not mean that societies may not engage in rational classifications. But the burden of explaining the reasonableness of a classification surely falls on the classifier. It may be that, however debatable, distinguishing between Muslims and Christians or Arabs and Africans in the fight against terror can be defended rationally on prophylactic or precautionary grounds.¹⁵⁸ It may also be rational for the United States to insist that only its nationals or citizens work as baggage inspectors at its airports.¹⁵⁹ But it is a good deal more difficult to explain on rational grounds a blanket distinction between the national and the outsider in identifying who constitutes a terrorist. This is especially so if, as I have argued, there is no inherent conflict between the concept of the state and the use of terror.¹⁶⁰

The injustice of the dichotomy is sharpened by the emergence of an opposite trend in the commercial arena. In recent years, the United States—and the West generally—has employed its preponderant global economic power to enshrine as a matter of both conventional and normative international law that it is (or should be) impermissible for national governments to discriminate between nationals and foreigners in the extension of legal protection to their investments.¹⁶¹ The position has gained significant international adherence in recent years.¹⁶² It would indeed be manifestly hypocritical to maintain that nationality ought to play a decisive role in determining the process due one whose liberty is to be extinguished but not one whose property is to be taken.

A second ground for approaching with diffidence the loyal patriot/outsider divide in the fight against terrorism is that its byproduct

158. See, e.g., Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES, July 30, 2004, at A14 (reporting that in response to requests from the Border and Customs Protection Division of the Department of Homeland Security, the Census Bureau has provided specially tabulated population statistics on Arab-Americans, “including detailed information on how many people of Arab backgrounds live in certain ZIP codes. . . . sorted by country of origin”); see generally SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT, *supra* note 10 (evaluating the rationality of differential treatment among American citizens in the war against terrorism).

159. See 49 U.S.C.A. § 44935(e)(ii) (West Supp. 2004).

160. See *supra* note 125-26 and accompanying text. The argument in the text, of course, does not challenge the individualized treatment of persons suspected to be “terrorists.”

161. See, e.g., Saamir Elshihabi, *The Difficulty Behind Securing Sector-Specific Investment Establishment Rights: The Case of the Energy Charter Treaty*, 35 INT’L LAW. 137 (2001) (suggesting that the right to invest should be extended to foreigners as well as nationals); Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT’L L. J. 469, 500 (2000) (suggesting that non-discrimination against foreign investment is a notable accomplishment of bilateral investment treaties).

162. See, e.g., *Eletronica Sicula S.P.A. (U.S. v. Italy)*, 1989 I.C.J. 15, 64 (July 20); A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT’L. L. & POL’Y 57, 57-58 (1998).

may well be to vitiate one of the strengths of the modern state. As I have explained, the state has become the dominant institution of our age largely because of its flexibility and adaptability.¹⁶³ This attribute has been evident as much in the development of membership criteria as elsewhere,¹⁶⁴ and no modern state has been as flexible in this regard as the United States. Here, we are met with a paradox. Although nationalism (especially its variant, so-called “ethno-nationalism”) is often pejoratively presented as a closed system that is grounded on consanguinity,¹⁶⁵ most modern states in fact have opened up and are continuing to broaden the grounds for admittance and national membership. This is true not only of former imperial states like France and the United Kingdom, or “settler” states such as the United States, Canada, and Australia, but also even of hitherto highly nationalistic and ostensibly homogeneous societies like the Federal Republic of Germany.¹⁶⁶ For all of these societies, flexible immigration rules have proved to be essential in order to accommodate the changing character of the state, whether in order to absorb the detritus of decolonization and Cold War policies or to meet new demands for labor in a post-industrial age.

Nor is national membership to be viewed narrowly in terms of citizenship alone. To the contrary, reinforcing its tendencies towards flexibility and institutional accommodation, the modern state seeks to satisfy the utilitarian needs of its varied constituencies by permitting and encouraging varying levels of participation. Thus, in the context of the United States, for example, citizenship might be acquired passively through birth or actively through the process of naturalization.¹⁶⁷ Those who are not citizens may nonetheless actively participate in the communal life of the society as “permanent residents.”¹⁶⁸ To insist on a dichotomy between the “citizen/patriot” and the non-citizen is not only to overlook the complexities of the relationships that exist within the modern state, but also to inject a potentially detrimental roadblock to the flexible machinery that has made the state the efficacious social institution that it has become.

163. See *supra* note 105 and accompanying text.

164. See *supra* note 105 and accompanying text.

165. Compare ANTHONY W. MARX, FAITH IN NATION: EXCLUSIONARY ORIGINS OF NATIONALISM (2003) (demonstrating that European nationalism, no less than contemporary “Third World” nationalism, was as much the product of exclusionary politics as it was of shared or enlightened solidarity), with Chibundu, *supra* note 131 (arguing that the exclusion of the “other” is in fact essential to the formation of any community, including that of the nation state).

166. See GERMAN EMBASSY (LONDON), REFORM OF GERMANY’S CITIZENSHIP AND NATIONALITY LAW (2000), at http://www.german-embassy.org.uk/reform_of_germany_s_citizenshi.html (last visited Sept. 30, 2004).

167. See U.S. CONST. amend. XIV, § 1.

168. See, e.g., 8 U.S.C.A. §§ 1101(20), 1255, 1427 (West 2004).

VI. CONCLUSION

Like poverty, “patriotism” and “terrorism,” shall always be with us. The challenge that contemporary societies face is the minimization of their destructive consequences. The challenge is both moral and political. As a legal academic with primary interest in international law, my preference is that societies employ, as much as feasible, legal tools in coming to terms with the challenge of international terrorism.¹⁶⁹ It is impossible, however, to ignore the role that fear plays in conditioning societal responses and the fact that law often falls flat in the face of such challenges. But the notion that patriotism responsibly can be brought to bear on the problem of international terrorism seems to require not only that we ignore history, but also that we suspend our rational faculties. Can one really watch the recent news items of Afghans in barely seaworthy boats being denied landing by well-equipped naval ships and not recall incidents of Jewish and Vietnamese refugees being treated similarly? Is it really the case that our humanity today is so fundamentally more advanced and civilized that we need not acknowledge the base human proclivities manifest in the abuse of power at Guantanamo Bay or Abu Ghraib? Liberal democratic societies may well be responsive to the push and thrust of the citizenry in whose name state power is exercised. Liberal democracy has yet to breed self-centeredness and fear of the unfamiliar and the outsider out of the body politic. Until it does, let us accept patriotism as unavoidable but allow it no more than the grudging recognition to which it may claim entitlement by virtue of pedigree.

169. As a human being and citizen, I would prefer, of course, that governments and societies seek to address the substantive issues that provide plausible justifications for terrorism.