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Timothy K. Kuhner*

Remarks by other panelists at today's conference\(^1\) have clarified and problematized increases in executive power, detriments to human rights, and the emergence of an ever-more adversarial and evasive political environment that removes transparency, accountability, rationality, and even principle from legal discourse. These remarks eulogize the war on terrorism's non-human casualties. I wish to point out with acute remorse that these casualties all belonged to a single family and that this family constituted our tradition. This was a tradition of liberal democracy, where torture was off the table and procedural protections were a centerpiece. Aggressive warfare signaled criminality, not patriotism. Human dignity, the rule of law, and the intelligent pursuit of peace, prosperity, and stability emblazoned the halls of this place where we resided. This tradition was hard-won; its emergence costly and far-sighted, a precious gift of heritage that we were tasked with maintaining, or even improving.

I also wish to say that although the rhetoric of our tradition’s demise is appealing for its dramatic excess, it is too conceited for me to maintain to the end, for it is not the demise of our tradition that we are witnessing but our abandonment of the same. The tradition will endure, at least in a cryogenically frozen state, until new adherents seek it out. My position, however, is that we should re-adhere to it now and save future generations the trouble. Here, focusing on our treatment of detainees and

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1. Roger Williams University School of Law, Legal Dilemmas in a Dangerous World: Law, Terrorism, and National Security, (Nov. 9, 2007).
aggressive warfare—just two of the ways we have abandoned our tradition—I will lay out a brief civilizational requiem. This redescribes the war on terrorism in a way that makes its excesses all the less appealing and its broader consequences all the more clear.

I. A DIALECTIC OF EXTREMISM

I submit that the supposed conflict between terrorists and the architects of our war on terrorism is in reality a collaborative relationship between two groups of extremists whose modes of action undermine civilizational commitments. The "clash of civilizations" predicted by Samuel Huntington and endorsed by Osama Bin Laden and George Bush alike ought to be described

2. Referring to the U.S. invasion of Afghanistan post 9/11, Bin Laden sees a united front in the West: "[t]he entire West, with the exception of a few countries, supports this unfair, barbaric campaign, although there is no evidence of the involvement of the people of Afghanistan in what happened in America." He then goes on to describe creed as the basis that divides the East from the West:

"This war is fundamentally religious. The people of the East are Muslims. They sympathized with Muslims against the people of the West, who are the crusaders. Those who try to cover this crystal clear fact, which the entire world has admitted, are deceiving the Islamic nation . . . Under no circumstances should we forget this enmity between us and the infidels. For, the enmity is based on creed . . . We should also renounce the atheists and infidels. It suffices me to seek God's help against them. God says: 'Never will the Jews or the Christians be satisfied with thee unless thou follow their form of religion.'"

Also notable in this same speech is Bin Laden's characterization of the conflict itself, which he defines as religious and having nothing to do with terrorism, except the terrorism that he believes the West has consistently committed against Muslims. Bin Laden Rails Against Crusaders and UN, B.B.C. News, Nov. 3, 2001, available at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1636782.stm. Phrases such as "the crusader-Zionist alliance" also deserve mention. Statement of the World Islamic Front, http://www.fas.org/irp/world/para/docs/980223-fatwa.htm.

3. On the night September 11, 2001, the President addressed the nation: "Today . . . our way of life, our very freedom came under attack." George W. Bush, President, United States, Address to the Nation (Sept. 11, 2001), available at http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html Here, I wish to be cautious, because it is the case that Bush has been careful in his comments about Muslims generally and making a distinction between terrorists ideology and Islam. But little can be said to commend his description of terrorists' motives: he wants the American public
as the corruption of civilizations. Huntington famously predicted in 1993 that the primary source of conflict in the world we now inhabit would be cultural differences: "The fault lines between civilizations will be the battle lines of the future," he warned; "[t]he great divisions among humankind and the dominating source of conflict will be cultural." It quickly became fashionable to believe that we would inevitably generate conflict just by being ourselves and staying true to our own values. In reality, however, the diverse set of conflicts relating to terrorism world-wide have been spurred by actors who dishonor their own civilizational commitments. Leaders on both sides distinguish themselves not by being true to their civilizations, but by attempting to corrupt their civilizations.

The underlying values and tactics among both camps are fundamentally similar in their violation of foundational social mores and legal norms. The Bush administration and Al Qaeda employ unlawful modes of warfare—preemptive warfare and terrorism are violations of fundamental customary and treaty prohibitions in international law. Each denies civilized treatment to its captives—indefinite detention without charges, torture, and beheadings all contravene sacred norms of due process and civilized treatment. And yet, each camp proclaims itself the

to believe that we are being attacked because we are free, because of who we are, and what we represent, when in fact transnational Jihadis have always had a practical set of goals relating to concrete foreign policies relating to the Palestinian people, the U.S. military presence in Muslim lands, and so on.


5. The Clash of Civilizations, supra note 4, at 454.

6. By referring to Al Qaeda by name, I do not mean to exclude other transnational jihadis. There are of course multiple groups of doctrinaire jihadis, such as the Islamic Group, Islamic Jihad, and al-Tawhid wa al-Jihad. FAWAZ A. GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL 1 (2005).

7. It is in fact remarkable that the United States continues, post invasion of Afghanistan, to apply a war paradigm in the first place. At the time of the World Trade Center bombings, there was a legal presumption that terrorism was not an act of war. See Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1012 (2d Cir. 1974) ("The cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities."). In a trial that ensued after 1993, a federal court of appeals upheld the conviction of a terrorist acting on U.S. soil for conspiracy to levy war against the United States. United States v.
guardian of sacred values—those of Western freedom on the one hand and Islamic faith on the other—while simultaneously employing tactics that can only be described as the antithesis of those same values. Just as the great majority of Muslims decry Al Qaeda\(^8\) (never mind suicide bombing and the beheading of hostages), the majority of Americans disapprove of the Bush Administration\(^9\) (never mind the use of torture and preemptive warfare).

The underlying similarity between both sides’ derogations reveals another crucial clarification: the only clash to be seen is one between extremists on both sides, our extremists and their extremists. And upon closer examination, it may not be so much of a clash as a symbiosis. Each side proclaims to its respective constituencies that its actions undermine the enemy, while in reality each camp entrones the other. The attacks of September

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Rahman, 189 F.3d 88, 123 (2d Cir. 1999) ("To support a conviction for seditious conspiracy under 18 U.S.C. § 2384, the Government must demonstrate that: (1) in a State, or Territory, or place subject to the jurisdiction of the United States, (2) two or more persons conspired to ‘levy war against’ or ‘oppose by force the authority of the United States government, and (3) that the defendant was a member of the conspiracy.’). Despite using the word “war,” this is a criminal charge. The Government pressed criminal charges against those responsible, fighting terrorists in the United States in the Article III courts, not by employing the laws of war on its own territory. See Stacie D. Gorman, In the Wake of Tragedy: The Citizens Cry Out for War, but Can the United States Legally Declare War on Terrorism?, 21 PENN ST. INT’L L. REV. 669, 676 (2003) (“the fact that the terrorists were tried in the court system--not fought on the battlefield--indicates that terrorists are criminals, and not soldiers of war. Although the charge against them was conspiracy to levy war against the United States, this was a criminal charge, punishable with jail time, not an act of warfare to be retaliated against with missiles.”). One might compare our shift in policy with Spain’s staying the course, prosecuting in civilian courts those responsible for Al Qaeda’s bombing of a Madrid train station. Some people were actually acquitted, but many were sentenced to long prison terms. But they held these trials under conditions of the rule of law.

8. GERGES, supra note 6, at 270 (“[T]he dominant response to Al Qaeda in the Muslim world was very hostile, and few activists, let alone ordinary Muslims, embraced its global jihad . . . [Moreover,] a broad representative spectrum of Arab and Muslim opinion makers and Islamists utterly rejected bin Laden and Zawahiri’s justification for their attacks on America and debunked their religious and ideological rationale.”).

9. In the most recent New York Times/CBS News poll, for example, only 28% of Americans approved of the job that President Bush is doing. David Leonhardt & Marjorie Connelly, 81% in Poll Say Nation is Headed on Wrong Track, N.Y. TIMES, Apr. 4, 2008, at A1.
11th have triggered a new era of fear and executive power, giving President Bush and his neoconservative handlers the opportunity they needed to invade Iraq and weaken the American commitment to rights. The invasion of Iraq has succeeded in creating a strong terrorist base where before there was none and elevated recruitment levels world-wide.  

Meanwhile, the American violation of civil and human rights has weakened core alliances and sympathies, playing directly into the hands of the terrorists. Al Qaeda and the Bush administration have established a sort of dialectic, a dialectic of extremism, in which each camp legitimates and strengthens the other. And this is to say nothing of the operational and financial linkages between jihadis and Americans in Afghanistan during the 1980s, a theater of war where jihadis acquired “practical experience in combat, politics, and organizational matters.”

II. OUR TRADITION

As this conflict escalates—the more we torture detainees and drop bombs that kill civilians, the more they send their operatives to our shores—hatred and fear will increasingly well up in our guts, and we, the collective human “we,” will come to forget who we are and what we stand for. It is imperative to remember and to repeat the observation that most fairly characterizes this new era: our extremists and their extremists undermine the core

10. See GerGes, supra note 6 and accompanying text.
12. See GerGes, supra note 6, at 12, 14 (“Despite subsequent denials by both jihadis and American officials, the two camps were in a marriage of convenience, united in opposition to godless Communism.”). Symbiosis indeed. Jihadis and American hawks exhibit a classic case: “a relationship between two people in which each person is dependent upon and receives reinforcement, whether beneficial or detrimental, from the other.” Random House Compact Unabridged Dictionary 1926 (Special 2d ed. 1996).
13. I do not believe it is coincidental, for example, that citizens of countries facing frequent terrorist attacks are far more tolerant of torture than citizens of countries that rarely face terrorist attacks. In a recent survey, Israelis and Iraqis were far more tolerant of torture as official policy (42-43% approving) than were citizens of the other twenty-three other countries polled (29% on average supporting some torture). See One-Third Support ‘Some Torture,’ B.B.C. News, Oct. 19, 2006, available at http://news.bbc.co.uk/2/hi/in_depth/6063386.stm#table.
values that define Western and Islamic civilizations. Here, I mean only to comment on our fidelity to our own mores, not their fidelity to their own.

The treatment of prisoners makes inroads to certain mores. We might bristle at our mind-boggling rate of incarceration. We are home to only 5% of the global population, but almost a quarter of the global prison population. But America never promised not to lock a lot of people up. This after all can partly be attributed to a democratic tradition of electing judges and prosecutors at the state level. "Law and order" remains a strong cultural value here. But our law and order culture is tempered by a commitment to rights that spans domestic and international law: due process, the prohibition on unlawful searches and seizures, equal protection, the prohibition on cruel and unusual punishment, adherence to the Geneva Conventions, the Torture Convention, the Civil and Political Rights convention, and so on. Although it is true that we did not promise not to lock them up, we have promised due process and civilized treatment.

Bring any great voice of our tradition to Abu Graib and Guantanamo Bay and each of us would hear expressed the civilizational agony we feel in our guts. Although on foreign ground, these are our prisons and Dostoyevsky said that it was here that "the degree of civilization in a society is revealed."

Even complex figures faced with the responsibilities of power beg us to consider the linkage between civil liberties and civil society, civilized treatment and civilization. As Chief Justice Burger put it, "the way a society treats those who have transgressed against it is evidence of the essential character of that society."

15. See, e.g., MARSHALL SHAPO, TORT LAW AND CULTURE 278-79 (2003) (discussing the tensions between law and order culture and the notion, expressed in police misconduct actions, that nobody is above the law).
17. Hudson v. Palmer, 468 U.S. 517, 523-24 (1984) ('The continuing guarantee of these substantial rights to prison inmates is testimony to a
Churchill gives the point more of what is due to it:

A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate . . . , and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man, these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.  

We should hope that our unconscionable treatment of prisoners abroad indicates the sort of decline in strength and virtue that Churchill warned of, and not an abandonment of strength and virtue altogether.

Yet, the Administration’s efforts to legitimate indefinite detention, change the definition of torture, and manufacture a doctrine embracing illegal warfare suggest the worst of these two scenarios. This would seem an effort to redefine strength—strength in power, strength in brutality, strength in shock and awe—and an effort to reshape virtue, now the vehemence of one’s self protection and the zealousness of one’s pursuit of national interest. And so aggression becomes strength, and single-minded pursuit of security and particular advantages reshapes the contours of virtue.

At one point, there was strength in reasoned restraint and virtue in the rare form of compassion one might feel for an enemy. Like many hard-won traditions of conscience, these meanings and the courage to pursue them are located not solely within one nation, but rather within a community of nations that has derived shared lessons from history. These lessons, too civilizational in scope to be proprietary, are forward looking. Their application is surely the great labor of civilizational belonging, surely a great benefit of civilizational belonging as well, for it is in living up to belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society.”

these lessons that we do what we know to be right and avoid the entanglements that flow, inevitably, from misdeed.

The basic ethics of the long-standing, but threatened, civilizational project in which Americans claim membership are special in substance, not function. Functionally, one is deontological and the other is consequentialist. The first tells us that the means matter; the second tells us that the ends do too. But the moral value, the substance, at the heart of our deontological ethic is nothing less than human dignity, and the goods that our consequentialism seeks to maximize are nothing less than peace, stability, and prosperity. Perhaps all traditions are the same when viewed at this high level of abstraction, varying only in how dignity and stability are defined, so let me be more specific: indefinite detention without charges, torture, and aggressive warfare violate both of our civilizational ethics. This becomes a gentle reminder that we consider such means wrong per se and that we already know that the ends professed for such means will remain elusive. This much our tradition has learned already at tremendous costs; this much we ignore only at the sake of losing ourselves and having to begin anew in a state of savagery.

Our deontological project of rights against the government is indeed civilizational in scope and importance. In our tradition, the protection of human dignity has undergone two separate revolutions—one American (1776), the other international (1945)—but its evolution began before either and has continued after both. The Supreme Court has said so quite clearly:19 "[O]wing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally."20 And since the conclusion of the American Revolution, we have been improving upon our "ancient liberties," for these have been rooted in the "forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-

19. The foregoing quotations and legal standards have evolved through the Court’s cruel and unusual punishment and due process jurisprudence—constitutional protections transplanted from the English Declaration of Rights of 1688 and the Magna Carta.

government."\textsuperscript{21}

Our project of self-government of course began with the declaration of seemingly insincere ideas. How could we profess "unalienable" rights to life, liberty, and the pursuit of happiness while holding slaves? How could we declare consent of the governed the legitimizing feature of any government while considering a large portion of the population to be mere property, by nature ineligible for rights and self-authorship?\textsuperscript{22} Where were the political equality and popular sovereignty we professed? Because the Declaration of Independence was believed by the colonists to be compatible with slavery, we must recall its words at present. The improvement in our ancient liberties, this process that has given new expression and greater effect to our ideals, defines our civilizational commitment to rights as hard-won, as a series of lessons learned. We considered inhuman and unworthy of rights an entire class of human beings while simultaneously holding up human freedom as our master value, our claim to legitimacy and respect. It was not until the slaves were free that America could even begin to live up to her principles. This evolution of rights reunited us with our conscience and our tradition. Indeed, the tradition of rights in this country has all the makings of an identity, a politically and philosophically genealogical feature that connects America with a tradition that is at once of her and beyond her.

The Supreme Court has proven itself an astute genealogist in these regards. It has described those due process rights valid against the states as "implicit in the concept of ordered liberty," and part of the "very essence of a scheme of ordered liberty."\textsuperscript{23} Due process rights are those that stand between a human being

\textsuperscript{21} Id. at 530 ("[T]t is better not to go too far back into antiquity for the best securities for our 'ancient liberties.' It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.").

\textsuperscript{22} And for many years after the Declaration of Independence, we might note that its principles posed no obstacle to treating Native Americans as a savage feature of the land that we were free to eradicate, another category of non-persons in which rights could not fully vest.

and indefinite detention without charges or trials without procedural guarantees. To abolish such rights, the Court has said is to "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 24 Justice Cardozo famously noted that a "fair and enlightened system of justice would be impossible without [such rights]." 25

Eighth Amendment jurisprudence reflects a similar preoccupation with the civilizational pedigree, indeed identity-constituting importance, of fundamental rights. In explaining why expatriation is cruel and unusual, a plurality of the Court observed that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." 26 A majority of the Court affirmed this comparative law method of analysis in 2005, 27 as well as the following progression of meanings. Underlying and flowing through the Eighth Amendment, the Court has found "the principle of civilized treatment" 28 and a process of "evolving standards of decency that mark the progress of a maturing society." 29 Hearing these phrases alerts us that it is this clause in our Bill of Rights that prohibits torture and connects us with a notable trajectory from savagery to civilization. The Court contextualizes our tradition of Eighth Amendment protection within the "affirmation of certain fundamental rights by other nations and peoples;" 30 this, the Court believes, "simply underscores the centrality of those same rights within our own heritage of freedom." 31 These words ring of

24. Id. (internal quotations omitted).
25. Id. Justice Cardozo died the next year. Palko is one testament to his judicial philosophy, one relevant aspect of which he gave to us in these words: "The great generalities of the Constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (Yale U. Press 1921).
27. Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").
30. Roper, 543 U.S. at 578.
31. Id.
deep cultural and civilizational significance. All of this, in turn, can be grounded upon a transcendental source that would seem to explain cross-border similarities and complicate derogation: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."32

The dignity of man perhaps never received such a blow as during World War II. Retooled as human dignity, this basic concept came to underlie the United Nations Charter and the international revolution it codified.33 The dropping of two atomic bombs within a month and a half after the signing of the Charter renders facile any descriptive claim of human dignity's triumph,34 but its assent is, at least, normatively clear. "We the Peoples of the United Nations [are] Determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person," the preamble explains.35 Responding to the ways in which human dignity and peace were compromised, the Charter prohibits aggressive force (i.e., preemptive war). Another body of law—including the Geneva Conventions and their protocols, the Hague Conventions, and customary law—regulates the conduct of warfare, requiring, inter alia, civilized treatment of detainees and minimization of civilian casualties.36 Also responding to the

32. *Trop*, 356 U.S. at 100; accord *Atkins*, 536 U.S. at 311-12. I understand perfectly well, and doubt very much that this will be lost on readers, that as a formalistic matter the extraterritorial application of the Bill of Rights is generally dubious. I feel, however, that as a civilizational matter, and as a self-definitional matter, that the seriousness of the values and the depth of the tradition cannot be so easily waived by a technicality which, importantly, is mostly rectified by our membership in human rights treaties and the Geneva Conventions.

33. It would also be fair to say that human dignity, together with pragmatic concern over Hitler's expansion, motivated U.S. involvement in World War II.

34. The Charter was signed on June 26, 1945, and ratified on October 24. August 6 and 9 of the same year stand as that moment in history when Hiroshima and Nagasaki were sacrificed to cause Japan's surrender. For commentary on these events, see Barton J. Bernstein, *Introducing the Interpretive Problems of Japan's 1945 Surrender: A Historiographical Essay on Recent Literature in the West*, in *THE END OF THE PACIFIC WAR: REAPPRAISALS* 36-37 (Tsuyoshi Hasegawa ed., 2007).


36. Regarding the *jus ad bellum*, see U.N. Charter art. 2, para. 4, art. 51; regarding the *jus in bello*, see, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug.
causes of World War II, the Charter establishes international collaboration in promoting human rights.\textsuperscript{37}

And then, in the Universal Declaration of Human Rights, which itself was labeled "the common standard of achievement for all peoples and all nations," there came a further solemn proclamation: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."\textsuperscript{38} The Declaration admonishes governments that human rights are the entitlement of "[e]veryone . . . without distinction of any kind, such as race . . . religion, political or other opinion, national or social origin, property, birth or other status," and that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs . . . or under any other limitation of sovereignty."\textsuperscript{39} The International Convention on Civil and Political Rights (ICCPR), one of the foundational human rights treaties, reasserts the basic deontological thrust of human rights and connects up with the Eighth Amendment: "these rights derive from the inherent dignity of the human person."\textsuperscript{40}

Through entangled treaty law and customary law that makes good on these precepts, the international revolution has established that governments are not free to treat people in their control however they please. This is the crucial limitation on sovereignty established in law by the human rights movement. The prohibition on torture, in fact, has been elevated to the status of a \textit{jus cogens} norm, a rare international law designation holding derogation to be impermissible under any circumstance, including

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\item 37. \textit{See}, e.g., U.N. Charter art. 1 ("The Purposes of the United Nations are: . . . To achieve international co-operation . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.").
\item 39. \textit{Id.} at Art. 2.
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Indeed, if human dignity is inherent, then certain rights are inalienable, and accordingly some things simply cannot be done. Sole, despotic dominion of territory and persons thereon is thus rescinded from states. The international revolution is an evolutionary leap in the "standards of decency that mark the progress of a maturing society." How could our prerogatives to protect the dignity of man and make good on our own heritage of freedom be taken seriously if states were free to pursue genocidal policies or conquer each other at will? It follows in an essentially evolutionary way that new rules and structures had to be established to protect human dignity in an interdependent community of states.

And so respect for fundamental rights is part of the longstanding civilizational project in which we claim membership. From the Magna Carta to the United Nations Charter, the protection of human dignity through fundamental rights has figured in our heritage and best efforts at producing a just society. The rescinding of civil liberties at home, indefinite detention without trial and torture abroad—from waterboarding to extraordinary rendition—and the waging of preemptive warfare in Iraq all speak to an abandonment of our own heritage of freedom; the principle of civilized treatment forgotten, the principles of justice so rooted in the traditions and conscience of our people now uprooted, plucked. Civilization forsaken. Our authority, freed from civilizational constraints, knows no bounds—we are not constrained by human dignity any longer, not limited by constitutional law, perhaps not even aware of international law. What hubris! Our extremists have reclaimed the right of conquest.

41. See Vienna Convention on the Law of Treaties, Art. 53, U.N. Doc.A/Conf.39/27. 1155 U.N.T.S. 171, available at http://www1.umn.edu/humanrt/instree/b3ccpr.htm ("a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."). On the jus cogens status of the prohibition on torture, see, for example, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n; Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) ("while not all customary international law carries with it the force of a jus cogens norm, the prohibition against official torture has attained that status.")

over foreign lands and the ability to revoke the personhood of those who threaten us. They have returned to savagery and the country cannot long remain autonomous from the flavor of its official acts. The rights of adverse possession will soon flow to those who just recently began as unlawful occupiers of the American tradition. Granted, these disseisors' occupation of our tradition has not always been obvious; indeed, secrecy has abounded. Nevertheless, the occupation has been notorious, hostile and brazen; our land has been altered. We must claim trespass, less we acquiesce and cede title.

But perhaps the neoconservatives are right: in an era of terrorism, we cannot afford to maintain naïve principles, these inconvenient traditions, this outmoded quality of conscience, for it is the first duty of government—they remind us—to protect the homeland. Once all terrorist groups of global reach are defeated, then we can return to Eden. Here we come to the consequentialist ethic at the heart of our civilizational project: the search for the good ends of stability and peace. I suspect most of us might come around to this ethic eventually if it were not so empirically unsound when applied to torture and wars of aggression. General David Petraeus, Commanding General of Iraq, has refuted the argument made by our extremists:

"Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. That would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone 'talk;' however, what the individual says may be of questionable value." 43

Indeed, the U.S. Army's own field manual contains a long-standing prohibition on torture. 44


44. See FM 34-52, Ch. 1, Department of the U.S. Army, Washington, DC, May 8, 1987, available at http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/chapter1.htm ("PROHIBITION AGAINST USE OF FORCE[.] The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is
Besides producing bad intelligence, torture produces more terrorists. Fawaz Gerges, in his authoritative study of how doctrinaire jihadis turned their sights from local targets to the West and its allies, notes that “Arab/Muslim prisons, particularly their torture chambers, have served as incubators for generations of jihadis.” He links this “bloody history of official torture” with a “culture of victimhood and desire for revenge [that] enables the movement to mobilize young recruits and constantly renew itself.”

Preemptive war has also proved spectacularly counterproductive for the goal of increased security. Gerges recounts study after study—including the findings of the director of the U.S. Defense Intelligence Agency, Saudi Arabia’s interior minister, and virtually all American, European, and Arab analysts to have considered the matter—that report an iron-clad consensus: U.S. policy pursuant to the war on terrorism, including the invasion and occupation of Iraq, “radicalizes Arab public opinion,” “fuel[s] Islamic resentment,” provides recruiting tools and a recruiting ground, and “play[s] directly into the hands of Al Qaeda and other militants.” Admittedly, the security issue would be a more complicated one had Saddam Hussein indeed been tied to Al Qaeda or capable of threatening the United States, which of course he was not. The many spurious rationales for invading Iraq continue to produce distrust and sometimes animosity in those who value truth.

neither authorized nor condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.”

45. GERGES, supra note 6, at 9.

46. Id.

47. Id. at 264-76. See also Peter Margulies, Making “Regime Change” Multilateral: The War on Terror and Transitions to Democracy, 32 DENV. J. INT’L L. & POL’Y 389, 396 (2004) (“Unfortunately, the preemptive style, rooted in coercion and legal sanctions, does little to dislodge the processes of social identity construction and social comparison that create a fertile ground for asymmetric violence. Because of this negligible impact on underlying processes, the Administration’s approach to disrupting the social capital of groups practicing asymmetric violence is ineffective. Indeed, the punitive approach in some ways enhances the social capital available for asymmetric violence, by sharpening the social comparisons that serve as the best recruiting tools for those committed to extremism.”)
Beyond tilting public opinion in the Muslim world closer to Al Qaeda, U.S. policy has caused sizable changes in global public opinion. Respect for the United States has declined steeply since the invasion of Iraq, and not just in Muslim countries. For example, the number of people in Britain, France, and Germany holding favorable views of the United States has decreased by 20-30% between 2002 and 2007.\(^{48}\) Meanwhile, in Indonesia, the world's largest Muslim country, the percentage of citizens holding favorable views went from 61% in 2002 to 29% in the same time span.\(^{49}\)

This does not surprise Joseph Nye. In his book, *Soft Power: The Means to Success in World Politics*,\(^{50}\) Nye cites the "plummeting" popularity of the United States and explains the growing practical problem of securing help from Islamic countries in locating and eliminating terrorists.\(^{51}\) This is a two-sided problem. As seen with Iraq, hard power policies increase the very problem with which we need the help of foreign leaders. Nye compares U.S. power to that of the Roman Empire and cautions that "Rome did not succumb to the rise of another empire, but to the onslaught of waves of barbarians. Modern high-tech terrorists are the new barbarians."\(^{52}\) Relying on reports from American intelligence and law enforcement officials, Nye confirms Gerges's findings, locating in the Iraq War a source of Al Qaeda's growth: "Al Qaeda and other terrorist groups intensified their recruitment on three continents by 'tapping into rising anger about the American campaign for war in Iraq.'"\(^{53}\) But, thanks to the second part of the problem, declining U.S. popularity makes it politically unpopular for foreign leaders to collaborate. Beyond aggravating the problem of terrorism, the careless use of force and the savagery of torture are quickly destroying our good name.


\(^{49}\) Id.

\(^{50}\) Nye, *supra* note 11.

\(^{51}\) Id. at xi. See also id. at 129 ([T]he United States cannot meet the new threat identified in the national security strategy without the cooperation of other countries. They will cooperate up to a point out of mere self-interest, but their degree of cooperation is also affected by the attractiveness of the United States.").

\(^{52}\) Nye, *supra* note 11, at x.

\(^{53}\) Id. at 29.
Nye writes that soft power is "the ability to get what you want through attraction rather than coercion or payments."\textsuperscript{54} He specifies that this source of power emanates from "culture (in places where it is attractive to others), \[\text{ ]} political values (when [a state] lives up to them at home and abroad), and \[\text{ ]} foreign policies (when they are seen as legitimate and having moral authority)."\textsuperscript{55} Indefinite detention, torture, and preemptive warfare have made short work of these last two sources of soft power. Our political values do not merely include rights and the rule of law; they reside in them. And yet, our extremists have been quick to discard them both at home and abroad. A foreign policy that includes aggressive warfare, extraordinary rendition, and indefinite detention is per se illegitimate and strategically disastrous. It is to a nation's moral authority what the molestation of children by priests is to a church's moral authority, but perhaps worse since the imputed actions are for the most part orders from high in the chain of command. Even those whose eyes are fixed in precisely the right direction will have trouble seeing that beacon of freedom said to originate in the United States; even her greatest admirers now begin to doubt U.S. claims about representing lauded values; even lovers of this country become estranged.

War has this effect and an unlawful war of aggression doubles it. Love is lost. Claims fail to touch upon truth. Freedom becomes just an end, its extinction our daily bread. War, lawful or not, falls on the extreme end of the hard power spectrum—coercion through violence, payments in blood. Understandably, Nye counsels us to employ tools from the soft power spectrum more frequently to achieve the balance between attraction and coercion that he calls "smart power,"\textsuperscript{56} however, we cannot even begin to do this until we hold true to our political values at home and abroad, and end our illegitimate and immoral foreign policies.

\textsuperscript{54} Id. at x.
\textsuperscript{55} Id. at 11.
\textsuperscript{56} See, e.g., the statement of the former Secretary General of NATO, Jaap De Hoop Scheffer: "There is no final military answer for Afghanistan. Afghanistan needs development, needs reconstruction, needs nation-building." Jaap de Hoop Scheffer, NATO Secretary General, Press Point at Informal Meeting of NATO Defence Ministers (Feb. 8, 2007), http://www.nato.int/docu/speech/2007/s070208e.html.
Perhaps then we can begin to think about eliminating the causes of terrorism, instead of adding to them; perhaps then we can begin to think about defeating our radical adversaries instead of continuing to radicalize our moderate allies.

III. STAYING TRUE

Having examined the threat posed to the two ethics of our civilizational project by our own extremists, let us consider how to stay true to high-minded traditions in moments when we feel threatened. Ronald Dworkin understands the tensions inherent in upholding rights and political values in trying times. He supplies guidance for avoiding derogations that, like those we have seen, constitute a rescinding of the institution of rights itself. Through a few of his quotations, I hope to illustrate a few guideposts for how to re-adhere to our tradition—that is, to take rights seriously again. "The concept of rights," says Dworkin, "has its most natural use when a political society is divided, and appeals to co-operation or a common goal are pointless."\(^5^7\) Rights provide the ground rules for liberal democracy itself and for the discourse, stability, and values of civility and restraint that characterize it. Even if the political community driving U.S. policy is divided on how to combat terrorism, we ought to be able to find among the vast majority of the population common ground where rights lie. Taking rights seriously means taking the rule of law seriously and nobody, except extremists, believes this should be easily discarded.

But how do we interpret rights? We may assume that, in a democracy, a government's action and inaction alike flow from popular opinion and the pursuit of general utility. Rights place certain courses of action off the table and require others. Our government may not, for example, inflict cruel and unusual punishment, while it must provide certain procedural protections at trial. In this way, rights circumscribe a government's realms of action and passivity, and, thus, constitute a restraint on politically

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57. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184 (1978). Although this book addresses the rights of citizens against their government, we have seen that this institution transcends U.S. borders. It must as an instrumental matter, Nye would tell us, in order for our values and foreign policy to generate soft power, but we know that it does as a formalistic matter, given the international revolution.
dominant preferences. Again, moderates in the United States, which is to say the great majority of the population, ought to be able to find common ground in twin convictions implied above and embraced by Dworkin: rights that can be overruled in light of shifting opinion are not rights at all; and rights that the majority can revoke at will in the interest of its general utility are similarly vacuous. Each situation, if taken as justifying the revocation of rights, reveals the institution of rights to be a sham.\footnote{Id. at 191 ("normally it is a sufficient justification ... that the act [of the Government] is calculated to increase ... general utility [but] [w]hen individual citizens are said to have rights against the Government ... that must mean that this sort of justification is not enough.") \textit{See also} id. at 193 ("There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient") and 194 ("A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.").}

But what if the political community is threatened? Surely this is the reason we have given for discarding rights during our war on terrorism. There is a chance that someone released from Guantanamo was wrongly deemed innocent. This person will then rejoin the enemy and perhaps perpetrate a great attack against us. Even with Jose Padilla and Hamdi, the two American citizens famously denied for years any semblance of due process rights, the government's claims boiled down to these two individuals being tied to terrorists and that no chances should be taken in dealing with them. Dworkin is cautious. He writes that "There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient."\footnote{DWORKIN, \textit{supra} note 57, at 193.}

This is to say that general utility justifications for rights violations fall short. "Yes," we might respond, "but what if we are speaking not of marginal benefits but avoiding catastrophic harm?"

Dworkin concedes that a genuine emergency, one of "clear and present danger . . . of magnitude," may justify a curtailment of
rights.\textsuperscript{60} International law also conditions derogation on an emergency of certain magnitude. Consider the ICCPR derogation clause: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties . . . may take measures derogating from their obligations . . . to the extent strictly required by the exigencies of the situation."\textsuperscript{61} But this clause is subject to a sizable limitation: The ICCPR prohibits derogation from, \textit{inter alia}, those articles concerning torture and cruel treatment, the right to life, and personhood.\textsuperscript{62} This may be the first difference between Dworkin and the international standard: the latter places some derogations off of the table, irregardless of magnitude. The second difference concerns magnitude itself. The ICCPR would seem to require the highest possible level of danger, perhaps beyond the reach of many 9/11s and in the realm of war against an enemy that could actually defeat the state. Let us be realistic, however, and concede that most states will not risk such outcomes.

So let us focus on the criteria most attune to the dilemmas of a permanent war on terrorism: clear and present danger as supplied by Dworkin—i.e., the certainty of the threat—and the notion of all derogations being permissible only to the extent strictly required by the situation. The latter requires that infringements on rights be narrowly tailored to accomplish a necessary objective. It immediately invalidates torture and the War in Iraq, since these derogations only aggravate terrorism. Rather than strictly required by the exigencies of the situation, such unreliable, costly, and counterproductive policies ought to be strictly prohibited by the exigencies of the situation.

But this logic would also eliminate the criterion of certainty, because it would view even an impending terrorist attack as irrelevant to a government interest in employing torture. Some in the administration, on the other hand, must be convinced that waterboarding and extraordinary rendition do provide some

\textsuperscript{60} Id. at 195. Dworkin also recognizes that preserving the rights of some may also justify the violation of the rights of others. \textit{See id.} at 194 ("In order to save [rights], we must recognize as competing rights only the rights of other members of the society as individuals.").


\textsuperscript{62} \textit{See id.} at arts. 6-8, 11, 15, 16, and 18.
benefit; otherwise they would not permit these practices. For example, President Bush recently vetoed a bill that would have required the CIA to limit its interrogation tactics to those authorized by the Army Field Manual.63 “Because the danger remains, we need to ensure our intelligence officials have all the tools they need to stop the terrorists,” the President remarked.64 And to credit this foolishness further, surely a policy of indefinite detention would, assuming even a 1:1,000,000 ratio of terrorists to innocent bystanders in detention, provide some marginal benefit to immediate security interests. Support for torture is indeed an extreme view, even descriptively speaking, as seen in a recent BBC study. When asked whether they would support torture if it could provide information that would save innocent lives, only 36% of Americans said “yes.”65

Because there is some chance that indefinite detention would prevent a loss or that torture would perhaps occasionally yield useful information, should we not therefore rescind the prohibition on torture and the right to due process? Dworkin grows impatient:

[T]his argument ignores the primitive distinction between what may happen and what will happen. If we allow speculation to support the justification of emergency or decisive benefit, then, again, we have annihilated rights. We must, as Learned Hand said, discount the gravity of the evil threatened by the likelihood of reaching that evil.66

For Bush, it is not just about clinging to torture; it is also about clinging to unfettered executive power to judge what is necessary in any given situation. The power to define the situation itself, though, must not be ceded. This is the power to define a state of constant emergency through speculation. If we are truly under grave and imminent threat, then a strong executive must do what he deems necessary to protect us. So let

64. See id. at 1.
66. DWORKIN, supra note 57, at 195.
us turn to the criterion of certainty, clear and present danger. This is the guidepost to hold dear. Because this war on terrorism has no known endpoint, the constant threat of terrorism must not be taken as sufficient justification for overriding rights. Consider President Bush's introduction of the war on terror to a joint session of Congress:

Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen.\footnote{147 CONG. REC. 107, 123 (daily ed. Sept. 20, 2001) (statement of President George W. Bush).}

If we are not to be in a permanent era of torture, indefinite detention, and revocation of the rule against aggressive warfare, then we must insist on a higher degree of certainty of harm before bowing to bald assertions of constant threat.

And, given the depth of our tradition of rights and its value to us and the world, something must be said about the type of harm grave enough to warrant casting aside our identity and civilizational membership. Dworkin provides a test for determining whether a right can be defined narrowly in a particular case, to avoid its application in that case, without revealing as a sham the initial recognition of the right. First is the marginal situation where the values protected by the original right are not at stake or only partly at stake.\footnote{DWORKIN, supra note 57, at 200.} Surely our extremists have argued along these lines in maintaining Guantanamo Bay to be a legal blackhole where no law applies, and in insisting that the Geneva Conventions do not apply to unlawful combatants. Second is a situation where extension of the right would abridge some competing right.\footnote{Id.} This is important for the right to life of U.S. citizens, for all manner of rights really, that would be extinguished by a direct terrorist attack. But this returns us to the problem of certainty and exigency already discussed—can we be so sure that an attack is

\footnotesize{\bibliography{references}}
forthcoming and that torture and indefinite detention would do anything to prevent it? Third is a situation in which extending the right would occasion a cost to society "of a degree far beyond the cost paid to grant the original right." I read this to require a weighing of the historical struggles that culminated in our tradition of fundamental rights. Depending on the right in question, these might include the Revolutionary War, the movement to abolish slavery, the civil rights movement, the cost of World War II and the human rights movement, and all manner of wars over centuries that led to the *jus in bello* legal framework.

These costs should give us pause, a reason to reflect on just how precious the institution of rights is and how only the gravest of costs could justify derogation. Literally, only a traitor would hold that a marginal increase in the possibility of a terrorist attack justifies rescinding our tradition of rights. If clear and present danger of the first magnitude, coupled with a reasonable expectation of avoidance through derogation, then perhaps. But only then, lest we reveal ourselves to be imposters holding out a venerable tradition as our own.

Still one matter attends us, yet it is beset by nationalism and provincialism. Dworkin’s guidance was given with regard to the rights of citizens. I took it broadly and applied it to citizens (Padilla, et. al) and non-citizens (Guantanamo, Abu Graib, extraordinary rendition, and etc.) alike. In the late 1940s, our tradition began to embrace human rights, not just U.S. constitutional rights. This much is formally clear from our membership in various treaties and the world community more generally, pursuant to which we have accepted the premise that human dignity matters, not just the dignity of Americans. But we must also recognize it to be pragmatically important, given that terrorist recruitment thrives on our abandonment of our own values and on the reasonable perceptions of U.S. foreign relations impropriety that follow. As we have seen, rights are part of the currency of soft power, a badge of belonging in the community of civilized nations, and a requirement for securing international collaboration to combat terrorism. Dworkin reminds us that:

[I]f rights make sense at all, then the invasion of a

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70. *Id.*
relatively important right [such as due process or freedom from cruel treatment] must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice ...”

We must take this to heart with regard to all human beings if we wish to address terrorism and if, in the process, we wish to retain what is good in our identities and heritage, and what is indispensable for a desirable future.

In the end, we must consider whether the juxtaposition between human rights and national security is false. Perhaps the way to achieve freedom and security is via human rights. Perhaps the deontological and consequentialist ethics of our tradition have been improperly separated. Perhaps rights, rightly understood, are the foundation of both human dignity and peace. But for those who do not accept such a premise, which is implied in Jefferson's hope for our shining city on the hill and specified outright by Wilsonian idealists, my hope is that they will at least value their tradition enough to not trade it in for scrap.

Though inconvenient at times, rights are part of who we are and our adherence to them gives us pride about who we are becoming. It is, after all, in each of our actions that civilization lives or dies. Some would say that we know this by virtue of universal moral traits: “in the soul of man,” said Emerson, “there is a justice whose retributions are instant and entire. He who does a good deed, is instantly ennobled himself. He who does a mean deed, is by the action itself contracted.” Others would add that we know this by virtue of the consequences of our actions. The Arab poet Adonis sums these up when, referring to our infamous foreign policy actions, he cites an “anguish which transcends private passion and pain.” This, he says, “creates civilizational agony for man and humanity.” I would say that we know it through both means—deontology and pragmatism—and,

71. Id. at 199.
73. GERGES, supra note 6, at 271 (quoting Adonis, Beyond History, Without Future, AL HAYAT, Dec. 4, 2003).
74. Id.
thus confirmed twice over, it becomes our task as citizens in a democracy to produce something better than a war on terrorism.

In the beginning of this essay, I conceded that the prospect of our tradition's demise at our own hands was a conceit. This is important to admit, because our piecemeal abandonment of a tradition should not be confused with that tradition's demise, and much less with the demise of the principles on which that tradition was based. Walt Whitman said this about liberty, the organizing principle of our tradition:

Nothing has precedence of it and nothing can warp or degrade it. Liberty relies upon itself, invites no one, promises nothing, sits in calmness and light, is positive and composed, and knows no discouragement. The battle rages with many a loud alarm and frequent advance and retreat . . . the enemy triumphs . . . the prison, the handcuffs, the iron necklace and anklet, the scaffold, garrote and leadballs do their work . . . the cause is asleep . . . the strong throats are choked with their own blood . . . the young men drop their eyelashes toward the ground when they pass each other . . . and is liberty gone out of that place? No never. When liberty goes it is not the first to go nor the second or third to go . . . it waits for all the rest to go . . . it is the last . . . When . . . the laws of the free are grudgingly permitted and laws for informers and blood-money are sweet to the taste of the people. . . . when the soul retires in the cool communion of the night and surveys its experience and has much extasy over the word and deed that put back a helpless innocent person into the gripe of the gripers . . . when the swarms of cringers, suckers, doughfaces, lice of politics, planners of sly involutions for their own preferment . . . obtain a response of love and natural deference from the people . . . or rather when all life and all the souls of men and women are discharged from any part of the earth—then only shall the instinct of liberty be discharged from that part of the earth.\textsuperscript{75}

\textsuperscript{75} Walt Whitman, \textit{Leaves of Grass} (1855) in \textit{Walt Whitman: Complete Poetry and Collected Prose} 17-18 (Library of America, 1982).
It is with Whitman's words that I close, because he is remarkably clear on a point that we, apparently, are not. Our sacred principles are above and beyond us, and yet by doing what we know to be right we connect with them, becoming of them and them of us, and it is in this connection that we and our country have shown notable, if yet inconstant, greatness. Greatness arises from challenges being met, especially that constant challenge of living up to one's principles. Slavery presented such a challenge, as did the subjugation of women and most recently homosexuals, and continued attention remains necessary on these fronts. The War on Terrorism presents a new front on which we are called to live up to our principles, and if we look carefully we see intertwined with these principles our own identities, fates, and legacies. And so it may be true that liberty, dignity, equality, and peace are beyond us, but we should not assume that we—in any form cognizable to us—are beyond them.