

6. War, terrorism, and the 'war on terror'

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What terrorism is

Most of us agree that terrorism is always, or almost always, wrong, which is hardly surprising, since the word is generally used to express disapproval. If an act of which we approve has features characteristic of terrorism, we will be careful to deny that it is in fact an act of terrorism. For example, those who believe that the bombings of Hiroshima and Nagasaki were morally justified tend to deny that they were instances of terrorism. So while we agree that terrorism is almost always wrong, we sometimes disagree about what it is we are condemning.

To avoid misunderstanding, I will say at the outset what I understand terrorism to be. Acts of terrorism are intentional efforts to kill or seriously harm innocent people as a means of affecting other members of a group with which the immediate victims are identified.¹ Usually the aim is to terrorize and intimidate the other members as a means of achieving some political or broadly ideological goal, though the aim might be different: it might, for example, be to punish or achieve vengeance against the group as a whole. Although the group against which terrorism is directed is usually political in nature, it need not be. It might, for example, be the group of doctors who perform abortions.

Because the term 'terrorism' is normatively loaded and therefore tends to be used by people to describe their enemies whatever their enemies may do, there is no definition that can capture all the many ways in which the term is ordinarily used. But the definition I have offered seeks to identify the core descriptive features of terrorism, while also explaining why terrorism, in its paradigm instances, is morally so abhorrent. Many of the definitions currently on offer in the literature stipulate that the agents of terrorism must be 'non-state actors' (thereby conveniently ruling out even the conceptual possibility that states can be guilty of terrorism; the most that states can do is to 'sponsor' terrorism), or that the targets of terrorist action must be noncombatants rather than, as I suggest, innocent people (thereby raising the question why violent police action does not count as terrorism), and so on. I think that these and other proposed restrictions on the notion of terrorism are distortions that derive either from the dominant state-centered paradigm of

international relations or from the theory of the just war that claims that combatants are legitimate targets while noncombatants are not.

The claim that terrorism involves intentional attacks upon the innocent raises a number of questions. I will discuss two. First, what is the relevant sense of 'innocence?' As I will use it here, 'innocent' has two senses, one formal, the other substantive. In the formal sense, a person is innocent when he has done nothing to lose his right not to be attacked or otherwise harmed – that is, when he has done nothing to make himself morally liable to attack. The substantive sense of the term gives a criterion of liability to attack. According to the regnant version of the theory of the just war, the criterion of liability to attack is posing a threat to another. On this view, the substantive sense of 'innocent' is 'unthreatening.' Another common sense is 'defenseless'. For reasons that I will not elucidate here, I believe that neither of these is the appropriate substantive sense with which to fill out the formal notion, for neither is correlated with a plausible criterion of liability to attack.² The appropriate sense, in my view, is 'morally innocent', by which, in this context, I mean 'not morally responsible for a wrong in a way that makes one morally liable to attack as a means of preventing or correcting that wrong'.

A second important question about innocence is whether a terrorist act is to be understood as an intentional attack on a person who is in fact innocent, or whether it is better understood as an attack on a person whom the attacker *believes* to be innocent. If we insist that a killer must believe his victim or victims are innocent in order for his act to count as terrorism, we will have to concede that there are fewer terrorists than we thought. Because many of those who are uncontroversially terrorists are morally motivated, it would be surprising if they believed that their victims were innocent in the relevant sense. Many appear, on the contrary, to accept some doctrine of collective guilt that allows them to believe that all the members of the group against which their action is directed are collectively inculpated. So an act can be a terrorist act even if the agent believes the victims are not innocent. (It can, however, matter *why* the agent believes the victims to be noninnocent. There can be mistakes of moral status and mistakes of identity. An attacker who correctly identifies his victims but mistakenly believes that they are noninnocent is a terrorist. But suppose a combatant fighting in a just war attacks a group of people whom he mistakenly believes to be enemy combatants, and attacks them intending in part to terrorize other enemy combatants. He is intentionally attacking people who are in fact innocent with the intention of terrorizing other members of their group. But because his mistake is factual rather than moral, he is not a terrorist.)

It is worth stressing that it is a necessary feature of acts of terrorism not just that they must be intended to kill people who are in fact innocent but also that the killing must be intended as a means of affecting others. Consider, for example, a person who bombs an abortion clinic intending only to prevent the killings of fetuses that would otherwise occur there. If this person does not intend to terrorize other abortion providers, he is not a terrorist, even if he would welcome it as a side effect if others were frightened into closing their clinics. If an act of killing is *purely* defensive, in that it is intended *only* to prevent the victim from causing harm, it is not terrorism even if the victim is innocent. Yet an act may be both defensive and punitive and still be terrorism. If, for example, the clinic bomber intends both to defend fetuses and to punish the particular abortionists he kills, he is nevertheless a terrorist if he also intends to terrorize and intimidate other doctors who perform abortions.³

Terrorism and unjust war

If what I have said is right, whether an act of killing counts as terrorism depends in part on what the killer's intentions are. What most people think of as legitimate acts of war also kill innocent people, and often on a scale much larger than that which contemporary terrorists have so far reached. The difference is that while terrorists intend to kill people who are innocent as a means of affecting others, legitimate acts of war kill innocent people only as a side effect – as 'collateral damage', in military jargon.

It is perhaps surprising that a distinction as important as that between terrorism and just warfare could be a matter of what an agent's intentions are rather than a matter only of what he causes to happen in the world. Indeed, many philosophers now argue that the intention with which an act is done does not affect the permissibility of the act. These philosophers have adopted a variety of positions on the distinction between terrorism and just war. Some have argued that there is an important difference between the two that does not involve intention: for example, that the moral principles that govern the conduct of war are different from those that govern the use of violence in other contexts, that the prohibition of killing the innocent can be overridden in order to destroy a military target as a means of advancing a just cause but not in order to terrorize people as a means of advancing a just cause, that it matters whether the killing of innocent people is a causal means to the achievement of a good or an effect of the achievement of the good, and

that violence in war typically has appropriate political authorization, whereas in terrorism it does not.⁴ Other philosophers who reject the relevance of intention to permissibility have been led by their rejection of terrorism in the direction of pacifism, while still others have openly endorsed the permissibility of terrorism in a wider range of cases than most of us are willing to recognize.⁵

I will not consider here whether the intention with which an act is done can affect the permissibility of the act. Nor will I explore the moral difference between terrorism and just warfare. But I will, as a means of understanding the moral and legal status of terrorists, examine the moral difference between terrorism and *unjust* war.

A war can be unjust for various reasons. It might be fought for a just cause but be unnecessary for the achievement of that cause, or disproportionately destructive relative to the importance of the cause. Usually, however, wars are unjust because they are fought for a goal, or cause, that is unjust. I will refer to combatants who fight for an unjust cause as 'unjust combatants' and to combatants who fight in a just war as 'just combatants'.

Unjust combatants pose a problem for the understanding of terrorism that I have offered. When unjust combatants attack just combatants, they are attacking people who are morally innocent, since those who merely defend themselves and others against wrongful attack are not thereby guilty of a wrong that makes them liable. If unjust combatants attack just combatants intending not only to eliminate the threat they pose but also to elicit fear in other just combatants, hoping thereby to deter them from fighting, then by the definition I have given, those unjust combatants are terrorists. Even if they mistakenly believe that their cause is just and thus that their adversaries are not innocent, that should not exclude their being terrorists, just as the abortion clinic bomber's mistaken belief about the status of his victims does not prevent him from being a terrorist, if his act is intended in part to intimidate other abortionists.

In practice this may not mean that many unjust combatants count as terrorists, since most presumably do not specifically intend for their acts of war to intimidate other enemy combatants. But those unjust combatants who do have that intention seem to be counterexamples to my definition, since no one believes that they are terrorists. Indeed, most people believe that unjust combatants do not act wrongly at all, provided

they obey the rules of engagement, even if they intend for their acts of war to frighten and deter other enemy forces.

It is, however, hard to discern relevant differences between an unjust combatant and the abortion clinic bomber who intends to terrorize abortionists generally, and whom most will agree is guilty of terrorism. The unjust combatant is, of course, an agent of the state and does not act illegally, whereas the bomber is a private individual who violates the law. But these differences do not seem to constitute the difference between permissible killing and terrorism. The unjust combatant is, after all, the agent of a state that is acting illegally through his action.

I suspect that our tendency to treat the clinic bomber but not the unjust combatant as a terrorist derives from our correct sense that terrorists deliberately attack illegitimate targets together with the mistaken but widely accepted view that all combatants are legitimate targets. Our unreflective acceptance of the just war theory's identification of the distinction between combatants and noncombatants with the distinction between legitimate and illegitimate targets has, if I am right, distorted our understanding of terrorism. (Many people do, however, consider certain attacks against military targets as terrorism. Many Americans, for example, describe the bombing of the Marine barracks in Lebanon in 1983 and the attack on the USS Cole as acts of terrorism. They defend this classification by noting that the US was not formally at war and the attackers were not agents of a state. Yet the attackers could claim to be legitimate agents of national liberation acting against hostile forces unjustly occupying their homeland.)

There are, however, morally significant differences between recognized terrorists and unjust combatants who confine their attacks to military targets. What are they?

Unjust combatants by definition fight in support of ends that are unjust. Terrorism, by contrast, is defined by its use of wrongful means. It is possible to use terrorism, or terrorist tactics, in support of ends that are just. For example, the British bombings of German cities in World War II that were intended as a means of demoralizing the civilian population were acts of terrorism wrongfully committed in pursuit of a just cause in a just war. (The bombings of Hiroshima and Nagasaki were also terrorist acts perpetrated in a just war, though their immediate aim – unconditional rather than conditional surrender – was not just.) So a comparison between terrorists and unjust combatants solely in terms of the ends they pursue seems initially to suggest that the acts of unjust combatants are, if

anything, more seriously objectionable than those of terrorists. But contemporary theorists of the just war generally claim that the conditions in which unjust combatants fight absolve them of responsibility for the aims of their war. And the goals that terrorists pursue are often unjust.

Perhaps, then, what distinguishes terrorists from unjust combatants is a matter of the means they use to achieve their aims. It might be argued that terrorists necessarily use wrongful means to achieve their aims, whereas unjust combatants do not, provided they obey the rules of war. If unjust combatants are absolved of responsibility for the aims of the war in which they fight, they may not be guilty of any wrongdoing at all. This is in fact the common view.

But this understanding of the action of unjust combatants is mistaken, despite its widespread acceptance. Unjust combatants are instruments of injustice. Even if they confine their attacks to military targets, they still do not serve their country's unjust ends by permissible means. This is because for them, with rare exceptions, there simply are no legitimate targets. Unless they are fighting in a war in which both sides are in the wrong, unjust combatants engage in combat against just combatants. And, unless the just combatants pursue their just aims by wrongful means, they are innocent in the relevant sense, for they do not make themselves liable to attack, or lose their moral right not to be attacked, simply by defending themselves and other innocent people against a wrongful attack. Most of us accept that it is normally wrong to kill innocent people as a means of achieving a goal that is *just*. How, then, could it be permissible to kill innocent people as a means of achieving goals that are *unjust*?

With these observations as background, reconsider the comparison between unjust combatants and terrorists. Terrorists by definition use unjust means, while unjust combatants by definition serve unjust ends. Terrorists often but not necessarily pursue unjust ends. Except perhaps in wars in which no one has a just cause, unjust combatants almost invariably use unjust means – that is, means that wrong their victims. With respect to ends and means, therefore, there is so far no reason to suppose that what terrorists do is morally worse than what unjust combatants do. Yet unjust combatants are almost universally believed to enjoy various privileges and immunities, such as exemption from punishment for killing just combatants, that no one believes that terrorists are entitled to. Is this belief justifiable? Or should we accept that what unjust combatants do is typically wrong to roughly the same degree as what terrorists do? Or should we perhaps conclude that what terrorists

do is in general morally objectionable only to the degree that we think that what unjust combatants do is objectionable?

There are three morally significant differences between unjust combatants and terrorists. Among these I do not include the fact that, unlike the just combatants killed by unjust combatants, the victims of terrorism are unthreatening and defenseless. As I noted earlier, that just combatants pose a threat does nothing to make them legitimate targets, since they are justified in posing a threat. And the murder of innocent people would be no less wrong if terrorists were to give them a sporting chance of defending themselves.

The first of the three significant differences between unjust combatants and terrorists is that even when both use unjust means to achieve unjust ends, unjust combatants in general have a greater range of excuses that mitigate their culpability and may even exculpate them entirely. Unjust combatants, for example, are often compelled to fight, whereas most terrorists are volunteers. (There are of course exceptions, such as child soldiers who have been abducted, brutalized, drugged, and sent to conduct a terrorist massacre in a village.) There are also epistemic differences. Unjust combatants tend to believe, often understandably and sometimes even reasonably, that what they do is justified. They may have limited access to information, they may have been lied to by their government, they regard the order to fight as morally and legally authoritative, and there is a long history of general acceptance of the idea that a combatant does not act wrongly if he confines his attacks to enemy combatants. Terrorists, by contrast, systematically violate a prohibition against intentionally attacking people who are merely going about the ordinary business of life – bystanders – that has been recognized in virtually all cultures for thousands of years, and is, indeed, recognized even in their own cultures. If, for example, Baruch Goldstein had been acting as an authorized agent of the Israeli state when he massacred 29 Muslims at prayer in 1994, this would have been recognized even by Palestinian terrorists as morally different from the killing of Palestinian civilians as a side effect of an attack on a launch site for missiles aimed at Israel. And it is reasonable to hold such terrorists accountable for failing to recognize the inconsistency between the belief that terrorist acts by their enemies would be specially heinous and the belief that their own terrorist acts are permissible. In general, therefore, there is less epistemic justification for terrorists than for unjust combatants to believe that what they do is morally permissible.

Yet the appeal to excuses cuts both ways, for some of the excuses that are often cited on behalf of unjust combatants also apply to *some* terrorists. Many suicide bombers, for example, are credulous and uneducated young people who have been repeatedly assured by the moral, political, and theological authorities in their culture that the killing of randomly chosen members of a population they regard as their enemy is supremely meritorious and will gladden the heart of the deity. From the nature of their action we may infer that they strongly believe that what they do is right – more strongly, presumably, than most unjust combatants believe in the rightness of what they themselves do. So, to the extent that we accept that unjust combatants do wrong but, because of the epistemic limitations under which they act, are not to be condemned or punished, we should also accept that the same may be true, though perhaps to a lesser degree, of some terrorists.

There is, moreover, a further reason for thinking that the excuses available to unjust combatants do not provide a significant ground of moral differentiation between them and terrorists. The claim that a person's action is excused presupposes that the person has acted wrongly. Yet what most people believe is not that terrorists and unjust combatants both act wrongly but that unjust combatants are excused while terrorists are not; it is, rather, that terrorists act wrongly while unjust combatants act permissibly, provided that they obey the rules of engagement.

The second important difference is that whereas unjust combatants who attack just combatants usually intend only to eliminate an obstacle to the achievement of their goals, terrorists who kill innocent people *use* their victims strategically as means to their ends. Common sense intuition tend to distinguish between these modes of agency, and to regard the opportunistic use of the innocent as the more seriously objectionable of the two.⁶ It is important to note, however, that this does not distinguish all unjust combatants from terrorists. Those who intend the killing of just combatants as a means of terrorizing the enemy also use their victims opportunistically.

The third and perhaps most important difference between unjust combatants and terrorist is that unjust combatants who obey the rules of engagement thereby respect and preserve laws and conventions designed to limit the violence of war. Even though unjust combatants act wrongly when they attack just combatants, we nevertheless grant them *legal* permission to do so. This legal permission is endorsed by morality because of its pragmatic utility. Morality is in effect compelled by current

conditions to allow, and indeed to require, that certain wrongful acts be impunible under the law.

The explanation for this is ultimately traceable to the epistemic constraints under which combatants act. For a variety of reasons, some of which I gave in citing excusing conditions that commonly apply to action of unjust combatants, most unjust combatants believe that the war in which they are fighting is just. Given the absence of any authoritative and epistemically reliable judicial body empowered to pronounce on matters of *jus ad bellum*, whatever is legally permitted to the just will therefore be done by the unjust in the belief – often genuine but sometimes feigned – that they are among the just. If, therefore, our aim is to make it more likely that unjust combatants will adhere to certain restrictions that ought to apply to them, we will have to subject just combatants to those restrictions as well, even if the restrictions ought not to apply to them. At present, this means that the principles governing the conduct of war must be neutral between just and unjust combatants. Since a neutral rule prohibiting killing in war by both just and unjust combatants would be not only ineffective but also unjust, since it would deny the permissibility of defense by the just against the unjust, the only feasible option is a rule permitting both just and unjust combatants to fight.

But there is no similar necessity for legally or conventionally permitting anyone to engage in terrorism. Because terrorism involves intentionally killing the innocent, it can be morally justified, if at all, only in conditions of extremity, and even then only for those with a just cause. Such conditions are rare enough that terrorism can be legally prohibited without, in general, unduly burdening the just in conflicts with the unjust. This is why participation in an unjust war, though morally impermissible, should be legally permissible, at least in the current institutional context, while terrorism must be legally impermissible in addition to being virtually always morally impermissible.⁷

This, then is the most significant difference between unjust combatants and terrorists: that even though both act wrongly, unjust combatants act under a legal permission that is justified morally by its utility in constraining the violence of war, while terrorists deliberately breach the barriers between war and ordinary life, thereby undermining the laws and conventions that have been devised precisely to insulate ordinary life from the violence and disruption of war.

Are terrorists combatants?

I have argued that unjust combatants are legally and conventionally permitted to act in ways that are morally impermissible. Part of what this means is that we agree not to punish or condemn them for participating in an unjust war, even if in doing so they kill people who are innocent in the relevant sense. I have claimed that terrorism should remain illegal – that is, that it should be legally forbidden even to those with a just cause and that it should always be punishable under the law. But doubts can arise about this. At least in certain cases, it can be and has been debated whether terrorists have, or ought to have, combatant status. Terrorists themselves often claim to be combatants, particularly when they are captured, since they would like to be accorded prisoner of war status. And, perhaps surprisingly, the Bush administration also claims that terrorists are enemy combatants in its 'war on terror'. Are terrorists combatants?

The concepts 'terrorist' and 'combatant' are not mutually exclusive. Given the definition of terrorism I have proposed, it is clearly possible for regular, uniformed military personnel to use terrorist tactics in the course of a war. These would be combatants who had also become terrorists. Their use of terrorist tactics would make them war criminals.

Consider, though, whether terrorists who are not members of any regular army or militia, and who do not openly distinguish themselves as combatants, are nevertheless entitled to combatant status. In the immediate aftermath of 9/11, Bush vowed that he would bring the surviving terrorist plotters to justice. But this is not what one does to enemy combatants.⁸ The rhetoric soon shifted, however, and terrorists were declared to be enemy combatants. This is perhaps surprising because it appears to accord to terrorists a kind of legitimacy that they lack. But the reasons for the shift are transparent. Under international law, combatants may be attacked and killed at any time, anywhere, by enemy combatants. Thus, by declaring that terrorists are combatants, the administration invested itself with the right to hunt them down and kill them anywhere in the world without making an attempt to capture them.

There are, however, disadvantages, from the Bush administration's point of view, to declaring that terrorists are combatants. For those with combatant status are legally granted rights and immunities as well as liabilities. It is because combatant status carries certain rights and immunities that captured terrorists seek to be classified as combatants. Combatants who are captured have prisoner of war status, which means that they may not be interrogated and must be treated humanely and be repatriated at the conclusion of hostilities. Enemy combatants also have

the legal right to attack military targets, such as military, police, and government personnel and facilities. If the terrorists of 9/11 were combatants, those who flew planes into the World Trade Center were guilty of war crimes. But if the others had worn uniforms and had flown an otherwise empty plane into the Pentagon, their action would not have been a war crime; it would not have been illegal at all. They would have been acting within the legal rights accorded to combatants.

How could the Bush administration invest itself with legal rights to do all that it wanted – that is, how could it claim the right to hunt down terrorist suspects and kill them while also denying them both the legal right to attack US military personnel as well as legal rights against interrogational torture and punishment in the event that they are captured? The solution on which the administration settled was to designate terrorist suspects as 'unlawful combatants'. This is a notion had its origin in a case in 1942 in which German military personnel infiltrated the US disguised as civilians in order to sabotage facilities that were important to the American war effort.⁹ The crime of which these saboteurs were guilty, and for which most of them were executed, is that they were combatants who disguised themselves as noncombatants to facilitate the conduct of military operations. In the words of Chief Justice Harlan Fiske Stone, who wrote the judicial opinion on this case after the executions had already been carried out, 'enemy combatant[s] who without uniform come... secretly through the lines for the purpose of waging war ... are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals'.¹⁰ There are various reasons why it might be thought that unlawful combatants should be treated differently from combatants who are guilty of war crimes involving intentional attacks against noncombatants – for example, that their action threatens to diminish respect for the distinction between combatants and noncombatants by undermining the adversary's assurance that people who appear to be noncombatants pose no threat. In any event, this case established the precedent for the concept of an 'unlawful combatant' to which the Bush administration has appealed.

According to the administration, unlawful combatants are like lawful combatants in that they may be attacked at will without an attempt to capture them. Yet they lack the rights and immunities of lawful combatants and thus may be tried by either civil or military courts for harms they may cause, even to opposing combatants. The administration also claims, though this is even more controversial than its other assertions about the status of unlawful combatants, that they are subject to

indefinite detention without trial and lack rights against harsh techniques of interrogation.

My concern in this essay is with morality rather than law. Yet because the laws and conventions of war have been designed to serve moral purposes, we cannot determine how we ought morally to treat terrorists and terrorist suspects without taking account of their legal status. I will therefore explain why it is doubtfully coherent to suppose that terrorists who do not act as distinguishable members of a regular military organization either have or could have combatant status.

The laws of war are not direct adaptations of the principles of morality to the circumstances of war.¹¹ They are human creations designed to serve certain purposes. The main purpose they are intended to serve is the separation of war from other human activities. They are designed to insulate ordinary civilian life from the destructive and disruptive effects of war. Combatant status is a legal artifact that has a crucial role in the achievement of this overriding purpose. The granting of combatant status involves a tacit bargain. Those to whom it is granted are thereby guaranteed humane treatment and eventual release if they are captured, as well as immunity to legal prosecution even if the war in which they fight is wrongful and illegal. In exchange for these rights and immunities, they are required to observe certain constraints on the conduct of war. They are required, in particular, not to conduct intentional attacks against civilians. Combatant status is conditional on reciprocity: one is entitled to the benefits only if one restricts one's action in the required ways.

Terrorists, however, subvert the central purpose of the laws of war in at least two ways. First, and most obviously, they intentionally attack civilians. It is their intention to expose ordinary civilian life to the violence characteristic of war. Second, those terrorists who are not already uniformed members of a regular military force in wartime carry out their missions clothed as civilians, thereby eroding the ability of those who would uphold the laws of war to distinguish between those who are threatening and those who are not. It is, in short, the essence of terrorism to do precisely what the laws of war have been devised to prevent. And combatant status is, in effect, a reward offered as an incentive not to do precisely what terrorists do. It would be pointless to grant the rewards for refraining from engaging in terrorism to terrorists themselves.

Even if it is true that people are *entitled* to the protections afforded by combatant status only if they obey the restraints imposed by the laws of

war, it is possible that there could be reasons to accord the same protections even to those who systematically subvert the restraints. There might be contingent or pragmatic reasons to grant to terrorists protections to which they have no claim as a matter of right. It is, however, hard to imagine what those reasons might be.

I have argued that terrorists cannot have combatant status. Yet combatants who commit terrorist acts in their role as combatants remain combatants and therefore seem to be terrorists who have combatant status. This is actually not as puzzling as it may seem. When someone in the role of a combatant commits an act recognized as terrorism, he becomes a war criminal and forfeits the privileges of combatant status. He is, to put it paradoxically, a combatant who lacks combatant status.

Still, the legal status of a combatant who has committed a terrorist war crime is different from that of a terrorist who is guilty of the same act but has not acted as a member of a regular military organization. If the law accords some privileges to the former that it denies to the latter, does this mean that the law does, in some instances, what I claim would be pointless – namely, granting at least some of the rewards for refraining from terrorism to terrorists? Recall that terrorists undermine the aims of the laws of war in two ways: by intentionally attacking innocent civilians and by posing as civilians, thereby making it more difficult for their adversaries to respect the distinction between combatants and noncombatants. When a uniformed combatant intentionally kills the innocent for terrorist purposes, he is at least not guilty of the second of these offenses. It may therefore make sense to accord him certain legal privileges just for that, while denying those privileges to those who both kill the innocent *and* blur the distinction between combatants and noncombatants.

Terrorists as criminals

In law, the alternative to assigning terrorists combatant status is to treat them as criminals – people with no special protected status whose acts violate domestic or international law. On this view, anti-terrorist action is a species of police action or law enforcement; thus, the treatment of terrorists comes within the scope of the legal and conventional norms governing police work rather than those governing the conduct of war. This explains why the Bush administration did not persist with its initial characterization of the terrorists of 9/11 as criminals, despite the fact that criminal status would deny them whatever legitimacy might be implied

by combatant status. For the norms of law enforcement require that criminals be arrested and tried in civilian courts, but the administration prefers 'manhunts' (the term favored by former Secretary of Defense Rumsfeld), killing, and – for the survivors – indefinite detention with interrogational torture.

Note that I have written that treating terrorists as criminals is *the* alternative, rather than *an* alternative, to treating them as combatants. This is because at present we have only two bodies of conventional and legal norms that might plausibly govern coordinated, large-scale responses to the threats of violence that terrorists pose: the norms of war and the norms of law enforcement. Because I have argued that terrorists cannot be classified as combatants, I conclude that at present they have to be regarded as criminals – that is, people who are guilty of criminal acts and criminal conspiracies – and that terrorist suspects are criminal suspects.

It is, of course, possible to hold that the treatment of terrorists need not be governed by the norms devised by or for any institutionalized practice, such as war or law enforcement. One might, for example, hold that anti-terrorist action should be directly governed by moral principles of self- and other-defense, unmediated by any institutional framework. On this view, terrorists might permissibly be killed by anyone, provided that the conditions of legitimate self- or other-defense were satisfied – that is, if killing them were a necessary, discriminate, and proportionate means of averting a threat of unjust (and, some would insist, imminent) harm that they posed to innocent people.

Obviously, however, it would be unwise to allow the threat of terrorism to be addressed by individuals acting in their capacity as private citizens. The threat requires an institutional response and, as I suggested in the previous section, institutions cannot operate solely on the basis of the fundamental principles of morality. The principles that regulate and guide the functioning of large-scale social institutions must be designed to be responsive to pragmatic considerations such as problems in the coordination of collective action and differences in the likely consequences of promulgating and attempting to follow certain principles in different social and political conditions.

At present the only types of institution we have that are capable of addressing the threat of terrorism are military institutions, whose activities are governed by the war convention and the laws of war, and institutions for law enforcement, which are governed by the norms for

police action. Of these, only the norms for police action can be appropriately applied to anti-terrorist action.

This is a conclusion I accept only with reluctance. For while terrorists are not combatants, they are also unlike ordinary criminals. Criminals are seldom motivated by the kinds of ideological concern that motivate terrorists, and their goals and the means they use to achieve them tend accordingly to be rather limited. Because many terrorists are morally, politically, and perhaps theologically motivated, and because their goals tend to be ambitious, embracing the lives of a great many people, they often seek to terrorize and intimidate entire political communities, and the level of destruction they seek to inflict is correspondingly large. Thus far their achievements have usually fallen well short of their aspirations. In some cases they may even see terrorism as a second-best option to be pursued only because genocide is unattainable.

There are other general differences between terrorists as a class and ordinary domestic criminals that tend to make anti-terrorist action rather different from domestic police action. These differences will be the focus of much of the remainder of this essay. They suggest the desirability of forging a new set of norms and conventions for anti-terrorist action that would be intermediate between the norms for police action and the norms governing the practice of war. While my remarks will be relevant to determining what the content of those norms should be, I will not presume to offer suggestions for specific norms, conventions, or laws. That is a task better left to people whose expertise in the formulation of social and political policy is greater than mine.

The requirement of arrest

One important element of the norms governing police action that distinguishes them from the norms and conventions governing the practice of war is what I will call the 'requirement of arrest'. This is the requirement that police seek to arrest criminal suspects so that they may be brought to trial rather than immediately attacking or killing them. Police action is in general only derivatively or secondarily defensive. Social defense against criminals proceeds indirectly through arrest, trial, and detention rather than directly through immediate preventive violence. Killing is permitted only as a last resort, or as a matter of necessity. The police are permitted to kill a criminal suspect only when that is necessary

to incapacitate him when he resists arrest and poses a serious and immediate threat to others.

Many people think that the requirement of arrest is excessively constraining in anti-terrorist action. They think that it is permissible to go after terrorists by military means even if terrorists are not themselves combatants. Is this right, or should anti-terrorist agents be required to try to capture terrorists rather than kill them?

To answer this question, it is necessary to understand the rationale for the requirement of arrest. Suppose that a man has committed a series of murders and remains dangerous. From the point of view of the police and the courts, he must of course remain a criminal *suspect*. But it is a presupposition of the example that he is in fact an actual criminal, a murderer. Although this is by hypothesis objectively true, the police are still required to try to arrest him and bring him to trial. This is so even if they *know* that he has committed a series of murders and remains dangerous (that is, even if their belief that he is a dangerous murderer is both epistemically justified and true). The critical question for our purposes is whether the requirement that the police arrest rather than kill him derives from *his rights*? Does he have a basic, nonderivative moral right to be arrested and tried rather than attacked and killed?

I think not. Given that he has in fact murdered innocent people and poses a wrongful threat to the lives of others, he is morally *liable* to be attacked or even killed if that is the most effective means of defense against him. If, for example, he were lurking in the park late at night and a private citizen, knowing the facts, could kill him as he approached his victim, it would be permissible and desirable for the citizen to do so. In killing him in defense of the potential victim, the citizen would neither wrong him nor violate his moral rights. The murderer has no moral right not to be killed while he continues to threaten the lives of others.

The reason we insist that the police must try to arrest him rather than kill him derives not from his moral rights but from the rights of other people – *innocent* people. It is simply too dangerous to the lives and liberties of innocent people to allow the police to kill rather than capture people they believe to be dangerous criminals. To give the police license to attack or kill criminal suspects without first attempting an arrest would inevitably and perhaps frequently result in the killing of innocent people, either through mistake or abuse. The requirement of arrest is a norm we accept as a concession to the fallibility of the agents charged with the defense of the innocent.

Parallel claims apply to anti-terrorist action. Actual terrorists – people who are in fact trying to kill innocent people as a means of achieving their political ends – are morally liable to defensive killing if that is the most effective way to prevent them from killing their potential victims. An actual terrorist would not be wronged by being killed to prevent him from killing innocent people. This is a clear implication of uncontroversial principles of self- and other-defense. Yet for various reasons it cannot serve as a guide to action in strategies for combating terrorists. For that would expose innocent people to unreasonable levels of risk at the hands of those assigned to their defense.

Perhaps the most significant risk is the risk of misidentification. In domestic law, the principal, though by no means only, reason we insist that criminal suspects be arrested and tried is to ensure that the innocent are not punished by mistake. For mistakes are easy to make when criminals try as well as they are able to evade identification. In this respect both domestic police work and anti-terrorism are quite different from war. For in war combatants are required to wear uniforms to distinguish themselves both from civilians and from combatants of other countries. But no one wears a uniform to identify himself as a criminal or a terrorist.

The risks of misidentification are considerable even in domestic anti-terrorist action, as was shown recently when British police killed a Brazilian man whom they mistook for a terrorist shortly after the terrorist bombings in London in 2005. But the risks of misidentification are exacerbated when anti-terrorist action has to be conducted in foreign countries, and especially when it has to be carried out without the cooperation of the government of the country in which it is conducted. In 1973, for example, agents of Mossad, the Israeli intelligence and counter-terrorism agency, killed an innocent Moroccan waiter in Norway in the mistaken belief that he was the leader of the Palestinian 'Black September' terrorist group that had massacred Israeli athletes at the 1972 Munich Olympics. This case provoked an international scandal, but in general the incentives to exercise reasonable care in identifying and attacking foreign terrorists are weaker than those for exercising care in domestic police work or anti-terrorist action. Governments will naturally take greater precautions to avoid killing their own citizens by mistake.

Another reason for insisting on the requirement of arrest in anti-terrorist action is that terrorists seldom offer the opportunity to attack them in isolated areas. If one attempts to kill them preventively, one generally must attack them where other people live, thereby imposing

grave risks on the innocent. This objection to hunting down and killing terrorists is often expressed by saying that the harm caused to the innocent by the attempt to kill terrorists may be *disproportionate* to the harm that such acts might be expected to avert.

While there are thus good reasons grounded in the necessity of avoiding harming the innocent to impose a requirement of arrest on anti-terrorist action, there are also reasons to believe that the requirement of arrest must sometimes be suspended in anti-terrorist action. These reasons derive from the various ways in which anti-terrorist action frequently differs from domestic law enforcement.

May the requirement of arrest sometimes be suspended in anti-terrorist action?

There are three features that together tend to distinguish anti-terrorist action from ordinary police work. The most important of these is of course that the threats posed by terrorists are often substantially greater than those posed by ordinary criminals. As I noted earlier, they often seek to coerce an entire people through terror by inflicting the greatest levels of death and suffering of which they are capable. So the harms to be averted through anti-terrorist action are in general significantly greater than those that ordinary police work seeks to prevent. When this is true, I will say that the 'threat condition' is satisfied.

Second, efforts to capture terrorists may be less effective as a means of defense than attempting to kill them. (When this is true, I will say that the 'effectiveness condition' is satisfied.) This difference in likely effectiveness is more pronounced in anti-terrorist action than in domestic law enforcement, especially when anti-terrorist action must be conducted abroad. When terrorists who threaten one country reside in another, the government of the country in which they live may, for a variety of reasons, including a concern for its own political survival, provide only limited, token support for the work of foreign anti-terrorist agents. Or it may provide no support at all, or may even engage in active obstruction of efforts to arrest terrorist suspects. Also, and for obvious reasons, terrorists tend to choose to live in areas where they enjoy the support of the local population. In these cases, terrorists often have sentinels who will alert them to the approach of anti-terrorist agents, assist them to evade capture, and obstruct their removal or extradition in the event that they are captured.

Third, efforts to arrest terrorist suspects are often more dangerous to anti-terrorist agents than killing them would be. (When this is true, I will say that the 'danger condition' is satisfied.) It is, of course, also true of domestic police work that killing criminal suspects would often be safer for the police than trying to arrest them. But the difference in the degree of risk between the options of capture and killing is much greater in the case of anti-terrorist action. This is in part because terrorists are more likely than ordinary criminals to fight to the death in resisting arrest. Not only are the penalties terrorists would face if convicted in general greater, but terrorists are also more highly motivated and may indeed regard the opportunity to kill anti-terrorist agents before dying a martyr's death as more desirable than being arrested and punished. But if terrorists can reliably be expected to resist arrest with maximum violence, it could be imprudent to forfeit the element of surprise by attempting an arrest rather than simply attacking them with the intention of capturing any who might be induced to surrender.

Another reason why anti-terrorist action is more dangerous, particularly in foreign areas, is related to one of the reasons why arrest may be less effective than killing as a method of defense. When terrorists have sentries who can warn them of the approach of strangers, as well as local supporters who are willing to protect them, anti-terrorist agents face the prospect of ambush both in trying to capture the terrorists and, if they succeed, in trying to extract them for trial elsewhere. Killing, by contrast, may often be accomplished from a safe distance.

The dangers of attempting to capture determined and well organized terrorists are illustrated by the events that culminated in the killing in November 2002 of six people whom the US described as Al Qaeda militants. They were killed by a Hellfire missile fired from a Predator drone aircraft while they were driving in a van in the Yemeni desert. This instance of 'targeted killing' by the US was much criticized (perhaps on good grounds, though objective evaluation is difficult because the primary source of information about the incident is the government that carried out the attack), but the relevant point here is that 14 soldiers had earlier been killed in an attempt to capture one of the people who was killed in the strike.¹²

I concede that the three respects I have cited in which anti-terrorist action may differ from domestic police work are not respects in which anti-terrorist work *always* differs from ordinary police work. The threat, effectiveness, and danger conditions are less likely to obtain when anti-terrorist action takes place in a domestic rather than foreign setting, and

are less likely to obtain even in a foreign setting when the foreign government is cooperative and competent.

My claim is only that when the three conditions do obtain, or even when only the first and second obtain, there is good reason to suspend the requirement of arrest. For when the threat that terrorists pose is grave, when killing them would be more likely to avert the threat than trying to capture them, and when trying to capture them would be riskier than killing them, we may then owe it to the terrorists' potential victims – both the innocents they would otherwise kill and the agents whose responsibility it is to protect those innocents – to try to kill them rather than to try to capture them. If the choice that terrorists have forced on us is between killing them and allowing the innocent to remain at risk of being killed by them, justice may demand that they, rather than the innocent, bear the costs of their own wrongful action.

The three conditions that may justify suspension of the requirement of arrest in anti-terrorist action may also be satisfied in some cases of domestic law enforcement. If a criminal suspect is highly dangerous to those around him, if killing him would be more effective in eliminating the threat he poses than an effort to arrest him, and if attempting to arrest him would be significantly more dangerous for the police, the requirement of arrest may yield to moral principles of self- and other-defense, making it permissible to kill him. The most obvious case in which these conditions may obtain is when a criminal suspect resists arrest through violence. The reason it is permissible to attack a suspect in such a case is that his use of violence both makes him liable to attack and also suggests that the risks to the police and others of continuing to try to subdue him have become excessive. But if, *in advance* of attempting an arrest, there is good evidence that a person has already acted in a way that makes him liable to defensive action and the risks of attempting to arrest him are *as great as* or even *greater than* those in a typical case in which a suspect violently resists arrest, it seems that the requirement of arrest ought, as a matter of consistency, to be suspended in this case as well.

The problem of liability

Both in domestic law enforcement and in anti-terrorist action, the obvious objection to bypassing the requirement of arrest and resorting directly to defensive action is that this involves treating a person as a criminal, and harming him in the process, without first demonstrating his

guilt. The person who is attacked rather than arrested is denied the presumption of innocence.

This, however, is a necessary feature of all action that is defensive rather than punitive, *ex ante* rather than *ex post*. And sometimes police action does have to be purely defensive. For example, on the day on which I am making revisions to this essay – 16 April 2007 – police in Blacksburg, Virginia, have just engaged in defensive action against a murderer who killed 32 people on the campus of Virginia Polytechnic University – though if their action succeeded at all, it was apparently only by inducing the murderer to kill himself.

The difference between this kind of case and most instances of anti-terrorist action, however, is that terrorists seldom present themselves as targets while they are in the process of committing a terrorist act. Suicide bombers, an increasingly common species of terrorist, act only once and cannot be punished after the fact. If one has sufficient knowledge to be able to attack them before they can detonate their explosives, and if an attempt to arrest them would risk an immediate detonation among innocent people, it could be justifiable to attack them preemptively. But there could also be cases in which *preventive* attack, before the threat becomes imminent, would offer the best prospect of effective defense. If the threat, effectiveness, and danger conditions are met, could preventive attack against a terrorist suspect be justified?

There are, of course, various objections to preventive defense. But many of the familiar objections to preventive *war* – for example, that recognition of the permissibility of preventive war could provide a legal rationale for virtually any war that a country might be tempted to fight – do not apply, at least not very strongly, to preventive defense against individual terrorists, or terrorist suspects. Yet one important objection may apply, at least in many cases. This is that preventive defense may involve attacking a person who has as yet done nothing to make him morally liable to attack. To attack someone who is not liable to attack is to attack someone who is innocent in the relevant sense. In general, it is unjust to subject a person even to preventive *detention*; how much worse, then, to subject him to preventive *execution*. We simply may not kill those who we think, even on very good grounds, will later become terrorists. Justified defense, like justified punishment, requires that the person acted against be doing something, or have done something, that makes him morally liable to what is done to him.

This objection to preventive anti-terrorist action should be distinguished from the objection based on the possibility of misidentification, though they are related and perhaps overlapping. The problem of misidentification is that anti-terrorist agents may mistakenly attack people who have no association with terrorism of a sort that would make them dangerous to others. The problem of liability is that anti-terrorist agents may attack people who *are* associated with terrorism in ways that may make them dangerous but who as yet have done nothing to forfeit their rights against attack. In terrorism, as in crime, there are many people who are dangerous, in the sense that they are significantly more likely than most other people to commit terrorist or other criminal acts, but who have so far not acted in a way that would make them liable to preventive action. Such people would be wronged if they were attacked to prevent them from posing a threat in the future.

The problem of liability is not an objection to preventive defense *in contrast* to arrest. For it would also be unjust to arrest a person if one has no reason to believe that he has done anything to make himself liable to punishment. The problem of liability is instead a general problem for any anti-terrorist action that is preventive in character, as most action against suicide terrorists – and indeed most action against all other first-time terrorists – must be.

The problem is not serious when there is compelling evidence that a person has been actively engaged in planning and preparing for a terrorist attack. In these cases we can follow the law of attempts by claiming a right of intervention against an uncompleted attempt, or the law of conspiracy in claiming that the preparatory actions are themselves a ground of liability to preventive measures, including arrest and even, if the conditions for the suspension of the requirement of arrest obtain, preventive attack.

Liability to preventive action

But what about people who have recently joined a terrorist organization and are currently performing nonviolent functions within the organization while training for possible future missions, yet are not planning, preparing for, or participating in any actual mission? Are such people liable to preventive attack?

To answer this question, it may help to consider a parallel problem in war. Suppose that our intelligence services discover decisive evidence

that the leaders of another country are planning a war of unjust aggression against us. At this point, however, the ordinary rank-and-file soldiers of the country know nothing about their leaders' plans. Suppose we can defend ourselves against the planned aggression only by attacking now, preventively. Are the unmobilized soldiers of our potential adversary liable to attack, even though they are not attacking us and even though there is at present no war between them and us? Most people believe that they are indeed liable, simply by virtue of their membership in the military. Anyone who wears their uniform is considered by most people to be a legitimate target of attack. Even if our surprise, preventive attack were illegal, the law holds that our own rank-and-file combatants who carried it out would not be guilty of war crimes. They would not be guilty of killing the innocent, provided they confined their attacks to the soldiers on the other side.

But how could merely wearing a uniform constitute a ground of liability to attack? To judge a person liable to attack merely by virtue of his membership in a certain group, such as a military organization, is, as I suggested earlier, the way in which terrorists rationalize their attacks against the innocent. Yet there may be grounds for holding unmobilized soldiers liable to preventive attack that do not presuppose a repellent doctrine of collective liability that makes mere membership in a group a basis of liability.

The argument for liability appeals to the idea that when a person enlists in the military, or when he allows himself to be conscripted into the military, he has become an instrument of the will of his superiors. The norms of military institutions are such that when a person becomes a member, he effectively commits his will to obedience. If his leaders begin to plan and prepare for an unjust war, he will have been made into an unjust threat by their action – assuming that he will in fact obey, as virtually all soldiers do. He may have been converted into a threat even if he is unaware of his leaders' plans, and so is unaware of having become a threat to others. Since it was foreseeable when he joined the military that this might happen, he is responsible for having become a threat. This is the basis of his liability.

One may object that while sometimes a person may be at fault for joining the military – for example, if the military organization he joins is known to be likely to fight in an unjust war – many people who join the military do so for good moral reasons, and act admirably when they do. How, one may ask, can morally permissible and indeed admirable action be a basis of moral liability to preventive force? The answer is that fault is

not necessary for liability in this kind of case. When a person joins the military and surrenders his will to his leaders, he thereby becomes *strictly* liable to preventive force in certain conditions. He knows, or should know, the moral risk he runs in surrendering his autonomy to his leaders, and if he has bad luck in having leaders who convert him into a threat without his knowledge, he rather than his potential victims must pay the cost of his earlier choice.

This argument for the liability of unmobilized soldiers to preventive force may be restricted in scope in two ways. First, there are rare instances in which active duty soldiers do disobey. But even those who engage in conscientious refusal are usually committed at the outset and renege on the commitment only later when they discover exactly what they have been committed to. It seems plausible to suppose that they remain liable to preventive force as long as their wills are committed. There may, of course, be a few who manage to preserve their autonomy by remaining uncommitted to future obedience, deciding whether to obey each order only when it is given. These individuals may not be liable to preventive force; but they are nevertheless responsible for misleading others by their presence in the military to believe that they *are* committed to obedience; they therefore may have no justified complaint if they are treated by others as if their wills were committed to future obedience.

Second, the argument for liability presupposes that all those in the military entered it voluntarily. But this is false. I concede this objection: a person cannot be liable to preventive force by virtue of having joined the military if his becoming a member was genuinely involuntary. Exactly what the conditions of voluntariness are is a contentious issue. For present purposes, perhaps it will do to say that a person's membership in the military is voluntary when he could reasonably have avoided it. When people enlist in the military voluntarily, or when they allow themselves to be conscripted into the military when the penalties for conscientious objection are mild, we can say that their being in the military is voluntary and they may be held accountable for their choice. By contrast, those who acquiesce in conscription only because the penalties for conscientious objection are draconian may be said to serve involuntarily. The argument for liability may not apply to them.

The argument I have given for strict liability among military personnel provides, I believe, the best defense of the common belief that even unmobilized soldiers can, on rare occasions, be legitimate targets of preventive attack. Most people who would accept this argument would also think that it applies unrestrictedly to all members of all legitimate

military organizations. I think, however, that it is subject to one further, highly significant restriction. I believe that it applies only to those soldiers whose leaders are planning and preparing for an *unjust* attack. But I will not discuss or defend this restriction here. For the point of the argument is to suggest that those who believe that members of the military – including those who are unmobilized – may be legitimate targets of preventive attack should also accept that members of terrorist organizations may be liable to preventive attack for the same reason. Indeed the argument for strict liability is stronger in the case of members of terrorist organizations than in the case of military personnel. This is so for several reasons. First, most terrorists are enthusiastic volunteers. There are people who are compelled to become terrorists – for example, child soldiers in Africa who commit massacres in villages as a means of terrorizing and intimidating the larger population – but they are atypical. Second, it is scarcely possible to join a terrorist organization permissibly and for morally admirable reasons. For a terrorist organization is by definition committed to the intentional killing of innocent people as a matter of policy. This is not, however, a necessary feature of military organizations and is not even contingently a feature of most actual military organizations.

Earlier I proposed three conditions that together could justify the suspension of the requirement of arrest in anti-terrorist action. I will now suggest two further conditions that, if satisfied, could justify *preventive* action against terrorists or terrorist suspects. The first is that the person is an active member of an organization that uses terrorist tactics *as a matter of policy*. Such an organization is dedicated to killing innocent people; its members may therefore be liable to preventive measures on the ground that they are guilty of conspiring to kill the innocent. Yet there are some organizations that comprise many branches that perform different functions, some of which are legitimate while others are terrorist. It is therefore important to insist on a second condition, which is that preventive action should be reasonably expected to make a proportionate contribution to the prevention of terrorist action. Preventive action may not be taken against a member of an organization that is involved in terrorism unless there is reason to believe that this will actually serve to protect the innocent. In this respect the restrictions on anti-terrorist action are more stringent than those conventionally imposed on military action in war. For in war the killing of enemy combatants is conventionally permitted even when there is no evidence that killing them will make any contribution to the achievement to the aims of the war. (My own view is that this is a mistake and that acts of killing in war should likewise be subject to a requirement of necessity.)

In cases in which these two conditions are satisfied *and* the threat, effectiveness, and danger conditions are satisfied as well, terrorists or terrorist suspects may be liable to preventive attack. The five conditions together are sufficient to make a person presumptively liable to preventive attack even if he has so far never engaged in actual terrorist action and, perhaps, even if he is not currently engaged in preparing for a specific terrorist action. In cases in which the two conditions are satisfied but the three conditions justifying the suspension of the requirement of arrest are not, terrorist suspects may be liable to preventive arrest even in the absence of evidence that they have previously participated in terrorist action or are actively preparing for a specific terrorist action. The grounds for liability to preventive arrest are similar to the grounds for arrest in the law of conspiracy, except that in these cases the ground of liability would have to be *complicity* in a conspiracy to commit terrorist acts rather than active individual preparation for specific terrorist action.

Proportionality in police action, anti-terrorist action and war

I noted earlier that one important reason for imposing the requirement of arrest on anti-terrorist action is that attacks on terrorists do not and cannot take place on remote battlefields but must in general be conducted in areas where other people live, thereby exposing innocent people to grave risks of harm as a side effect. Some people who agree that terrorists are not combatants and that anti-terrorist action is not governed by the norms and conventions of war contend that the proportionality constraint on anti-terrorist action is more restrictive than that which applies to action in war. They believe, in other words, that anti-terrorist action may not expose innocent people to same risks to which it may be permissible to expose them in the course of war. Michael Walzer, for example, claims in a recent article that 'justice demands...that the army take positive measures, accept risks to its own soldiers, in order to avoid harm to civilians. The same requirement holds for anti-terrorists—holds *more strongly*, I think, insofar as it is mostly police rather than soldiers who are at work in this 'war' (or, the soldiers are doing police work), and we impose much higher standards of care for civilians on the police than we do on armies in combat'.¹³

There is a sense in which this is true. As a general matter, the requirement of due care for the safety of bystanders is stronger in the case of police work than it is in war; but this is only because the goals of police action are in general less important. Many criminal suspects, including

some actual murderers, will not pose a serious threat to others even if they are not arrested. We seek to arrest, try, and punish criminals for a variety of reasons other than to defend ourselves against them: for example, retribution, redress, reform, deterrence of others, and so on. Such aims are usually less important, or less certain of achievement through punishment, than preventing a criminal from further harming the innocent. But in those cases in which the primary aim of law enforcement is defense rather than punishment – for example, when a murderer is on a rampage and threatens to kill a great many people – the requirement of due care for the safety of bystanders to which the police are subject may be less demanding, since more is at stake.

Indeed, there is one reason why the proportionality constraint may on such occasions be *less* demanding than the corresponding requirement that applies in war and foreign anti-terrorist action. This is that those who would be endangered by domestic police action in these cases may already be at considerable risk from the criminal, so that it may be on balance safer for them if the police take more aggressive measures against the criminal. The risk of inadvertent harm to the innocent from the action of the police may be outweighed by the extent to which police action reduces the threat that the criminal poses to the innocent. Unless we think that there is some reason why it is better to be at greater risk from a criminal than to be at lesser risk of accidental harm by the police, the requirement of due care, or proportionality, should be relaxed in these cases.

There is, in fact, no difference in stringency between the proportionality constraint on acts of war and the proportionality constraint on police action. They are the same constraint. A state of war does not have the effect of weakening or compromising the rights of innocent people. Their right not to be harmed as a side effect of an act of war is no less strong than their right not to be harmed as a side effect of police action. It is just that in war the harms to be prevented are generally greater; therefore the harms that it can be permissible to risk or to inflict as a side effect of averting those harms can be correspondingly greater and still be proportionate.

There is, however, one reason why anti-terrorist agents could be justified in some instances in adhering to a weaker standard of due care for bystanders. There may be instances in which anti-terrorist agents know that many of the people among whom terrorists are living are supporters who shelter and assist them in various ways. These people are not themselves terrorists. Their action does not make them liable to

intentional attack. But those who voluntarily allow terrorists to live in close proximity to them in order that they may shelter and support them can have no legitimate complaint if they are harmed as a side effect of action taken against the terrorists to which there would otherwise be no objection. Such people make themselves liable to the risks they run by collaborating with people who are themselves legitimate targets of attack. They cannot claim a right not to be harmed even unintentionally when acknowledgment of such a right would enable them to provide a moral shield for terrorists.

It is of course almost never true that all the bystanders who would be at risk of being harmed by an attack against terrorists are supporters who aid and abet terrorist activities. But it can nevertheless make a difference if *some* are. Here is a hypothetical example based on a recent and all-too-real episode. In the summer of 2006, members of Hezbollah in southern Lebanon fired thousands of missiles into northern Israel. Many of the warheads were packed with metal pellets that on detonation spewed out in all directions. At the explosion sites I saw a few months later (one a children's playground), all surfaces within about a 100-foot radius – houses, trees, walls, sidewalks, pavements – were densely riddled with deep pock-marks from these pellets. (The pellets themselves had long since been collected by neighborhood children.) The nature of the missiles, combined with the fact that they were not aimed at military targets, indicates that the intention of those who fired them was to kill as many people as possible. It did not matter who these people were as long as they were Israelis. These were therefore terrorist attacks. Many of the missiles were fired from within villages in southern Lebanon. Israel was criticized, with some justification in my view, for causing disproportionate civilian casualties in its defensive strikes against the missile sites. But suppose that Israel had chosen to make a more restrained and measured military response, making precision strikes against only a small number carefully chosen missile sites. Suppose that all the sites from which missiles had been launched were within villages and that Israeli tactical planners had to choose between attacking one launch site within a village known for its allegiance to Hezbollah and attacking another site within a village known for its opposition to Hezbollah's terrorist tactics. I think it would clearly be wrong to attack the latter, if other factors were equal, since it would be reasonable to expect that a higher percentage of the unintended casualties in the other village would befall people whose support for terrorism had made them liable, at least to some degree, to suffer the side effects of anti-terrorist action. They would, at a minimum, have weaker grounds for moral complaint at being harmed by action directed against terrorists whom they had sheltered and assisted. If this is

right, it suggests that the proportionality constraint on anti-terrorist activity *may* be more stringent if terrorists are attacked in a neutral area than if they are attacked in an area in which they are known to be sheltered and assisted.

It is worth stressing, however, that if the standard of care may sometimes be less stringent in foreign anti-terrorist action than in domestic law enforcement, that is *not* because the people among whom terrorists live matter less because they are members of another society. People who are wholly innocent – who are in no way responsible for the threats terrorists pose – have the same right not to be attacked or harmed whatever their nationality.

This means that the proportionality constraint in war and in anti-terrorist action abroad is actually more stringent than most people suppose. If we want to determine whether it would be acceptable to kill a certain number of innocent people as a side effect of some act of war, or of some anti-terrorist action, we should ask ourselves if it would be permissible to proceed *if* the innocent people who would be killed were our compatriots rather than foreigners. If we think that it would be wrong to sacrifice our compatriots in those circumstances, then we ought not to proceed. Suppose, for example, that the only way to eliminate the threat from a certain terrorist is to fire a missile at the hotel room in which he is staying. If it would be wrong to fire the missile if the hotel were in New York or London, then it would be wrong to fire it if the hotel were instead in Baghdad, or Kabul.

I will conclude by asserting two liberal pieties that, though familiar and even platitudinous from the point of view of the political left, nevertheless seem to me to be both true and profoundly important. One is that attacks against terrorists or terrorist suspects that kill the innocent, either by mistake or as a side effect, are often not only disproportionate but also counterproductive. By inflaming the hatred of those related to the victims by nationality or religion, these acts may recruit more terrorists than they eliminate. The second, related point is that the most important part of anti-terrorist action is not military action, police action, or even interdiction of terrorist attacks. It is to give justice, and to show generosity and magnanimity to oppressed, exploited, humiliated, or merely disadvantaged peoples whose grievances – some unreasonable but many legitimate – are the ultimate sources of terrorism.¹⁴

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- ¹ For the sake of brevity, I will refer only to killing rather than to killing or harming.
- ² For a critique of the criterion of liability found in the dominant version of the just war theory, see Jeff McMahan, 'The Ethics of Killing in War', *Ethics* 114, no. 4 (2004), 693–733.
- ³ Here I assume that those who perform abortions do not thereby make themselves liable to attack. If they did, the clinic bomber would be relevantly analogous to a hypothetical bomber of the SS quarters at a pre-war Nazi concentration camp, intending to intimidate SS officers at other camps. This person would not be a terrorist, since his victims would be liable to attack.
- ⁴ See Judith Jarvis Thomson, 'Self-Defense', *Philosophy and Public Affairs* 20 (1991), 283–310; Thomas Scanlon, *Moral Dimensions* (Harvard University Press, forthcoming), chapters 1 & 2; Frances Kamm, *Morality, Mortality Volume II: Rights, Duties, and Status* (New York: Oxford University Press, 1996), especially part II; and Lionel McPherson, 'Is Terrorism Distinctively Wrong?' *Ethics* 117 (2007), 524–546.
- ⁵ One who moves in the direction of pacifism is David Rodin, 'Terrorism without Intention', *Ethics* 114 (2004), 752–71. Two who defend terrorism are Jonathan Bennett, *The Act Itself* (Oxford: Clarendon Press, 1995), 218; and Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007, especially chapters 3 and 5.
- ⁶ See Warren Quinn's remarks on 'eliminative' and 'opportunistic' agency in his 'Actions, Intentions, and Consequences: The Doctrine of Double Effect', *Philosophy and Public Affairs* 18 (1989), 344.
- ⁷ For elaboration on the moral and legal status of unjust combatants, see Jeff McMahan, 'The Morality of War and the Law of War', in David Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Legal and Moral Status of Soldiers* (Oxford: Clarendon Press, 2008).
- ⁸ Bush declared: 'Make no mistake, the US will hunt down and punish those responsible for these cowardly acts'. One would think it would be preferable to condemn terrorist mass murderers for what they really are, but apparently the macho code requires that one insult them as cowards, even if what they have done is to fly a plane into a building. On the

distinction between war and criminal justice, see George Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton: Princeton University Press, 2002), 3–9.

⁹ *Ex parte Quirin*, 317 U.S. 1 (1942). For a good discussion of this case and its implications for the policies of the Bush administration, see Fletcher, *Romantics at War*, chapter 5. Also see Shlomy Zachary, 'Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?', *Israel Law Review* 38 (2005), 378–417.

¹⁰ *Quirin*.

¹¹ For discussion, see McMahan, 'The Morality of War and the Law of War' (note 7).

¹² For information on the attack, see <http://archives.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html>. For discussion, see Michael Walzer, 'Terrorism and Just War', *Philosophia* 34 (2006), 3–12, 10–11.

¹³ Walzer, 'Terrorism and Just War' (note 12), 9–10. Italics added.

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