

NECESSITY, POLITICAL VIOLENCE AND TERRORISM

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Necessitas facit licitum quod alias non est licitum.
(Necessity makes that lawful which otherwise is not lawful.)¹

I. INTRODUCTION

There has been much talk about “getting inside the terrorist’s mind” in order to better understand the rationale behind terrorist attacks.² A typical comment has been, “We may not agree with it, but in their minds, [the terrorists] have good reasons for what they’ve done.”³ The idea is that perhaps we should be able to win the “war on terror” by simply using a compassionate approach, so as to understand the cause of grievances of those who seek to justify the deliberate taking of innocent lives.

This Article will discuss both political violence and terrorism and attempt to distinguish these two species of violence. The distinction is important, if it can be made, because the international community in general supports political violence as an adjunct to political reform movements of various types, while this same

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1. 10 Coke’s Reports, 61.

2. See e.g. Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (HarperCollins Publishers, Inc. 2003); Lee Anderson, *The Evil in Terrorists’ Minds*, Chattanooga Times Free Press B7 (Dec. 3, 2002); Margo Hammond, *Writing on Sept. 11*, St. Petersburg Times 4D (Sept. 8, 2002); Kirk Kicklighter, *Terrorist Mind Dark, but Not Unfathomable*, Atlanta J.-Const. 7A (Sept. 13, 2001).

3. Kicklighter, *supra* n. 2 (quoting Samuel Karson, a former chief psychologist at the U.S. State Department who has studied terrorists for many years).

community generally condemns the species of violence that carries the label “terrorism.” In the end, one is hard-pressed to provide a clear demarcation between the two species of violence because both kinds of violence may involve indiscriminate targeting of noncombatants, and both kinds of violence are motivated in large part by a desire to effect political change. Even so, once the mode or scope of violence goes beyond a certain threshold, then even legitimate freedom fighters will be branded as terrorists by the international community.

To terrorists, there is a pressing *necessity* for the kind of violence that is typically labeled “terrorism”—the targeting of innocent civilians, for example. Terrorists will concede that the maiming and killing of “innocent” targets violates basic human rights, but they insist that these actions are justified because they are designed to avert a greater evil: the brutal oppressiveness, the grave injustices, and the exploitation of their own peoples’ lives by the practices of the powers that be. Terrorists think, like President Abraham Lincoln did, that there is an “indispensable necessity” associated with their efforts to preserve “by every indispensable means” their way of life, free from the constraints of others.⁴ This Article will consider these justifications in light of the age-old doctrine of necessity, sometimes referred to as the necessity defense or the “choice of evils” defense, which predates common law.⁵

4. Ltr. from Pres. Abraham Lincoln to U.S. Sen. Albert G. Hodges (Apr. 4, 1864), in *Speeches and Writings: Vol. 2: 1859–1865*, at 585–586 (Don E. Fehrenbacher ed., Lib. of Am. 1989).

5. There are biblical accounts that illustrate the necessity doctrine. In the New Testament, for instance, Jesus responds to criticism of acts performed in violation of the Sabbath:

What man of you, if he has one sheep and it falls into a pit on the Sabbath, will not lay hold of it and lift it out? Of how much more value is a man than a sheep! So it is lawful to do good on the Sabbath.

Matthew 12:11–13 (Rev. stand.). Another account is the New Testament example of David who, through necessity of hunger, ate the sacred bread, and in doing so did not break the law, although he broke the words of the law, because he did it for necessity. *Matthew* 12:3–4. Another example is that in which the apostles of Christ plucked the ears of corn in a crop belonging to someone else and ate them, although in doing so they committed theft. *Matthew* 12:1.

II. THE DOCTRINE OF NECESSITY

The doctrine of necessity holds that certain conduct, though it violates the law and produces a harm, is justified because it averts a greater evil and hence produces a net social gain or benefit to society.⁶ Granville Williams expressed the necessity doctrine in this way: “[S]ome acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils.”⁷ Williams offered the following example:

Suppose that a dike threatens to give way, and the actor is faced with the choice of either making a breach in the dike, which he knows will result in one or two people being drowned, or doing nothing, in which case he knows that the dike will burst at another point involving a whole town in sudden destruction. In such a situation, where there is an unhappy choice between the destruction of one life and the destruction of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil.⁸

The utilitarian idea is that certain illegal conduct ought not be punished because, due to the special circumstances of the situation, a net benefit to society has resulted. This utilitarian rationale is sometimes criticized as “ends justifying the means” in that the doctrine allows that, within certain limits, it is justifiable, especially under exigent circumstances, to break the letter of the law if doing so will produce a net benefit to society.⁹

Another commentator observed:

6. See Joseph J. Simeone, “Survivors” of the *Eternal Sea: A Short True Story*, 45 St. Louis U. L.J. 1123, 1141 (2001).

7. Granville Williams, *The Sanctity of Life and the Criminal Law* 198 (Alfred A. Knopf 1957).

8. *Id.* at 199–200.

9. In a famous dissent in *Olmstead v. United States*, Justice Brandeis said,

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

277 U.S. 438, 485 (1928).

[T]hese [justified] acts are ones, as regards which, upon balancing all considerations of public policy, it seems desirable that they should be encouraged and commended even though in each case some individual may be injured or the result may be otherwise not wholly to be desired.¹⁰

It has been further opined that the necessity doctrine “represents a concession to human weakness in cases of extreme pressure, where the accused breaks the law rather than submitting to the probability of greater harm if he does not break the law.”¹¹

The idea, in its simplest form, is that it is unjust to penalize someone for violating the law when the action produces a greater good or averts a greater evil. Had the unlawful action *not* taken place, society would have endured a greater evil than that which resulted from violating the law. Therefore, under the necessity doctrine, those who violate the law in certain circumstances are justified in doing so.

With the necessity defense there will always be a *prima facie* violation of the law. It might involve the violation of a minor traffic law, with no harm caused to life or limb, but the technical violation of the law will nonetheless count as a harm to society. In other instances the violation of law may involve tortious conduct that causes damages to economic or property interests. Or, the violation of law may involve serious criminal conduct that results in the death or maiming of innocent people.

English and American courts have long recognized the defense of necessity.¹² Historically, courts have applied the necessity defense almost exclusively to situations in which the actor faced imminent death or bodily harm to himself or a third person.¹³ But

10. Justin Miller, *Handbook of Criminal Law* 189 (West 1934).

11. A. J. Ashworth, *Reason, Logic and Criminal Liability*, 91 L.Q. Rev. 102, 106 (Jan. 1975).

12. See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289, 291-296 (1974) (tracing the history of English and American case law dealing with the necessity doctrine).

13. In *U.S. v. Kroncke*, 459 F.2d 697, 701 (8th Cir. 1972), the court noted,

The common thread running through most of these cases in which the defense of necessity was asserted is that there was a reasonable belief on the part of the defendant that it was necessary for him to act to protect his life or health, or the life or health of others, from direct and immediate peril. None of the cases even suggests that the defense of necessity would be permitted where the actor's purpose is to ef-

modern cases have considered the doctrine in a wide range of dangers to life, limb, property, and other interests of the actor or of third parties. In the annals of jurisprudence, there has been a wide range of applications, including the following:

- The starving survivors of a shipwreck kill an innocent member of their group, resort to cannibalism, and claim necessity in defense to charges of murder.¹⁴
- Shipwrecked seamen kill innocent victims by throwing them overboard to lighten a disabled lifeboat and claim necessity in defense to charges of manslaughter on the high seas.¹⁵
- A lost and starving hiker breaks into a private cabin, takes available food, and claims necessity as a defense to a charge of trespass.¹⁶
- *A* kills *B* reasonably believing it to be necessary to save *C* and *D*.¹⁷
- A prisoner escapes from prison, asserting that conditions at the prison were inhumane and dangerous, and claims necessity as a defense to a charge of escape.¹⁸
- Citizens destroy a private house and defend the action based on the public necessity of creating a fire break to prevent a fire from spreading over the whole town.¹⁹
- A patient suffering nausea and painful side effects from a serious illness buys and smokes marijuana in violation of the Controlled Substances Act and claims medical necessity.²⁰

fect a change in governmental policies which, according to the actor, may in turn result in a future saving of lives.

14. *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884).

15. *U.S. v. Holmes*, 26 Fed. Cas. 360 (C.C. E.D. Pa. 1842).

16. See Model Penal Code § 3.02, cmt. 1 (ALI 1985); see also *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910) (holding that one who damages property in a case of private necessity must pay compensatory damages).

17. Wayne R. LaFare, *Criminal Law* § 5.4, 482 (3d ed., West 2000).

18. *U.S. v. Bailey*, 444 U.S. 394, 398 (1980).

19. *Surocco v. Geary*, 3 Cal. 69, 72 (1853).

20. *Gonzales v. Raich*, 125 S. Ct. 2195, 2199–2200 (2005).

- In fulfilling a promise to his wife, a husband hastens her death by turning off her respirator after a stroke renders her comatose. He claims moral necessity as a defense to a charge of manslaughter.²¹
- A man kills his severely disabled daughter to stop the unbearable pain she suffered from cerebral palsy and seeks to defend charges of murder based on necessity.²²
- A doctor uses narcotics to alleviate a patient's pain, even though the dose is large enough to hasten the death of the patient, and argues that the value of stopping the pain is greater than the value of postponing death.²³
- Cargo is jettisoned overboard from a barge during a storm, and the captain justifies the action as necessary to prevent the boat from capsizing, thus saving the passengers and other cargo.²⁴
- Protestors arrested for criminal trespass argue that the action was justified to help end the CIA's secret foreign policy, which they claim was designed to murder, mutilate, and torture civilian populations and to destabilize the government of El Salvador.²⁵
- Before abortion became legal, it was held that the necessity of saving an expectant mother from serious injury was a defense to abortion.²⁶
- A patient who is in dire need of an organ transplant seeks to buy the needed organ on the black market in violation of the National Organ Transplant Act.²⁷

21. See Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity As Jury Responses to Crimes of Conscience*, 69 S. Cal. L. Rev. 2039, 2098–2099 (1996).

22. *Queen v. Latimer*, 1 S.C.R. 3, 4–5 (2001).

23. Arnolds & Garland, *supra* n. 12, at 292.

24. *Mouse's Case*, 77 Eng. Rep. 1341, 1341–1342 (K.B. 1609).

25. *Mass. v. Carter*, No. 8745-JC-0091A (D. Ct., Hampshire Co., Mass., Apr. 15, 1987).

26. *Rex v. Bourne*, 1 K.B. 686, 688–689 (1939).

27. Jason Altman, *Organ Transplantations: The Need for an International Open Organ Market*, 5 Touro Intl. L. Rev. 161, 169–176 (1994).

- A rancher kills a grizzly bear in violation of the Endangered Species Act and seeks to justify the action based on necessity to protect himself from bodily harm.²⁸
- A defendant charged with theft of two dolphins from a marine laboratory seeks to defend the action based on the necessity of giving the dolphins freedom by returning them to the ocean.²⁹
- A defendant destroys a span of a bridge that has been swept onto his property in a severe storm and seeks to defend an action for damages based on necessity.³⁰

What these situations have in common is that they are real-life cases in which people who are faced with a situation of imminent danger violate the law to avert the greater of two evils and, as a result, cause damages that otherwise would not have occurred. If violating the law is the lesser evil, and if certain other criteria are in place, the actor may successfully defend the action based on necessity.

The doctrine of necessity has been expressed in numerous ways, but in this discussion, the Author will apply a comprehensive six-prong test that must be met in order for someone to invoke the defense. The defendant must prove that

- (1) he was faced with a choice of evils and chose the lesser evil;
- (2) he acted to prevent imminent harm;
- (3) he reasonably anticipated a causal relation between his conduct and the harm to be avoided;
- (4) there were no other legal alternatives to violating the law;³¹ and

28. *Shuler v. Babbitt*, 49 F. Supp. 2d 1165, 1168–1169 (D. Mont. 1998).

29. *State v. Le Vasseur*, 613 P.2d 1328 (Haw. App. 1980).

30. *Forster v. Juniata Bridge Co.*, 16 Pa. 393, 398–399 (1851).

31. *U.S. v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989).

- (5) the [l]egislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.³²

Finally, a sixth factor generally has been held to require that the circumstances that occasion the necessity were not caused by the negligent or reckless acts of the defendant in the first instance.³³

Courts generally require that *all* the factors be proven for the defendant to succeed in the necessity defense. In this discussion of terrorism and the necessity doctrine, the Author will refer to these six factors as follows: (1) the choice of evils factor; (2) the imminence factor; (3) the causal nexus factor; (4) the legal-way-out factor; (5) the preemption factor; and (6) the clean-hands factor.

III. THE MORALITY OF POLITICAL VIOLENCE: MILL, KANT, AND MARX

Political violence is generally a legitimate, justifiable means to wage a long-term ideological battle against a hostile government. Political violence has been ubiquitous throughout human history. Many governments have met with their demise through the means of coup d'etat, by which the rulers of the government are overthrown by violent means. Numerous kings of England ascended to the throne as a result of regicide or other acts of treachery.³⁴ Acts of political violence led to the American Revolution and the overthrow of British colonial rule. Numerous world leaders today ascended to power as a result of insurrection and violence, including Fidel Castro in the 1959 Cuban Revolution.³⁵ Recently, rebels assassinated Sri Lanka's foreign minister, Lakshman Kadirgamar, who had sought to have the international community declare the country's Tamil Tiger rebels a terrorist

32. *Commonwealth v. Brugmann*, 433 N.E.2d 457, 461 (Mass. App. 1982); see also *State v. Diener*, 706 S.W.2d 582, 585 (Mo. App. 1986) (quoting same language).

33. See e.g. *U.S. v. Agard*, 605 F.2d 665, 667 (2d Cir. 1979) (defendant must show that he has not "recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]").

34. See Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 Am. J. Intl. Literature 1, 5 (1998) (discussing the history of regicide and usurpation in English history).

35. Alan Riding, *Ferment in Central America Adds to the Woes of the Region's Poor*, N.Y. Times A1 (July 8, 1980).

group.³⁶ The ethnic Tamils have waged a violent campaign since 1983, in which 64,000 have been killed, to form an independent state in the north.³⁷ In Mauritania, troops recently seized power after overthrowing President Maaouyia Ould Taya.³⁸ And in Iran, dozens of activists were recently arrested, seventeen people were killed, and 200 people were injured in political violence in the country's northwestern region of Kurdistan, where Kurdish rebels have been seeking autonomy and protesting government restrictions on cultural freedoms.³⁹ In these and many other situations involving internal strife, the international community generally takes the position that such matters pertain to domestic sovereignty. This view is implied in the United Nations Charter, Article 2(7), which states, "Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."⁴⁰

In his vision of American political identity, Thomas Jefferson praised periodic rebellion as "medicine necessary for the sound health of government."⁴¹ The major champion of utilitarianism, John Stuart Mill, argued that political violence may be justified based on what the balance of reason says is morally right in the circumstances in question.⁴² Violence may be a *prima facie* evil, but "[i]f good is to come of evil it must be practised with an awareness of the need to curtail its general tendency to produce yet more evil."⁴³ Mill argued that if a government has taken away freedoms of press and of speech, it has taken away a principal means by which the public may express its dissent, and in such

36. Hari Kumar, *Anti-Rebel Minister in Sri Lanka Is Assassinated at His Home*, N.Y. Times A2 (Aug. 13, 2005).

37. *Id.*

38. Olly Owen, *Mauritanian Autocrat Kicked out after Two Decades by Own Presidential Guard*, World Mkt. Analysis (Aug. 4, 2005) (available at LEXIS, News library, ALLNWS file).

39. Nazila Fathi, *Unrest in Iran's Kurdish Region Has Left 17 Dead; Hundreds Have Been Wounded*, N.Y. Times 12 (Aug. 14, 2005).

40. U.N. Charter art. 2, ¶ 7.

41. Thomas Jefferson, *Letter to William S. Smith* (Nov. 13, 1787), in *The Papers of Thomas Jefferson* vol. 12, 355-357 (Julian P. Boyd ed., Princeton U. Press 1955).

42. John Stuart Mill, *The Contest in America*, in *Essays on Equality, Law, and Education* XXI, 137 (John M. Robson ed., U. of Toronto Press 1984).

43. Geraint Williams, *J.S. Mill and Political Violence*, 1 *Utilitas* 102, 103 (1989).

circumstances, protestors are released from the normal duty to change society by nonviolent means.⁴⁴ He wrote,

A government cannot be blamed for defending itself against insurrection. But it deserves the severest blame if to prevent insurrection it prevents the promulgation of opinion. If it does so, it actually justifies insurrection in those to whom it denies the use of peaceful means to make their opinions prevail. . . . Who can blame persons who are deeply convinced of the truth and importance of their opinions, for asserting them by force, when that is the only means left them of obtaining even a hearing? When their mouths are gagged, can they be reproached for using their arms?⁴⁵

Mill also asserted that there are two factors that together can morally justify political violence: that the cause is just and that there is likelihood of success in the deployment of violence.⁴⁶ Mill's definition of "success" is similar to that required by the causal nexus factor of the necessity doctrine. The question is whether the violent action will be causally effective in changing society, either directly or in the long run. Sometimes success might be equated with simply drawing significant attention to one's cause, but more concrete success is equated with pressure on the authorities to capitulate to the demands of insurrectionists. In some cases success may be measured over time. Over time, the dissidents' persistence gradually may result in the intended change. In any event, the Author will question Mill's claim that an act of political violence, to be justified, must have a *likelihood* of success. The likelihood of success of an oppressed people in staging a revolt against a powerful regime is usually far from assured. But their claim may well have moral justification despite their impotence against the status quo:

Why should the moral justification of political action of any kind be contingent on its likelihood of success? Should a greatly oppressed people in a highly organized and militarily

44. *Id.* at 105.

45. *Id.* (quoting John Stuart Mill, *The French Law against the Press*, in *Collected Works of John Stuart Mill* vol. 25, 1238 (John M. Robson ed., U. of Toronto Press 1982)).

46. John Stuart Mill, *Radical Party in Canada*, in *Collected Works of John Stuart Mill* vol. 6, 414 (John M. Robson ed., U. of Toronto Press 1982).

powerful regime wait until the regime is about to weaken and fall in order to finally attempt to gain its independence from brutal opposition?⁴⁷

In contrast to the utilitarians' justification of political violence, philosopher Immanuel Kant is known for his view that participation in revolutionary violence is always wrong.⁴⁸ However, some Kantian scholars believe that there is wiggle room in Kant's moral philosophy to consider political violence as morally justified under some circumstances, subject to certain constraints.⁴⁹ For instance, one might argue consistent with Kant that political violence is morally justified to avert threats to the rational agency of an oppressed people. In this case, people would be defending themselves from a fundamental violation of Kant's Categorical Imperative.⁵⁰ Moreover, an act of political violence could be justified as an act of self-respect and an assertion of human dignity. If violence were deployed in an insurrection against an oppressive regime, then under Kant's moral philosophy, the violence must be proportional; that is, no more violent than that which is sufficient to accomplish the end.⁵¹

Commentator Robert Audi argues that political violence may be deployed as a last resort, that is, only after "all channels of nonviolent protest have been exhausted."⁵² This caveat sounds like the legal-way-out factor that the Author will discuss in the analysis of the necessity doctrine. If one takes Audi's assertion literally, that one must avail oneself of *all* legal means of protest before engaging in violence, there would never be an insurrection, for there is really no end to the availability of nonviolent channels of protest. There will always be some further legal means available to seek political change other than starting a revolution. It is

47. J. Angelo Corlett, *Terrorism: A Philosophical Analysis* 53 (Kluwer Academic Publishers 2003).

48. *Id.* at 58 (citing Thomas Hill, Jr., *A Kantian Perspective on Political Violence*, 1 J. Ethics 105, 106 (1997)).

49. *Id.* at 59–60 (citing Hill, *supra* n. 48, at 137–139).

50. *Id.* at 55. Kant's Categorical Imperative holds that "we must never treat anyone as a mere means to an end, but as an end only, and that we ought to perform that action which is consonant with a rule that we would will to be a universal maxim." *Id.* (emphasis omitted).

51. *Id.* at 58.

52. Robert Audi, *On the Meaning and Justification of Violence*, in *Violence* 87 (Jerome Schaffer ed., McKay 1971).

always possible to file one more petition to redress grievances, to hold one more peaceful rally, to write more letters to officials, to circulate more handbills, to seek further diplomatic solutions, and so forth. When dissidents are up against a tyrannical regime or recalcitrant colonial power, there simply may be *no* nonviolent political or diplomatic solutions available.

Audi's comment would be more palatable if it suggested pursuing all *reasonable* nonviolent means, or pursuing all nonviolent means that might be *effective* rather than futile, before engaging in political violence. Even if one interprets Audi's claims to mean that the actor must first pursue all *reasonable* nonviolent remedies, sometimes awaiting the outcome of reasonable nonviolent political processes may be outweighed by the quantum of evil that will occur in the meantime—for instance, if the grievance pertains to egregious violations of human rights by a brutal dictator.

A further way of analyzing the appropriateness of political violence is from a Marxist standpoint. Marx considered the violent overthrow of an unjust regime as a means of justifying social change.⁵³ One commentator interprets Marxist political violence in this way: we are causally responsible for whatever harm we could have prevented from happening by an unjust regime; the harm of an unjust regime is, in and of itself, violence; and failure to prevent harm may be in itself a form of violence.⁵⁴

The United States shed the yoke of English colonialism principally through acts of political violence that eventually led to the Revolutionary War. Thomas Jefferson asserted, when he worked on the Declaration of Independence, that "people have the right of revolution whenever a government becomes destructive of 'certain unalienable rights'"⁵⁵ General George Washington referred to the *necessity* of engaging in political violence in a letter dated July 9, 1776, to the Massachusetts Committee of Safety, stating in part,

53. Adam Schaff, *Marxist Theory on Revolution and Violence*, 34 *J. History of Ideas* 263, 264 (1973).

54. John Harris, *The Marxist Conception of Violence*, 3 *Phil. & Pub. Affairs* 192, 192–193 (1974).

55. John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 *Pace Intl. L. Rev.* 77, 87 n. 48 (2002).

You will perceive by the inclosed Declaration . . . that Congress of late have been employed in deliberating on Matters of the utmost Importance. *Impelled by Necessity* and a Repetition of Injuries unsufferable without the most distant prospect of relief, they have asserted the Claims of the American Colonies to the rights of Humanity and declared them, Free and Independent States.⁵⁶

Some of the same claims are made by those who engage in political violence *or* terrorism—to wit, that they are impelled by necessity to act to avert the repetition of injuries that violate their rights of humanity, that the injuries are “unsufferable,” and that there is no prospect of relief by other means than violence.

Members of al Qaeda or Hamas regard themselves as every bit as legitimate as freedom fighters, and they have made clear that their objective is to attack the political, social, and economic structures of the West so as to thwart perceived inequity, tyranny, or injustice.⁵⁷

IV. THE DIFFICULTY OF DISTINGUISHING ORDINARY POLITICAL VIOLENCE, TERRORISM, AND CONVENTIONAL WAR

This Section considers the following dilemma: legitimate political violence, which involves an ideological battle coupled with a military mission, may gain widespread acceptance, if not approval, in the international community. But terrorism, which also involves an ideological battle and violence, is uniformly condemned. The distinction, if one can be made, is important for the obvious reason that political violence is often perceived to be morally justified, while terrorism is not (except from the terrorists' perspective—a perspective that will be explored later in this Article). In both instances there will be atrocities and violations of human rights. “Since the end of WWII, in almost every region in the world, there have been conflicts characterized by terror-

56. Lib. Cong., *George Washington to Massachusetts Safety Committee, July 9, 1776*, [http://lcweb2.loc.gov/cgi-bin/query/r?ammen/mgw:@field\(DOCID+@lit\(gw050222\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammen/mgw:@field(DOCID+@lit(gw050222))) (accessed Nov. 9, 2005) (emphasis added).

57. Bruce Hoffman, *The Mind of the Terrorist: Perspectives from Social Psychology*, in *Essential Readings on Political Terrorism* 62 (Harvey W. Kushner ed., Richard Altshuler & Assocs., Inc. 2002).

violence.”⁵⁸ In modern times, Europe has witnessed political violence “with the Red Brigades in Italy, the Baader-Meinhof group in Germany, the Basque separatist movement in Spain, and the IRA in Ireland,” among other movements.⁵⁹ The rebellious groups engaged in acts of violence that are of the same type as those ordinarily claimed to be “terrorist,” in an effort to assert political claims.⁶⁰ Yet “international law accepts that the desire to attain freedom should be construed not as terrorism but as an act of self-defense.”⁶¹

Making a coherent distinction between the two brands of violence is difficult if not impossible. For example, subnational groups in a secessionist movement may at times engage in acts of violence that closely resemble acts of terrorism in that there may be the indiscriminate targeting of civilians, among other things. “[F]reedom fighters and terrorists are not mutually exclusive categories. Terrorists can also fight for national liberation, and freedom fighters can also carry out inhumane atrocities.”⁶² Nearly all instances of guerilla warfare and similar armed rebellions involve terrorist-styled tactics such as the killing of innocent civilian targets.⁶³ “Over one third of the Specially Designated Global Terrorists identified by the United States Department of Treasury are associated with self-determination movements.”⁶⁴ Terrorists and freedom fighters also seem to have this in common—they deny that “independence can be won by peaceful means. It’s all a lie. . . . The only possibility we have of gaining [] liberty is through violence.”⁶⁵ The Author thinks it is uncontroversial to assert that the deployment of suicide bombers constitutes a terrorist tactic regardless of the context. Yet attacks by the Tamil

58. M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 Case W. Res. J. Intl. L. 299, 301 (2004).

59. *Id.*

60. *Id.* at 300–301.

61. Cohan, *supra* n. 55, at 86–87.

62. Alex Schmid, *Terrorism—The Definitional Problem*, 36 Case W. Res. J. Intl. L. 375, 414 (2004).

63. See generally Paul R. Williams, Michael P. Scharf & James R. Hooper, *Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty*, 31 Denv. J. Intl. L. & Policy 349, 349 (2003).

64. Paul R. Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination*, 40 Stan. J. Intl. L. 347, 348 (2004).

65. Hoffman, *supra* n. 57, at 68 (quoting Yoyes, a terrorist with the Basque separatist group in Spain).

Tigers in Sri Lanka, in the context of civil war, have involved suicide bombing.⁶⁶ The long-standing Israel-Palestine conflict has spawned numerous Islamic groups that have resorted to suicide attacks as a means of political expression.⁶⁷

Both in terrorism and in legitimate political struggles, violence is directed by a dissident political group toward the political authorities, in an effort to avert some evil. Typically, domestic political struggles, around which the international community may rally, will pertain to civil rights, anti-colonialism, secessionism, an anti-corruption movement, democratic movement, efforts to elevate the group's status in the face of a hostile government, efforts to overcome a tyrannical regime and form a new government, or other movements for political autonomy. In numerous situations in which freedom fighters are hard-pressed to attain victory, other states will offer aid or military assistance, based on the principle of humanitarian intervention.⁶⁸

Justifiable political violence is said to be a kind of recourse to the concept of just war, in which there is a

failure to grant citizens effective means of peacefully gaining redress against tyrannical abuse of power; when these matters are not respected revolutionary activity will be justified if there is a strong likelihood the government (or sovereign) can be toppled without ensuing tyranny or anarchy and bloodshed of an inordinate extent.⁶⁹

66. See Thomas L. Friedman, *Lessons from Sri Lanka*, N.Y. Times A17 (Aug. 7, 2002) (noting that the Tamil Tigers militia killed roughly 1,500 people with suicide bombers over a ten-year period).

67. Williams & Pecci, *supra* n. 64, at 348.

68. Humanitarian intervention involves coercive military action for the purpose of protecting people whose human rights are being violated. The doctrine of humanitarian intervention has been enunciated by the United Kingdom Foreign Secretary as newly emergent customary international law:

[A]rmed force should be used only as a last resort to avert overwhelming humanitarian catastrophe that a government has shown it is unwilling or unable to prevent or is actively promoting; it must be objectively clear that there is no practicable alternative to the use of force to save lives; the use of force should be proportionate to the humanitarian purpose and likely to achieve its objectives; any use of force should be collective.

Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 *European J. Intl. L.* 1, 10 (2002).

69. Robert Young, *Revolutionary Terrorism, Crime and Morality*, 4 *Soc. Theory & Prac.* 287, 297 (Fall 1977).

There are many who endorse the view that a struggle for political freedom can be justified regardless of the extent of violence deployed. Some have even suggested that the international community should recognize insurgents as legitimate belligerent powers under these conditions:

- (1) The insurgents must have a government and a military organization of their own.
- (2) The insurrection must be conducted in the usual technical forms of war, i.e., the conflict must be more than a mere petty revolt and must assume the true characteristics of a war, as that term is generally understood.
- (3) The government of the insurgents must in fact control a certain part of the territory of the State in which the civil war takes place, i.e., the order established by the insurgents must be effective for a certain part of the territory of this State.⁷⁰

Addressing the United Nations in 1974, Palestinian Liberation Organization leader Yassir Arafat stated, "He who fights for a just cause, he who fights for the liberation of his country, he who fights against invasion and exploitation or single-mindedly against colonialism, can never be defined a terrorist."⁷¹ Leon Trotsky, in his work *Terrorism and Communism*,⁷² endorsed the use of "terror" in the context of political revolution. He wrote,

If human life in general is sacred and inviolable, we must deny ourselves not only the use of terror, not only war, but also revolution itself. . . . As long as human labor power, and, consequently, life itself, remain articles of sale and purchase, of exploitation and robbery, the principle of the "sacredness of human life" remains a shameful lie, uttered with the object of keeping the oppressed slaves in their chains. . . . To make the individual sacred we must destroy the social order

70. Hans Kelsen, *General Theory of Law and State* 229 (Harvard U. Press 1949).

71. Schmid, *supra* n. 62, at 414 (translated from original quoted in Luigi Bonanate, *Dimensioni Del Terrorismo Politico* 101 (Franco Angeli Milano ed., 1979)).

72. Leon Trotsky, *Terrorism and Communism* (U. of Mich. Press 1961).

which crucifies him. And this problem can only be solved by blood and iron.⁷³

It appears to be the growing consensus in the international community that acts of aggression are justified based on the principle of *jus ad bellum*, or just cause, provided that just means are employed.⁷⁴ Many in the world community may approve of the goals of insurrectionists, but might disapprove of certain tactics. The deployment of certain tactics will cause world opinion to label the action "terrorism" and erode public sympathy for the cause. For example, there seems to be universal condemnation of deliberate violence in the form of ethnic cleansing, that is, eliminating potentially hostile pockets of ethnic groups before they have a chance to arm and strike. This is deliberate violence by one group to create a climate of fear in the population of a rival group, resulting in population transfers.⁷⁵

Efforts to draw the distinction between legitimate political violence and terrorism are sometimes based on the legitimacy of the political changes sought. The perceived legitimacy, in turn, often will depend on one's subjective point of view as to the legitimacy of the cause. "One person's terrorist is another person's freedom fighter,"⁷⁶ is a maxim well worth keeping in mind. Opponents and advocates of a particular movement may disagree as to whether the tactics employed in the struggle constitute terrorism. Each side may accuse the other of unremitting acts of terrorism, to which it becomes necessary to deploy countermeasures. The countermeasures in turn are viewed by the other side as terrorism. This has been seen again and again over the years in the Israel-Palestine conflict. In that conflict, no matter what the violent action was, when performed by Israel it was considered legiti-

73. *Id.* at 62–63.

74. Cohan, *supra* n. 55, at 86.

75. Examples of terrorist groups in ethnic conflicts include the Kurds in Turkey, the Basques in Spain, Jewish radicals under the British Mandate in Palestine, and the Tamils in Sri Lanka, among others. See generally Daniel Byman, *The Logic of Ethnic Terrorism*, 21 *Studs. in Conflict & Terrorism* 149 (1998). Sometimes ethnic terrorists will strike international targets as a means of garnering tremendous publicity for the group. "Ethnic terrorists, like terrorists of all stripes, have learned that international targets provoke more media and government attention than do domestic targets." *Id.* at 161.

76. Walter Berns, *Mystic Chords of Memory: Cultivating America's Unique Form of Patriotism*, *Am. Educator* (Spring 2002) (available at http://65.110.81.56/pubs-reports/american_educator/spring2002/mystic.html).

mate, sometimes with the admission of possible excessive use of force, while when the violent action was performed by the Palestinians, it was almost always called terrorism. Thus, it is often the case that “terrorism” is used as a rhetorical device in political debates “where charges and counter-charges compete for the moral indignation or approval of relevant audiences.”⁷⁷

Carrying enormous emotional freight, *terrorism* is often used to define reality in order to place one’s own group on a high moral plane, condemn the enemy, rally members around a cause, silence or shape policy debate, and achieve a wide variety of agendas. . . . *Terrorist* became a mantra of our time, carrying a similar negative charge as *communist* once did. Like that word, it tends to divide the world simplistically into those who are assigned the stigma and those who believe themselves to be above it. Conveying criminality, illegitimacy, and even madness, the application of *terrorist* shuts the door to discussion *about* the stigmatized group or *with* them, while reinforcing the righteousness of the labelers, justifying their agendas and mobilizing their responses.⁷⁸

Sometimes an “ordinary” sort of massacre might nonetheless be labeled an act of “terrorism.” For example, when a Jewish gunman who had deserted from the Israeli army sprayed a bus with gunfire, killing four Arabs, Israeli authorities called the shooting a “terrorist attack.”⁷⁹ But on the scale of violence, the shooting ranked qualitatively somewhat below the alarm that might be occasioned by a bombing or other larger-scale attack.

In distinguishing terrorism from ordinary political violence, one is tempted to use the default position that the distinction lies in whether innocent persons, that is, noncombatants, are targets of attack. This point of view has been expressed as follows:

The “ideal-type” (in the Weberian sense) freedom fighter fights those who deprive people . . . of their freedoms. However, if the victims of their armed struggle are others than

77. Schmid, *supra* n. 62, at 397.

78. Philip Herbst, *Talking Terrorism: A Dictionary of the Loaded Language of Political Violence* 163–164 (Greenwood Press 2003) (emphasis in original).

79. Greg Myre, *Israeli Arab Town Mourns 4 Victims of Jewish Gunman*, N.Y. Times A3 (Aug. 6, 2005).

those who directly stand in the way of achieving freedom, the would-be freedom fighter risks being labeled differently. Such a fighter exercises a tyrannical kind of violence, depriving innocent third parties of not just freedom but the right to life. The goal of freedom for one group does not justify depriving another group from living in peace, so long as that other group is not demonstrably contributing to the oppression of the first group.

When civilians are purposefully targeted by freedom fighters to achieve their political goal, they become terrorists. When terrorists, on the other hand, confine their targeting to legitimate targets—armed security personnel and installations—they could qualify as freedom fighters. To achieve this, they would have to desist from attacking and terrorizing civilians, would have to discriminate in their use of force and not engage in tactics such as hostage-taking or killing of prisoners.⁸⁰

This view seems to recognize that revolutions have occurred throughout history without resorting to unjust and disproportionate violence. Under this view, if there are civilian targets, the label “terrorism” will apply to guerilla warfare⁸¹ or other insurrections that otherwise might have garnered widespread support in the international community. Yet at the same time, if guerilla warfare involves attacks against the police or the armed forces, or involves kidnapping of political and business figures, these tactics would seem to constitute legitimate political violence, because the targets are agents linked to the political power against which the resistance is directed.

The difficulty of distinguishing political violence from terrorism is seen in the situation in Iraq. After the fall of Saddam Hussein, there was (and continues to be) significant violence by extremists, consisting of suicide bombings; roadside bombings; kid-

80. Schmid, *supra* n. 62, at 414–415.

81. Guerilla warfare is an armed liberation movement that often attacks civilian targets in addition to military targets. The guerilla warriors may consist of indigenous vigilante groups that are supported openly or covertly by the military of other nations. Guerilla warfare also involves taking control over a “liberated” area in a country, that is, an area where the police and local government officials have withdrawn, and then reorganizing the guerrilla forces into overt military units to enforce their own form of public order, and mobilizing the people into armies to drive back the government forces on a wider scale. The conflict is, in effect, a civil war.

nappings, usually with demands; and videotaped beheadings of hostages.⁸² Should these be considered terrorism or tactics of legitimate guerilla warfare? Under the above formulation, only those attacks directed to “illegitimate” targets would constitute terrorism, and those directed to “legitimate” targets would be acceptable political violence. Some of the attacks in Iraq have been indiscriminate attacks on ordinary citizens, but many of the attacks have been against military personnel of the occupying powers, against contractors accompanying or working for the military, against police working for the government, and against political figures and others who were collaborating with coalition forces. The effect has been to protest the onset of democratic processes and the erosion of power of the former regime, to protest the presence of foreign troops, to exert pressure on the world community to rid Iraq of Westerners, and to achieve political autonomy free from Western constraints.

Another problem involves the status to be ascribed to regime change by means of coup d’etat, by which the rulers of the government are overthrown by violent means. Usually, the occurrence of a coup is met with international condemnation. At the same time, it seems this method would *not* be terrorism under the above criteria, but would constitute a legitimate mode employed by freedom fighters, because the actions of the group are motivated by a desire to overcome oppression or attain freedom, and the victims of the violence are highly target-specific, being the heads of state and related security personnel. Thus, the action, even if it involves killing as opposed to a “bloodless” coup, would seem to qualify as ordinary political violence.

Again using the Iraq example, in August 2005, armed extremists ousted the mayor of Baghdad and replaced him with a representative of a powerful Shiite militia.⁸³ Also, as mentioned above,⁸⁴ in August 2005, a coup occurred in Mauritania, in which troops seized power and deposed President Maaouyia Ould Taya.

82. See e.g. Times Wire Serv., *The Conflict in Iraq: Insurgents’ Video Boasts of Infiltrating Base for Attack; Images Appear to Show Events before, during, and after Bombing Near Mosul That Killed 22*, L.A. Times A5 (Dec. 27, 2004) (describing a militant group’s involvement with a suicide bombing).

83. James Glanz, *Baghdad Mayor Is Ousted by a Shiite Group and Replaced*, N.Y. Times A8 (Aug. 10, 2005).

84. Owen, *supra* n. 38.

That incident sparked condemnation and “concern” from the United States, Spain, Israel, and other nations, as well as the United Nations Secretary General Kofi Annan.⁸⁵ But under the above formulation, this action would seem to be a legitimate form of political violence because the militia were very target-specific, directing the violence toward deposing someone who ruled a totalitarian regime.⁸⁶

It is, of course, a simple matter to distinguish ordinary criminal violence from political violence and terrorism. Commentator Paul Wilkinson offered the following distinction:

Criminal individuals or groups resort to terrorising their victims with the sole object of selfish material gain or of eliminating a possible rival or informer. The vast majority of crimes are certainly not motivated by any social or political purpose. For the political terrorist proper, however, it is a *sine qua non* that the overriding objective and ultimate justification for terror is the furtherance of his political cause.⁸⁷

Criminal violence is usually motivated by some desire for private gain or personal vendetta, while acts of political violence or terrorism are motivated by a collective or “altruistic” purpose. Wilkinson also said,

What fundamentally distinguishes terrorism from other forms of [organized] violence is not simply its severity but its features of amorality and antinomianism. Terrorists either profess indifference to existing moral codes or else claim exemption from all such obligations. Political terror, if it is waged consciously and deliberately, is implicitly prepared to sacrifice all moral and humanitarian considerations for the sake of some political end.⁸⁸

The Author does not quite agree with this passage, as it seems that both the ordinary criminal and someone labeled as a “terrorist” “profess indifference to existing moral codes or else claim exemption” therefrom. At the same time, it seems that both ordi-

85. *Id.*

86. *Mauritania National Security Chief Heads Junta after Coup*, AFX News Ltd. (Aug. 4, 2005) (available at LEXIS, News library, ALLNWS file).

87. Paul Wilkinson, *Political Terrorism* 12–13 (Macmillan Press Ltd. 1974).

88. *Id.* at 16–17.

nary criminals and terrorists adopt their own “moral” code, in which their actions are “good.” For example, terrorists operate under the principle that the killing of “innocents” is not unlawful because all citizens of the enemy state are collectively responsible for the policies of their government.⁸⁹ And many religious extremists regard suicide missions as the will of God.⁹⁰ Extremists might even point out that during World War II, Japanese kamikaze pilots “deliberately went to their deaths in horrifying suicidal exploits. The pilots, who were of the Shinto faith, believed that their lives had no value except as instruments in service of the Japanese emperor in the pursuit of his wartime efforts.”⁹¹ Similarly, suicide bombers today believe that that they will go to heaven as a result of their “sacrifice.”⁹²

Jeanne J. Kirkpatrick, former United States ambassador to the United Nations, distinguishes terrorism and ordinary criminality this way:

Terrorism is *political* in a way that crime is not; the terrorists act in the name of some political, some public purpose. [However,] while the conception of the actor transforms the act, and while a purpose related to a public goal makes an act political, it does not make it moral. A public purpose does not make a terrorist who has been arrested a political prisoner.⁹³

As noted above, “terrorism” at times is deployed as a rhetorical device to condemn certain acts of violence. This also sometimes occurs in the context of criminal violence committed by gangs. For example, the border town of Laredo, Texas, has experienced ongoing killings and kidnappings by gangs engaged in drug trafficking.⁹⁴ Local officials refer to the violence as “terror-

89. *Infra* nn. 278–281 and accompanying text.

90. *Fresh Air*, “Tom Roberts and Israel Goldvicht Discuss the Making of the PBS Documentary ‘Suicide Bombers’” (Natl. Pub. Radio June 30, 2004) (radio broad., transcr. available in LEXIS, News library, ALLNWS file).

91. John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War*, 15 Fla. J. Intl. L. 481, 494 (2002–2003).

92. *Id.*

93. Jeanne J. Kirkpatrick, Address, *Defining Terrorism, Catholicism in Crisis* (D.C., June 25, 1984) (quoted excerpt available at <http://www.maxwell.af.mil/au/aul/aupress/Books/Sloan/Sloan.pdf>).

94. Ralph Blumenthal, *Texas Town Is Unnerved by Violence in Mexico*, N.Y. Times A1

ism” despite the fact that the city’s mayor has insisted that all the kidnapping victims were tied to the drug trade.⁹⁵

*V. POLITICAL VIOLENCE, TERRORISM, AND
CONVENTIONAL WAR*

Political violence and terrorism have features in common with conventional war. “[B]oth have parallel goals and rationales, i.e., attacking the political, social or economic structures of a given state. As in war, terrorists believe the enemy threatens their very existence and they accept the possibility of their own death in pursuit of the cause.”⁹⁶ Terrorism and political violence are similar to war insofar as the combatants attack the political, social, or economic structures of a given state.⁹⁷

Acts of self-determination are similar to warfare in that the objective is to gain the support of the people, disarm the military of the offending regime, and carry out a massive propaganda campaign in the international community. As with conventional war, in which attacks are sometimes made in retaliation for attacks by the enemy, political violence and terrorism often involve attacks to “punish” the enemy. For instance, Osama bin Laden claims that al Qaeda’s terrorist attacks are *retribution* for killings of Muslims by the United States and Israel.⁹⁸

War, political violence, and terrorism favor the technique of providing a “show of force” with attacks being carried out without warning, so as to provide an element of surprise. As with conventional war in which soldiers who win battles enjoy a heightened sense of morale, every act of a terrorist or guerilla group not only intimidates the opponent, but invigorates and intensifies the faith of the actors.

Terrorists and guerillas alike believe that they are engaged in war. For example, the idea of war was on the minds of Chechen rebels who planned acts of terror that killed more than 440 people

(Aug. 11, 2005).

95. *Id.*

96. Cohan, *supra* n. 55, at 85–86.

97. Richard A. Falk, *Revolutionaries and Functionaries: The Dual Face of Terrorism*, 76, 90–93 (E.P. Dutton 1988).

98. Don Van Natta, Jr., *Sizing up the New Toned-down Bin Laden*, N.Y. Times D1 (Dec. 19, 2004).

in Moscow in the summer of 2004, killed or injured hundreds of children at a public school in Beslan, and orchestrated the in-flight destruction of two passenger jets.⁹⁹ The guerilla commander justified the acts by saying, "We do not have any options. We are offered a war and we shall continue waging it to the victory, whatever is said about us or whatever labels are stuck on us."¹⁰⁰

Political scholar R.M. Hare has commented that "[t]o some extent terrorism is a substitute for conventional war."¹⁰¹ Terrorists are not sovereign leaders capable of large-scale warfare by conventional military force, nor do they have any real hope of deposing a government against which they have grievances. According to Hare, terrorists are "acting on behalf of an oppressed section of the population which has absolutely no alternative means of securing redress of its just grievances. Such people might claim that they were prepared to have anybody do the same to them in a like case."¹⁰² Hare points out, however, that "[t]here will be problems about what are to count as just grievances . . . , [and it] will have to be shown that there are no other means"¹⁰³ for resolution of grievances.

Sometimes conventional war takes on the form of "total war" and deploys terrorist tactics, as occurred during World War II, most notably in the random terror bombing by Allied forces against German civilians and in the atomic bomb attacks on the populations of Nagasaki and Hiroshima.¹⁰⁴ Many claim that these tactics were terrorist in form if not substance, in that these bombs caused indiscriminate casualties, without distinguishing between combatants and noncombatants, and created fear and chaos in their audience.¹⁰⁵ President Harry Truman, in announcing the use of the atomic bomb at Hiroshima, said that the city was "an important Japanese army base."¹⁰⁶ While there was a military

99. C.J. Chivers, *Chechen Rebel Grimly Vows to Carry Out More Attacks*, N.Y. Times A1 (Sept. 18, 2004).

100. *Id.*

101. R.M. Hare, *On Terrorism*, 13 J. Value Inquiry 241, 244 (1979).

102. *Id.* at 244-245.

103. *Id.* at 245.

104. Falk, *supra* n. 97, at 73, 76.

105. *Id.*

106. Harry Truman, Address, *Statement by the President Announcing the Use of the A-Bomb at Hiroshima* (D.C., Aug. 6, 1945) (available at <http://www.trumanlibrary.org/publicpapers/index.php?pid=100&st=a-bomb&st1=hiroshima>).

base in Hiroshima,¹⁰⁷ the psychological purpose of the bomb was not simply to destroy the modest military installation in that city. Rather, the total destruction of the city, without warning, was designed to maximize the shock of destruction so that Japanese willingness to continue the war might be overcome.

Sometimes rulers of a government, particularly in brutal dictatorships, but also in democracies, will engage in terrorist-type acts outside the context of a just war. To the state actors in question, the action is legitimate and justified—for example, to suppress a rebellion. Saddam Hussein is known to have engaged in genocide and mass executions of strangers and political foes alike.¹⁰⁸ The period between 1793 and 1794 during the French Revolution is known as the “reign of terror” in which there was a wave of public executions of “enemies of [the] state” orchestrated by the Committee of Public Safety.¹⁰⁹ Thousands were executed, and 300,000 French citizens were arrested.¹¹⁰ The very word “terror” has its roots in the French revolution.¹¹¹

The French engaged in the extensive use of torture during the brutal anti-colonial war in Algeria from 1955 to 1962.¹¹² An estimated one million Algerians were killed in their anti-colonial struggle against France.¹¹³ French soldiers raped many Algerian women.¹¹⁴ Some tens of thousands of Algerians who fought on the side of the French during the war were later abandoned by the French and massacred when the French pulled out of Algeria.¹¹⁵ An officer who supervised the torture, General Paul Aussaresses, wrote a memoir, *Algeria Special Services 1955–1957*, narrating

107. *Id.*

108. John F. Burns, *How Many People Has Hussein Killed?* N.Y. Times 4D (Jan. 26, 2003).

109. Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 Admin. L. Rev. 229, 271 (2005).

110. William H. Rehnquist, *Judicial Independence*, 38 U. Rich. L. Rev. 579 (2003) (unpublished remarks from a symposium at the University of Richmond School of Law on March 21, 2003).

111. Cohan, *supra* n. 55, at 78 (noting that the use of the term “terrorism” was originally identified with the “Reign of Terror” during the French Revolution).

112. Robert Graham, *Confessions of a Torturer Opens Scars of Algerian War*, Fin. Times (London) 6 (May 5, 2001).

113. *Id.*

114. Suzanne Daley, *France Is Seeking a Fine in Trial of Algerian War General*, N.Y. Times A6 (Nov. 29, 2001).

115. *Id.*

his cold-blooded account of how he summarily executed twenty-four men and supervised the torture of dozens of others.¹¹⁶

During the Cold War, the Soviet Union engaged in terrorist tactics against its opponents, most notably through the use of its mental institutions and the activities of the KGB¹¹⁷ In China, up to and including the Cultural Revolution, there have been campaigns of state-inspired terrorism against individuals and groups such as Christians.¹¹⁸

Thus, both in democracies and dictatorships, acts that many of us would readily label as “terrorism” have been deployed both at home and abroad with the authority of commanders. The governments responsible for these acts have sought to place an imprimatur of legitimacy on the violence based on the need to attain what they regard to be important military objectives. Only in modern times have government rulers started to be held accountable for atrocities such as torture or genocide, which in earlier times failed to garner international condemnation.

Perhaps the main line of demarcation between conventional war and acts of terrorism is that in war, innocent civilians may not be used as targets for military victory, while terrorists freely choose from unarmed, undefended civilian targets. Also, terrorists engage in violence against people who in fact are not at war and who do not understand themselves to be at war.¹¹⁹

116. In the book, the general gives chilling details about how and why he tortured prisoners, and he says that almost all who were interrogated were killed, whether or not they talked. Graham, *supra* n. 111, at 6. No one was tried for war crimes in connection with this matter. Daley, *supra* n. 113, at A6. However, once the general's book came out in France, he was prosecuted, not for his acts of supervising torture, but under an obscure French law that made it a crime to try and justify war, and he was fined \$6,500. Suzanne Daley, *France Fines General, 83, for Memoir Justifying Algerian War*, N.Y. Times A4 (Jan. 26, 2002). The prosecutor charged the general with revealing the facts of the episode to the public in his book, and seeking to justify it. Daley, *supra* n. 114, at A6.

117. Robin Munro, *Judicial Psychiatry in China and Its Political Abuses*, 14 Colum. J. Asian L. 1, 3 (2000).

118. Ellen S. Reinstein, *Turn the Other Cheek, or Demand an Eye for an Eye? Religious Persecution in China and an Effective Western Response*, 20 Conn. J. Intl. L. 1, 1–5 (2004).

119. Cohan, *supra* n. 55, at 86.

VI. EXTANT DEFINITIONS OF "TERRORISM" AND
SUGGESTED CRITERIA FOR IDENTIFYING "TERRORISM"

The Author subscribes to the view that an objective, coherent definition of terrorism is not possible.¹²⁰ If a line can be drawn to distinguish "acceptable" political violence from "unacceptable" terrorism, it is a nebulous one, and differences in viewpoint make it extremely difficult to arrive at any agreed definition of terrorism. Nonetheless, many commentators have confidently set forth definitions of terrorism that they believe will withstand scrutiny. Some scholars, in denying that a coherent definition is possible, point out that there is confusion as to whether "terrorism is really a form [of] crime or a form of war, an instrument of protest or an instrument of control."¹²¹ An exact definition of terrorism is elusive "if only because variations in use often reflect differing evaluations of the justifiability of certain acts. Especially has this been true of the views of opposed forces in repressive regimes."¹²² These conflicting views again call to mind the maxim that one person's freedom fighter is another person's terrorist, so that it seems that the answer depends on whom one asks. To those in Iraq who support the government's move toward democracy, acts of suicide bombing and kidnapping constitute terrorism, even if the targets are military personnel, foreign workers, or political officials, rather than women and children in a marketplace. To the insurgents who harbor hopes for an Islamic state, these are not terrorist acts but a heroic mode of warfare intended to force a foreign government to withdraw troops and to garner public sentiment to their cause.

Despite the difficulties, the international community has in numerous ways sought to define "terrorism" as the kind of violence that provokes widespread international condemnation, and this has led to the catchphrase "the global war on terror." There are many and diverse definitions of terrorism that have been discussed in the literature.¹²³

120. See Schmid, *supra* n. 62, at 414 (discussing in depth the difficulties scholars and statesmen have had in defining "terrorism").

121. John C. Griffiths, *Hostage* 26 (Carlton Publ. Group 2003) (quoting Caroline Moorhead, *Fortune's Hostages* (Hamish Hamilton 1980)).

122. Young, *supra* n. 69, at 287.

123. See Corlett, *supra* n. 47, at 114-118 (exploring philosophical conceptions and vari-

A simple definition, such as the following, is both over- and under-inclusive: "Terrorism is the use of coercive means aimed at civilian populations in an effort to achieve political, religious, or other aims."¹²⁴ It is over-inclusive in that subnational political dissidents at times will use "coercive means aimed at civilian populations" to further their political agendas, but their action would not necessarily be called "terrorism" by the international community. The definition is under-inclusive in that acts of anti-government extremists, such as those in Iraq, will be regarded at times as terrorism even though the violence is directed to military targets rather than civilians. With this definition, is one to conclude that the attack on the Pentagon on September 11, 2001, was *not* a terrorist attack inasmuch as it targeted the military, rather than the civilian population?

Another simple definition of terrorism is:

[T]errorism is the attempt to achieve political, social, economic, or religious change by the actual or threatened use of violence against persons or property; the violence employed in terrorism is aimed partly at destabilizing the existing political or social order, but mainly at publicizing the goals or cause espoused by the terrorists; often, though not always, terrorism is aimed at provoking extreme counter-measures which will win public support for the terrorists and their cause."¹²⁵

This definition makes no distinction between the targeting of civilians versus military populations; instead, an act of terrorism extends to "persons or property" across the board. This definition also points out that terrorism can be a *threat* of violence, not just the actual use of violence. Finally, this definition distinguishes terrorism from other acts of violence by the "attempt to achieve political, social, economic, or religious change," in an effort, at least in part, to destabilize the "existing political or social order." The Author thinks that the broad scope of this definition makes it impossible to distinguish terrorism from ordinary political vio-

ous definitions of terrorism).

124. Noam Chomsky, *9/11*, at 57 (Seven Stories Press 2001).

125. Burleigh Taylor Wilkins, *Terrorism and Collective Responsibility* 6 (Routledge 1992).

lence, such as that engaged in by freedom fighters, guerrillas, secessionists and others who are attempting to achieve political change by the use of violence against an oppressive regime.

Domestic terrorism, as defined under the USA PATRIOT Act, includes activities that

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.¹²⁶

The reach of this definition is limited to acts that are intended to intimidate or coerce a *civilian* population. Still, this definition does not clearly distinguish terrorism from legitimate forms of political violence. The Boston Tea Party, for instance, involved acts “dangerous to human life” that violated criminal law, and it was intended to intimidate or coerce the civilian population (of English traders) so as to influence England’s policy regarding taxation, by means of “mass destruction” of cargo.¹²⁷ Yet Americans, then and now, have praised this and other acts of political violence that led to the American Revolution.

From the foregoing, some tentative conclusions can be pieced together to help distinguish, as best as the subject matter allows, between terrorism and ordinary political violence. It is not possible to provide criteria so that in *all* instances in which the criteria exist, everyone would readily agree that the act in question *always* constitutes terrorism. This is not rocket science, but political science, and exactitude is not one of its hallmarks. It would be

126. Pub. L. No. 107-56, § 802(a), 115 Stat. 272 (2001).

127. See Eric Shimamoto, *Rethinking Hate Crime in the Age of Terror*, 72 U. Mo. Kan. City L. Rev. 829, 835 (2004) (concluding that the Boston Tea Party probably does not fall under the definition of terrorism).

misguided to expect exactness or precision in this inquiry. At best, a general principle can emerge, and a general principle will not apply in all cases. Generalizations are not infallible, and there are always exceptions.

It seems that one of two factors will be sufficient to start labeling acts of political violence "terrorism." With acceptable types of insurrection, there seems to be an international consensus that supports the legitimacy of the push for reform. If no international consensus exists in support of the goals pursued by the actors, then even simple acts of violence will be labeled "terrorism." Much depends on the context, circumstances, and nature of the struggle in question. International law accepts that the desire to attain freedom should be construed not as terrorism, but as an act of self-defense when internal oppression by a totalitarian regime necessitates warfare to achieve freedom.¹²⁸ The right to use insurgent force to prevent the trampling of "inalienable" natural rights was affirmed in the Declaration of Independence, and it was this sort of lawful insurgency that established the United States.¹²⁹ Many struggles for political freedom, such as the Contra insurgency in Nicaragua or the anti-Castro insurgency supported by the United Nations, have had some features in common with full-blown terrorism, but these struggles are distinguished as legitimate assertions of inalienable rights. On the other hand, if Osama bin Laden installed himself as dictator of Afghanistan in a simple, bloodless coup in which the existing democratic leaders were overpowered, arrested, and imprisoned, what would the world community say of this? The act would be called "terrorism," even though no one would be killed, due to the lack of international support for the actors' objectives.

A second broad factor has to do with the mode of violence. There are limits to what sort of tactics the world community will condone, even with respect to a just cause. Many would agree that the Palestinians ought to have the freedoms and autonomy to-

128. R.I.R. Abeyratne, *The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order*, 22 *Transp. L.J.* 449, 463 (1995).

129. *Declaration of Independence* [¶1] (1776); see also Cohan, *supra* n. 55, at 87 (discussing how Thomas Jefferson asserted that people have the right of revolution whenever a government becomes destructive of "certain unalienable rights," and how Jefferson desired a natural order in a world whose laws are external to all human will and that are discoverable through human reason).

ward which they have been striving for so long, but many would condemn the tactics of suicide bombing. If the purpose of the insurrection is an acceptable one, but the mode or scope of violence becomes unjust or disproportionate, the world community will start to apply the “t-word” to the extremists. The attacks occasioned by ordinary political violence tend to be directed primarily at government officials and ministers who are perceived as the oppressors. Acts of internal disruption, assassinations, kidnappings, destruction, and injury have to be analyzed according to the surrounding circumstances. As the mode of violence of legitimate political struggle moves closer to indiscriminate targeting of civilians, suicide bombing of marketplaces, aerial hijacking, kidnapping of nonpolitical targets, videotaped “executions,” genocide or ethnic cleansing, “scorched earth” policy, attacks on infrastructure, poisoning of the water supply, and other unconventional types of violence, the international community will start to condemn these acts as terrorism.

The more worthy the cause, the more likely the international community will accept an increased threshold of violence in furtherance of the insurrection. Acts of extreme political violence against a tyrannical regime may be regarded by the international community as a justifiable means of achieving political autonomy and self-determination.

And of course, if both factors are in play—that the world community condemns the goals *and* the mode of violence of dissidents—there is likely to be an even higher quantum of consensus that the actors are engaged in terrorism.

There are always exceptions. As mentioned above, it is an impossible task to define terrorism because inevitably a subjective element is interjected by whoever happens to be analyzing the facts. Sometimes there is a kind of buddy system in the world community so that even a bloodless coup in which a totalitarian dictator is deposed will bring widespread condemnation by other world leaders. The Author cites the example, noted above,¹³⁰ of the coup in Mauritania. Is the world not better off now that the dictator has been replaced by those who wish for democratic reform? Yet many people in democratic countries referred to the

130. Owen, *supra* n. 38.

coup as terrorism, even though no one was killed.¹³¹ On the other hand, in 1986 rebel troops deposed President Ferdinand Marcos in the Philippines, but there was an utter lack of condemnation from other world capitals.¹³²

Another sphere of concern, which might help in evaluating whether certain acts constitute terrorism, involves the issue of appeasement and transparency. Subnational groups and others engaged in legitimate political struggles are usually readily identifiable, often with distinctive uniforms. These groups usually have a clearly known chain of command, a headquarters, and a subnational flag. They will have clearly stated objectives such as independence, dissolution of colonial rule, and so forth. In connection with their actions, there will be some sort of demand made against a government or a nongovernmental organization—the release of political prisoners, the disbanding of the troops of the opposition, the publication or broadcast of a statement, the re-drawing of boundaries, and so on. The ruling regime will have the opportunity to engage in diplomacy, to reason with the dissidents and establish a fair and equitable resolution of the grievances that led to the violence in the first place, and thereby avert further violence.

With those whom the world community generally calls terrorists, there is a mixed bag. For example, the terrorist attacks on the United States on September 11, 2001, were not preceded by or associated with a demand and an opportunity for negotiation. With international terrorist organizations such as al Qaeda, there is very little opportunity to “negotiate” with members of the group or even to know clearly what their demands are. There is often difficulty in identifying, locating, and communicating with the leadership, making it almost impossible to work out a diplomatic solution. Often enough, there may be no demands, but the action instead serves to punish the enemy and to spread terror in the targeted audience. As mentioned above, bin Laden claims that al Qaeda’s strikes are retribution for American and Israeli killings

131. Brian Smith, *Mauritania Coup: Condemnations All Round, but Junta Stays in Power*, <http://www.wsws.org/articles/2005/aug2005/maur-a12.shtml> (last updated Aug. 12, 2005).

132. Seth Mydans, *Philippine Leaders Celebrate Freedom to Squabble*, N.Y. Times A3 (Feb. 26, 1996).

of Muslim women and children.¹³³ With this and other apocalyptic terrorist organizations that may be inspired by religious zealotry, there do not appear to be any realistic political goals.

A terrorist organization such as al Qaeda operates without regard to the host of international commitments that provide an incentive for states to avoid all-out warfare and to engage in sustained diplomacy to achieve national goals.¹³⁴ States are usually motivated to engage in diplomatic efforts to achieve national goals, while terrorist organizations are not recognized states and therefore lack diplomatic recognition and accountability to the world community. Compounding the problem is that terrorist organizations usually have no specific boundaries or territory, as they are not confined to a specific geographic area, and they do not wear the distinctive insignia of conventional combatants. Moreover, Article 33 of the UN Charter cannot be extended to terrorist organizations. Article 33 requires parties in a dispute that threatens international peace to exhaust all peaceful means of resolving their dispute, including “negotiation, enquiry, mediation, conciliation, arbitration or judicial settlement.”¹³⁵ Since “terrorist groups are not structured like states, they are incapable of negotiating effectively or enforcing their agreements.”¹³⁶

With other situations that the world community generally perceives to constitute terrorism, such as the numerous Iraqi kidnappings, there have been demands made and an opportunity for appeasement. The demands were usually clear enough—withdraw your workers (or your troops) from Iraq, and the hostages will be freed; otherwise, they will be killed. In other instances, Iraqi insurgents engaged in a nihilistic kind of violence (e.g., indiscriminate bombings) apparently designed to whittle away at the enemy’s strength, with the view of eventually overpowering and conquering the greater power, but with no demands set forth. Even so, negotiation with a terrorist group is usually

133. Van Natta, Jr., *supra* n. 98, at D1.

134. Sovereign states endeavor to achieve changes in the policy of other nations not through the use of violence but by diplomatic means. A terrorist group is less vulnerable to international sanctions than is a state, as it does not possess a visible economy, land holdings, or an identified populace.

135. UN Charter art. 33 (available at <http://www.un.org/aboutun/charter/>).

136. See Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 *Touro J. Transnatl. L.* 67, 72 (1991) (discussing how negotiations can be used as a non-forceful legal response to terrorism).

shunned by states because it would suggest the psychological recognition and legitimacy of its organization and activities.

Associated with the lack of transparency and the difficulty of negotiating effectively with terrorists is something that is a defining feature of terrorism: by the very term “terrorism,” the idea connoted is that the action aims “to strike terror into the hearts of those at whom the activities are directed (for example, the state and its agents, significant private figures, and so on, via their persons or their property).”¹³⁷ This psychological feature, of projecting a mental state of terror into a targeted population or audience, is something that helps distinguish terrorism from other forms of political violence.

A helpful distinction cannot be made based on whether the violence in question is territorial or international in scope. While ordinary political violence usually involves domestic groups that carry out acts of violence against local targets confined to a specific geographic region, the world community has used the “terrorism” label regardless of the geographic reach of the actors (e.g., domestic terrorism in Iraq, domestic terrorism in England, or domestic terrorism in Northern Ireland).

VII. THE TERRORISTS' ARGUMENT OF NECESSITY

Putting aside the quandary of defining terrorism, can terrorism be legally justified and, if so, how? More specifically, the issue is whether a terrorist attack can be justified under the necessity doctrine. For the purposes of this discussion, simply assume that terrorism refers to the kinds of attacks by nonstate actors, extremists, insurrectionists, and the like, that are uniformly condemned and labeled as “terrorism” by the international community. A paradigmatic example that can be kept in mind during this analysis would be the September 11 attacks, which were universally declared to be acts of terrorism.¹³⁸

137. Young, *supra* n. 69, at 288.

138. See UN Sec. Council, *Security Council Condemns, 'In Strongest Terms' Terrorist Attacks on United States*, <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm> (last updated Dec. 9, 2001) (explaining that the UN Security Council, for the first time in its history, approved a resolution explicitly invoking and reaffirming the inherent right of a nation to self-defense in response to terrorist attacks); see also Jack M. Beard, *America's New War on Terror: The Case for Self-Defense under International Law*, 25 Harv. J.L. & Pub. Policy 559, 568 (2001–2002) (discussing how the Security Council implicitly described

This Article will now examine the elements of the necessity doctrine from the point of view of terrorists and their advocates. It is not the purpose of the necessity doctrine to encourage individuals to make their own determinations as to which laws they will obey. No legal system could survive long if it gave every individual the option of disregarding with impunity any law that conflicts with his or her personal, ethical, moral, or religious beliefs. To do so would mean that

markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment.¹³⁹

A proper case of necessity must show that all of the elements of the doctrine are in play. With reference to the six-prong test introduced above,¹⁴⁰ terrorists would need to justify their actions by showing that (1) they were faced with a choice of evils and chose the lesser evil; (2) the evil sought to be averted posed an imminent threat; (3) they reasonably anticipated a causal relationship between their conduct and the harm to be averted; (4) they had no reasonable legal alternative to committing the act; (5) the subject matter in question has not been preempted by some legal constraint that would preclude the necessity justification; and (6) they were not reckless or negligent in bringing about the evil sought to be averted.

In considering terrorism and the necessity doctrine, it is helpful to refer at times to the terrorists' perspective, that is, the terrorists' subjective state of mind. To terrorists, their actions cleanly fit into the criteria that make up the necessity doctrine. On a more objective analysis, however, there is room to differ.

Author Carl Wellman has suggested that terrorism cannot be justified because terrorism (1) is harmful; (2) uses terror; (3) unduly harms the innocent; (4) is necessarily coercive; and

the September 11 terrorist attacks as an "armed attack" under Article 51).

139. *People v. Weber*, 208 Cal. Rptr. 719, 721 (Cal. Super. App. Dept. 1984).

140. *Supra* nn. 31-33 and accompanying text.

(5) infringes on rights.¹⁴¹ However, many kinds of violence are harmful, coercive, illegal, and infringe on rights but are justified under the necessity doctrine, as has been pointed out above. In cases in which necessity qualifies as a justification, the action in question is *prima facie* illegal, and there is a harm that results, usually involving coerciveness and infringement on rights. In the example of breaching a dike to save an entire town at the expense of one household, posited in the above quote of Granville Williams,¹⁴² clearly this act infringed upon someone's rights. While a breach in the dike would be harmful, the action is necessarily coercive and the illegality of the action is translated into justification within the meaning of the necessity doctrine. Such action would be necessary to avert a greater evil, namely, the bursting of the dike at another point where a whole town would be suddenly destroyed.

Another point made by Wellman is that terrorism is wrong because it uses terror.¹⁴³ But that begs the question, for that is the very question in issue: whether, despite the fact that the action produces, uses, or provokes terror, the action is justified because it is necessary to avert a greater evil. This problem has been noted by various commentators.¹⁴⁴ Terrorists specifically intend to spread terror, and if this is achieved, the mission is considered successful in whole or in part. To say terrorism is wrong because it terrorizes does not really address the question of whether terrorism is wrong any more than saying stealing is wrong because it deprives others of property. Such a statement fails to address *why* terrorism is wrong and what underlying moral or legal principles can inform us with some degree of specificity about the rationale behind it being wrong. Thus, the analysis must delve deeper rather than running in circles.

141. Carl Wellman, *On Terrorism Itself*, in *Assent/Dissent* 254–255 (Joe P. White ed., Kendall/Hunt Publg. Co. 1984).

142. Williams, *supra* n. 7, at 198.

143. Wellman, *supra* n. 141, at 254–255.

144. See e.g. Virginia Held, *Terrorism Rights, and Political Goals*, in *Violence, Terrorism, and Justice* 65 (R.G. Frey & Christopher Morris eds., Cambridge U. Press 1991) (examining usage in defining and justifying terrorism). Held has argued that definitions of terrorism have built into the notion of terrorism a kind of prejudgment against it, so that it makes it impossible even to question, philosophically, whether terrorism can ever be morally justified. *Id.*

In the discussion on the necessity of terrorism, the main stumbling blocks for the terrorist point of view are the following:

- (1) Terrorists believe that the evils sought to be averted are clear and present dangers to themselves and their people—such things as imperialism, hegemony, imposition of Western values, etc. But under the necessity doctrine, the evil sought to be averted must be something that reasonable people would agree constitutes an evil. It is not sufficient that the actor holds a strong, subjective belief that some “evil” poses an imminent threat and that therefore it needs to be averted by a “lesser” evil.
- (2) Even if an evil exists from a reasonable standpoint, the action to avert it must be such as to produce a “lesser evil.” Thus, the action must be reasonable in light of the evil sought to be averted. If the mode of action taken—that is, if the violation of the law—is disproportionate to the results produced, if the action ends up causing a *greater harm*, the necessity defense will fail to exonerate the actor.
- (3) If there is a reasonable legal alternative to violating the law, the necessity defense will not be available. Terrorists believe that there is no reasonable recourse other than the acts of terrorism, as the governments against which they have grievances will not otherwise listen to them, and there are no diplomatic channels available to them by which they could present their demands. However, the weight of international opinion holds that terrorists do have reasonable legal alternatives, by way of negotiation and diplomacy, if they wish to venture into these domains.
- (4) There is a consensus in the world community that regardless of motives, there is no justification for political violence of any kind against innocent or indiscriminate civilian targets. From the terrorist’s point of view, however, the targets are not “innocent” because all citizens of the offending state are collectively responsible for the evils in question.

A. The Choice-of-Evils Factor

In applying the necessity doctrine, the first inquiry is whether the action of violence is a lesser evil compared to the evil sought to be averted. Under this factor, there is a weighing of evils under a balancing analysis, in which the actor determines that the illegal action is necessary to avert a greater evil. Terrorists may engage in a balancing-of-evils calculus. Terrorists may perceive that they are faced with a significant form of injustice or oppression by a powerful political enemy, that an act of terrorism is necessary to avert this harm because there is no other remedy, and that the act would be, on balance, the lesser evil. To the terrorist, it is clearly a lesser evil to deploy violence against civilians and other "innocent" targets than to allow the offending government to continue certain policies. Moreover, from the terrorist's perspective, the targets are not truly innocent but are collectively guilty of their government's policies.

The concept of "evil" is broadly construed in the necessity doctrine, as illustrated by the following definition suggested by author Joel Feinberg:

Let us mean by an evil, in the most generic sense, any occurrence or state of affairs that is rather seriously to be regretted. To say of such an event or condition that it is an evil is to say that it would be better (in some objective sense) if it did not exist or had never come to exist, that the universe would be a better place without it.¹⁴⁵

According to Feinberg there are two broad categories of evil: one consists of "Acts of God' and other regrettable occurrences and circumstances, such as the existence of killer diseases despite reasonable and even heroic human efforts to stamp them out, that are not imputable to human misconduct, indifference, or error."¹⁴⁶ The second "contains all the evils that are reasonably foreseeable or preventable consequences of human beings' actions or omissions."¹⁴⁷

145. Joel Feinberg, *Harmless Wrongdoing* vol. 4, 18 (Oxford U. Press 1988).

146. *Id.*

147. *Id.*

The evil sought to be averted depends on the philosophy and goals of the particular terrorist group. There are different strands of terrorism—left-wing, right-wing, ethno-nationalist, religious extremist, single issue, broadly Utopian, and others, so that it is difficult to make generalizations about the actual human motivations of terrorists. To some, the evil consists of the imperialism and hegemony by Western powers; to others it consists of the occupation of Iraq by foreign troops, the secularization and democratization of the new government, and the expansion of women's rights; and to other terrorists, their plight was created by an increasingly global capitalist influence. Terrorists may believe they are not the initial aggressors, but that the enemy government's imperialism constitutes unlawful violence and aggression against their fundamental rights, and that terrorist action is the only reasonable means of fending off the offending government and of overcoming tyranny.

One commentator has opined that

[W]here the terrorist act is the less-evil act, the terrorist act should be done. We must not be evasive about this. It is, of course, morally wrenching when we have to make such choices. Not even a halfway decent person can accept with equanimity the killing or harming of the innocent. But are we going to accept with equanimity letting an even greater evil transpire where we can do something about it?¹⁴⁸

Terrorists believe that the evil to be averted consists of those who are guilty of injustice and who therefore deserve the terrorist "response."¹⁴⁹ To terrorists, the deployment of terrorism results in a net balance of good for society. To terrorists, there is a certain righteousness about their response to exploitation, a kind of just war theory, so that terrorists perceive themselves to be soldiers in a real, if undeclared, war. To terrorists, terrorism is justified as a kind of self-defense, because they are, in effect, responding to the

148. Kai Nielsen, *On the Moral Justifiability of Terrorism (State and Otherwise)*, 41 *Osgoode Hall L.J.* 427, 441 (2003).

149. *Id.* at 440–441.

aggression of the enemy.¹⁵⁰ It has been said that “every war looks like a war of self-defense to those who pursue it.”¹⁵¹

To terrorists, any chance of success is worth the suffering inflicted on “innocents”:

[I]t would seem that where human suffering is concerned the additional suffering caused by terrorism might be but a drop in the bucket, a drop which would seem justifiable if there were any chance at all that it might alleviate the wider human suffering to which it is a reaction.¹⁵²

In some cases terrorists may commit an act of violence in *retaliation*, that is, to punish the enemy, rather than to fend off some perceived oppression or danger or to effect a change in policy. In these instances the necessity doctrine would not come into play because in a retaliation situation, the purpose is to punish the opponent, not to avert an imminent threat. It is an act done in response to something that is in the past, not in response to something that is an imminent or ongoing threat.

1. Reasonableness Standard in Choice-of-Evils Factor

One of the main hurdles in the necessity doctrine is that in order to justify violating the law, the courts almost always scrutinize the facts based on the balance of human reason in light of all the relevant circumstances. The actor must entertain a reasonable belief in the necessity of his conduct. The reasonableness standard ensures that a jury, in evaluating the defendant's action, shares the actor's evaluation of the circumstances that created the claimed necessity. This standard has been expressed as follows:

While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, *those perceptions remain relevant only so long as they are reasonable*. The accused person must, at the time of the act, honestly believe, *on reasonable grounds*, that

150. See Corlett, *supra* n. 47, at 112 (explaining that other scholarly opinions justify terrorism as an acceptable form of violence when used in situations of self-defense).

151. Paul W. Kahn, *The Question of Sovereignty*, 40 Stan. J. Intl. L. 259, 263 (2004).

152. Wilkins, *supra* n. 125, at 48.

he faces a situation of imminent peril that leaves *no reasonable legal alternative* open. There must be a *reasonable basis* for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was *reasonable* given his circumstances and attributes.¹⁵³

Under this standard, it is not sufficient that a terrorist subjectively believes that an act of violence is necessary to prevent a greater evil.¹⁵⁴ Under the reasonableness standard, an actor must reasonably construe that there is an actual, imminent threat in the first place, and in making a choice among evils, that one evil is greater than the other. The threat need not be an actual threat, provided the actor has a well-founded belief that impending harm will result unless he takes steps to avert it.¹⁵⁵ The balancing of evils "cannot, of course, be committed to the private judgment of the actor, but must, in most cases, be determined at trial with due regard being given for the crime charged and the higher value sought to be achieved."¹⁵⁶

The reasonableness standard is to ensure that the necessity defense will apply in situations in which society benefits from the violation of the law. "That benefit is lost, however, and the theory fails when the person seeking to avert the anticipated harm does not act reasonably."¹⁵⁷

153. *Latimer*, 1 S.C.R. at ¶33 (emphasis added).

154. See Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 Am. J. Crim. L. 481, 518 (2002) (explaining that the necessity defense has an objective component based on society's morals and legal principles, not on an individual's belief system).

155. See e.g. *U.S. v. Ashton*, 24 F. Cas. 873 (C.C.D. Mass. 1834) (discussing the necessity defense of a group of sailors charged with mutiny). The defendants sought to justify mutiny on the grounds that their ship was not seaworthy. *Id.* The court instructed the jury "that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief, that the ship was unseaworthy." *Id.* The court said that if in fact the crew was mistaken as to the unseaworthiness of the ship, the jury could determine whether, nonetheless, the crew was reasonable in its belief and in taking action in accordance with that reasonable belief. *Id.* at 874–875. The jury could acquit if it found that the crew, "having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert, that they should have done the same." *Id.* at 874.

156. *State v. Warshow*, 410 A.2d 1000, 1003 (Vt. 1979).

157. *U.S. v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972).

2. *The Proportionality Principle and Choice-of-Evils Factor*

The choice-of-evils factor requires that the action taken to avert the greater evil be proportionate to the evil sought to be averted, based on a reasonable assessment of the facts. Thus, a further inquiry under this factor is whether the means utilized in averting the threat is proportionate in light of the circumstances. For example, if a farmer seeks to save his livestock by diverting flood waters coming onto his property under exigent circumstances, and by doing so diverts the water so that it floods a schoolhouse and kills a number of children, the action would be disproportionate because his actions resulted in a worse evil than the evil sought to be averted.

The objection to terrorism is strongest when it targets people who are ordinary citizens, and randomly at that. If terrorists instead sought to be more discriminate in selecting their targets—for example, by kidnapping only those government officials who are responsible for the grievances in question—their acts might no longer be considered terrorism but instead fall under the more acceptable category of political violence. This notion is echoed by Albert Camus in his play, *The Just Assassins*, which illustrates that at times the revolutionary will distinguish between legitimate and nonlegitimate targets.¹⁵⁸ In the play one person says, “Even in destruction, there’s a right way and a wrong way—and there are limits.”¹⁵⁹

The principle of proportionality is well established in conventional warfare. The idea in conventional war is that the level of response inflicted on the enemy must not be disproportionate to the military advantage expected to be achieved. This puts a “cap” on the degree of violence that is justified and is a principle referred to as “military necessity,” which is an “integral part” of the law of war.¹⁶⁰ The Nuremberg Military Tribunal expressed the deontological prohibition against killing innocent members of a population in the following language: “[T]he shooting of innocent members of the population as a measure of reprisal is not only

158. Albert Camus, *The Just Assassins*, in *Caligula and Three Other Plays* 258 (Stuart Gilbert trans., Alfred A. Knopf 1958).

159. *Id.*

160. William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 *Am. J. Intl. L.* 251, 251 (1953).

criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror.”¹⁶¹

At the same time, there is significant authority to the effect that military necessity allows that “if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible.”¹⁶² Some view military necessity “as the *bete noire* of international jurisprudence, destroying all legal restriction and allowing uncontrolled brute force to rage rampant over the battlefield or wherever the military have control.”¹⁶³

Inherent to the proportionality principle is the notion of discrimination. Discrimination requires care in selecting methods, weaponry, and targets.¹⁶⁴ That is, the means of warfare should not be indiscriminate. This means that the attack on the enemy should be directed at military targets that will be helpful in gaining victory and that the method of attack should not be excessive compared to the military advantage to be obtained.

Thus, one of the reasons why terrorist attacks are so widely condemned is that the level and kind of violence deployed is, according to the weight of world opinion, intrinsically unjust and disproportionate to the grievances in question because it results in the wrongful deaths of innocent people.

Author J. Angelo Corlett has argued that terrorism can be a morally acceptable practice provided certain constraints are observed, including that of proportionality.¹⁶⁵ Corlett opines that “if we look beyond the media reports of terrorism, we might begin to see that at least some acts or events are in some significant measure morally justified.”¹⁶⁶ He lists four factors in suggesting a kind of template for assessing the morality of an act of terrorism: “the level(s) of *responsibility* of those targeted and affected by the

161. UN War Crimes Commn., *Law Reports of Trials of War Criminals* vol. 8, 64 (1949).

162. Downey, *supra* n. 160, at 253 (quoting Elihu Root, the president of the American Society of International Law, from his remarks before the American Society of International Law, on Apr. 27, 1921).

163. *Id.* at 251.

164. Mark J.T. Caggiano, Student Author, *The Legitimacy of Environmental Destruction in Modern Warfare: Customary Substance over Conventional Form*, 20 B.C. Envtl. Aff. L. Rev. 479, 495 (1993).

165. Corlett, *supra* n. 47, at 122.

166. *Id.* at 133.

terrorism, the *proportionality* of the terrorist violence or threat thereof in light of the harm(s) being addressed by the terrorism, the degree, if any, to which a target of terrorism genuinely *deserves* to be its target, and the degree to which the terrorist herself has *clean moral hands*.”¹⁶⁷

Corlett suggests that the morality of a terrorist attack depends in part on whether the terrorist is as “conscientiously selective as possible,” meaning that there should not be an intention of harming either innocents or noncombatants:

In at least some circumstances, this means that the terrorist will need to consider and use, say, a lesser caliber weapon so as not to endanger innocent persons. Detonating a powerful explosive in a building during business hours would endanger many innocent persons, whereas posing a terrorist threat of violence to certain individuals in specific offices within that building, perhaps by holding them as hostages and at gunpoint, would be a less harmful, and, other conditions obtaining, more morally justified, form of terrorism.¹⁶⁸

To Corlett, the proportionality principle applied to terrorism means the following:

[T]hat the levels and kinds of harms that the terrorism inflicts are only on those guilty of such injustice and therefore deserving of a proportional terrorist response. . . . This requirement of proportionality rules out the moral justification of terrorism altogether in cases where a harsh terrorist response clearly outweighs the oppression to which the terrorism is a response, say, where a terrorist detonates a bomb in a court room simply because she did not approve of the verdict[.]¹⁶⁹

In the context of terrorism, the principle of proportionality thus suggests that the terrorist act, to be justified, must be the least harmful option available for avoiding the threatened harm. Thus, to be morally justified, the terrorist needs to steer clear of indiscriminate or excessive violence. If the mode chosen to attack

167. *Id.* at 127 (emphasis in original).

168. *Id.* at 128.

169. *Id.* at 128.

the enemy results in damage or casualties that exceed what is reasonably necessary to avoid the impending evil, then the action would be deemed disproportionate. A disproportionate action would produce an even worse state of affairs, and hence the necessity doctrine would not justify the action. An exception might be shown if the action were reasonable, but, due to unforeseen circumstances, a disproportionate outcome occurred.

Applying the necessity doctrine to standard cases of terrorism, then, most such acts will be disproportionate because they result in disproportionate harm, at least from the standpoint of world opinion. The proportionality principle would seem to rule out indiscriminate terrorist attacks, such as random targeting of innocents as distinguished from targeting those who are responsible for the policies in question.¹⁷⁰ The outcome produces a *greater* harm than the evil sought to be averted and thus outweighs the overall good sought to be produced.

Thus, with regard to the choice-of-evils factor, the terrorist may be hard-pressed to show, on a reasonableness standard, that (a) the perceived evil to be averted is an evil at all, or (b) that it is a greater evil than the terrorist act in question. To the larger community, the evil produced by a terrorist attack will be *greater* than the perceived harm to be averted.

But from the standpoint of terrorists, the means utilized are just and proportionate given the magnitude of their grievance and their objective of striking terror in the population of the enemy so as to provoke a change in policy. One of the main reasons why terrorism “works” is that terrorists are able to spread terror by the very means of inflicting “punishment” on indiscriminate targets.

B. The Imminence-of-Harm Factor

How imminent is the evil sought to be averted? If the evil to be averted is not truly imminent, this suggests that there may be sufficient time in which to pursue reasonable, lawful means to redress the grievance.

170. See Wellman, *supra* n. 141, at 250 (distinguishing between primary and secondary targets of terrorism). A primary target of terrorism is an individual who is mainly responsible for the grievance in question, while a secondary target is someone who is used simply as a means to address the primary target. *Id.*

One obvious concern is that there is a certain vagueness to what is meant by "imminent." There is no litmus test for how imminent a danger must be to be "imminent" under the necessity doctrine. Generally, courts have construed the imminence factor to refer not so much to the temporal proximity of the threatened harm, as to the probability that the threatened harm will actually occur. For instance, in *Aldrich v. Wright*,¹⁷¹ the Court observed,

[t]he term "imminent" does not describe the proximity of the danger by any rule of mechanical measurement The law does not fix the distance of time between the justifiable defence and the mischief, for all cases, by the clock or the calendar. The chronological part of the doctrine of defence, like the rest of it, is a matter of reasonableness; and reasonableness depends upon circumstances.¹⁷²

The imminence factor is important in that if a threatened harm is *not* imminent, the actor has the opportunity to seek legal alternatives in order to avert the harm rather than to violate the law. In other words, if the danger is not truly imminent, it would be unnecessary to make a choice among evils because time will allow the actor to avert the harm by seeking legal redress.

In some circumstances, a danger removed in time may nonetheless be imminent for purposes of the defense because of the magnitude of the danger. For example, in some civil disobedience cases, defendants have argued that the severity of a danger such as a nuclear holocaust may be so great that the imminence factor should be relaxed or disregarded for purposes of the necessity defense.¹⁷³ The imminence requirement has been interpreted to mean that the danger is something "inevitable," but not necessarily a threat immediately at hand.

The Model Penal Code rejects the imminence factor altogether.¹⁷⁴ As the Code's commentary states,

171. 53 N.H. 398 (1873).

172. *Id.* at 402.

173. See e.g. *Commonwealth v. Capitolo*, 498 A.2d 806, 809 (Pa. 1985) (rejecting necessity as a defense to trespass committed with the aim of shutting down a nuclear power plant allegedly emitting dangerous levels of radiation).

174. Model Penal Code § 3.02, 16 (ALI 1985).

[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, *A* and *B* have driven in *A*'s car to a remote mountain location for a month's stay and *B* learns that *A* plans to kill him near the end of the stay, *B* would be justified in escaping with *A*'s car although the threatened harm will not occur for three weeks.¹⁷⁵

The imminence factor carries with it the requirement that the harm must not be "debatable or speculative,"¹⁷⁶ but real. It must be an imminent danger from "obvious and generally recognized harms."¹⁷⁷

To terrorists, the harm generated by the offending party is ongoing and continual, with no relief in sight. This harm seems so potent that it is a constant and immediate threat to their own freedom. Moreover, as discussed further below, terrorists maintain that there is no reasonable legal recourse to redress their grievances. To the terrorist, it is irrelevant whether the danger is imminent because even if it is not really imminent, there is no reasonable legal alternative available to avert the harm. If there are no legal alternatives to breaking the law to avert the threatened harm, then the imminence factor becomes irrelevant in that, no matter how soon the danger will materialize, there is no legal way out, so that violating the law *will* be necessary in order to avoid the danger. In such a situation, waiting until the danger is immediately at hand may seem to be a ridiculous, unnecessary constraint.

C. The Causal Nexus Factor

The causal nexus factor requires that there be a causal relationship between the illegal action and the evil to be averted, preferably a direct causal connection. The inquiry is whether the

175. *Id.*

176. See e.g. *Commonwealth v. Brugmann*, 433 N.E.2d 457, 461 (Mass. App. 1982) (ruling against a group of protestors for trespassing at a nuclear power plant, and noting that the "low level radiation, nuclear waste, and the possibility of a nuclear accident" that the protestors cited in support of their necessity defense, have been regarded as "long term" hazards) (citing *Warshow*, 410 A.2d at 1000).

177. *State v. Dorsey*, 395 A.2d 855, 857 (N.H. 1978).

terrorist attack will have some direct, or even indirect, causal efficacy in averting the threat in question. Very few acts of terrorism will have a *direct* causal relationship in overthrowing the particular regime, policy, or program being targeted, but sometimes there is evidence of a direct causal result. In numerous instances, there is an *indirect* causal result. Moreover, striking terror in the targeted populace is, in itself, an objective sought to be achieved, and often enough that objective is achieved as a direct consequence of a terrorist attack.

On the causal efficacy issue, Hare asserted that acts of terrorism “are most likely to promote people’s interests in the long run,” but that it is only very seldom that terrorist acts achieve the terrorists’ aim or otherwise relieved their suffering.¹⁷⁸ Author Kai Nielsen argues that there is a gap in the causal link between terrorist acts and effective results.¹⁷⁹ He claims that while terrorism may sometimes be justified, generally it is ineffective and very likely worsens the plight of the oppressed classes for whom the terrorists act.¹⁸⁰

Terrorists are known to be patient and hence willing to wait for their efforts to bear fruit: “[T]hey live in the future, that distant—yet imperceptibly close—point in time when they will assuredly triumph over their enemies and attain the ultimate realization of their political destiny. . . . Indeed, the innate righteousness of their cause itself ensures success.”¹⁸¹ One terrorist has said, “You convince yourself that to reach this utopia, it is necessary to pass through the destruction of society which prevents your ideas from being realized.”¹⁸²

Just how terrorists might measure or evaluate whether their action has been successful is hard to say. The ultimate success of terrorism occurs if there are rewards or concessions (e.g., the reward of national statehood to Palestinians, or the withdrawal of foreign troops and contractors from Iraq). But there are other ways in which the overall causal efficacy of a terrorist attack might be measured.

178. Hare, *supra* n. 101, at 246–247.

179. Kai Nielsen, *On Terrorism and Political Assassination*, in *Assent/Dissent* 312 (Joe P. White ed., Kendall/Hunt Publg. Co. 1984).

180. *Id.*

181. Hoffman, *supra* n. 57, at 64.

182. *Id.* at 65 (quoting Adriana Faranda of the Red Brigades).

Perhaps the most sweeping goals of terrorism are those of bin Laden, in which al Qaeda seeks to drive the United States out of the Muslim world and to coerce it to stop supporting Israel. Bin Laden wants Americans and Europeans to “urge their leaders to change their Middle East policies.”¹⁸³ He has said in taped messages that if the United States had listened to his warnings in the 1990s, the United States might have changed its foreign policy in the Middle East, and the September 11 attacks could have been avoided.¹⁸⁴ Many Muslims believe the al Qaeda leader eloquently expresses their anger and frustration in this respect.¹⁸⁵ If causal efficacy is at issue, one would be hard-pressed to see *any* efficacy in al Qaeda’s acts of terrorism because there have been no changes in America’s Middle East policy, or at least none that would comport with bin Laden’s goals. However, some changes have been evident in European countries, particularly those that have refused to send troops to join the coalition effort to democratize Iraq.

But in other ways, it seems that the September 11 attacks were causally effective to the objectives of al Qaeda. The attacks were successful in that over three thousand people who were “collectively guilty” of the government’s evil were killed, fomenting chaos and terror. In addition, the attacks were successful in destroying billions of dollars worth of property, in particular a symbol of the financial power of the West—the World Trade Center. Attacking certain targets has symbolic value. The World Trade Center represented the perceived source of al Qaeda’s grievance. Attacking such a symbol provided a catharsis and in some sense a political victory. In addition, the Pentagon, another despised source of grievance, was publicly desecrated. The desecration was transmitted by a far-reaching and highly responsive media. These elements contributed to al Qaeda’s sense that it had won a symbolic victory. On the other hand, the attacks failed to overthrow the government or change the government’s Middle East policies. In fact, the attacks resulted in the war in Afghanistan.

Still, terrorists can point to the September 11 attacks and show that terrorism can have cascading and lasting adverse ef-

183. Van Natta, *supra* n. 98, at D1.

184. *Id.*

185. *Id.*

fects on even the strongest economy in the world. There was and continues to be a long-term, serious disruption of the American economy. The attacks had rippling effects first on the aviation industry, and then on all sectors of the economy. The government and airlines have had to spend a lot more money on precautions against terrorism and have assessed taxes on the price of air travel; these measures have impacted other areas of international commerce, including shipping and trucking. There were major institutional changes on the heels of the attacks, resulting in heightened and intrusive security precautions in office buildings and in public spaces, encroachments on personal liberties, fingerprinting of visitors, greater strains on police resources, tightening of national borders, and so on.¹⁸⁶ The world's leading democracy has launched a lengthy and expensive war to combat terrorism, first in Afghanistan and then in Iraq. There is no end in sight to the "war on terror."

Thus, a liberal democracy, confronted by active terrorist operations, found it necessary to curtail basic liberties, which is what terrorists want to happen, to create an environment that will eliminate basic liberties so as to cause greater oppression of the masses, and in turn diminish if not destroy the liberal democratic state. Bin Laden has alluded to the success of the September 11 attacks in producing the United States' budget and trade deficits and has said that al Qaeda is committed "to continuing this policy in bleeding America[]to the point of bankruptcy."¹⁸⁷ Bin Laden noted that the attacks cost al Qaeda about \$500,000, while the economic fallout to the United States has been more than \$500 billion, including military costs associated with the ongoing "war on terror," and curtailment of fundamental freedoms in the name of heightened security.¹⁸⁸ When democracies clamp down on their own values, they in a sense hand a kind of unintended victory to the terrorists.¹⁸⁹

186. See generally Eric Lichtblau, *Ashcraft's Tour Rallies Supporters and Detractors*, N.Y. Times A14 (Sept. 8, 2003) (reporting widespread protests of governmental security precautions impacting civil liberties); Edward Wong, *Inconsistency: New Hobgoblin for the Airlines*, N.Y. Times C1 (May 3, 2003) (discussing the effects of security measures on airline taxes and costs).

187. Van Natta, *supra* n. 98, at D1 (quoting Osama bin Laden from an audio-taped message).

188. *Id.*

189. Richard Bernstein, *What Is Free Speech, and What Is Terrorism?* N.Y. Times D14

The mere fact that bin Laden has been declared “Public Enemy Number One” has a kind of causal efficacy that plays into the hands of terrorists:

What an extraordinary recognition of status to such a person and to such a group of people whose only merit is to advocate violence, and on occasion to successfully carry it out. Such status gives the person and the group the type of recognition and success that they hope for. Worse yet, it is an incentive for similar groups to emulate them, as in the case of Abu Musa Al-Zarqawi in Iraq, who before getting a [b]in Laden franchise, fell into a maverick category.¹⁹⁰

Another kind of causal efficacy is seen when a government takes countermeasures that in turn “provoke responses that will intensify anger in the Muslim world.”¹⁹¹ In the aftermath of the London bombings of July 2005, British Prime Minister Tony Blair announced laws to uproot extremists; close mosques; deport fundamentalist clerics; ban some Islamic organizations; monitor militant Web sites, centers, and bookstores; and establish “special courts” sitting in secrecy to decide whether extended detention might be authorized without charges being filed against suspected extremists.¹⁹² In response, one leader of a radical sect said that “the banner has . . . risen for jihad inside the U.K.”¹⁹³

1. The Psychological Success of Terrorism in Spreading Fear and Terror

Terrorists will consider terrorism to be causally effective if an attack foments terror in the targeted populace. Perhaps this is the most obvious purpose of terrorism—to establish a threshold of fear and intimidation in the target audience, to induce a sense of powerlessness and helplessness, and to hurt or frighten the entire body politic. A terrorist attack is not simply an end in itself. It may be retaliation or punishment inflicted on the enemy, but there is some further end in mind, namely, to produce a certain

(Aug. 14, 2005).

190. Bassiouni, *supra* n. 58, at 303.

191. Bernstein, *supra* n. 189, at D14.

192. Alan Cowell, *Britain: Taunts Follow Crackdown*, N.Y. Times D14 (Aug. 14, 2005).

193. *Id.*

perception on the part of an audience. This production of a state of fear or terror by the killing of “innocents” is also a means to some further end, namely to call attention to the motives or goals of the terrorists and to coerce others into some desired political course of action. The logic of attacking indiscriminate targets is that the resulting deaths or injuries will shock the opposition into making concessions in favor of the terrorists’ political cause.

Terrorists may claim significant success if such fear translates into capitulation to their demands, but the mere projection of terror into the targeted audience is considered a success. This psychological feature, of projecting a mental state of terror into a civilian population, is something that, in general, distinguishes terrorism from other forms of political violence.

The logic of instilling terror is that terrorists may then be successful in persuading electorates that the strengths of their societies—public debate, mutual trust, open borders, and constitutional restraints on executive power—are weaknesses. This effort to ridicule a democracy’s traits can influence people to abandon them. A reign of terror can induce a society to curtail constitutional rights, violate civil rights, maximize secrecy and deception, and erode other values for which democracy stands. As noted above, in the wake of the September 11 terrorist attacks, the United States implemented various measures, including the USA PATRIOT Act, deemed necessary by Congress and by law enforcement officials to help detect and curtail terrorist plots. In the process, people’s liberties are being curtailed by an erosion of privacy, intrusive searches are being conducted even on municipal public transportation, and cameras stand watch on public streets. Overall, a vague sort of paranoia has begun to permeate society.

2. The Success of Terrorism in Capturing Media Attention

Media reports of terrorist attacks make it possible for terror to spread quickly among a population. The replay of terrorist scenes with the mayhem and blood further instills fear in the targeted population. Moreover, as one author points out, media reporting helps to raise consciousness about the terrorist cause:

Terrorists use violence (or the threat of violence) because they believe that only through violence can their cause triumph and their long-term political aims be attained. Terror-

ists therefore plan their operations in a manner that will shock, impress, and intimidate, ensuring that their acts are sufficiently daring and violent to capture the attention of the media and, in turn, the attention of the public and the government.¹⁹⁴

Terrorists will frequently issue public statements after a given terrorist attack, taking responsibility for the attack, stating the objectives, demands, or purpose of their mission, and defending the attack on behalf of their cause. Sometimes, if terrorists attack their own people, they will seek to publicly explain the attacks. For example, one group, sensitive to those who criticized it for killing fellow Muslims, “defend[ed] attacks on members of the Iraqi Army and police officers, saying they have abandoned their religion and become mere pawns of the West.”¹⁹⁵

A certain sophistication has been observed in the way terrorists interact with the media:

To some extent, the insurgents are creating their own press coverage, and successfully. After [the March 9, 2005] hotel attack in Baghdad, for instance, one group quickly released its own videotape of the bombing, along with statements explaining why and how it chose that target. Within hours, all of it was appearing not only on Arabic Web sites and chat rooms but also on television stations and even in some Western news reports.¹⁹⁶

The greatest success of terrorism occurs if a government is induced to revise its policies. Terrorists have a long history of issuing demands to the targeted government.¹⁹⁷ The modern history

194. Hoffman, *supra* n. 57, at 63.

195. Robert F. Worth, *Jihadists Take Stand on Web, and Some Say It's Defensive*, N.Y. Times A1 (Mar. 13, 2005).

196. *Id.*

197. There are numerous issues involved in evaluating terrorist behavior in hostage situations:

In looking at negotiation behavior, what did the terrorists want: release of political prisoners? Specific political changes? Safe passage from the scene? Publication/broadcast of a statement? Other non-logistic demands? Did they even bother to make demands? Did they increase, decrease, or substitute demands during the negotiations? Did they allow the sequential release of hostages, or substitution of hostages? Did they allow a deadline to pass without engaging in a threatened action? We also look at how the negotiations were conducted. Who was the target negotiator? What was the response of the target? How many, if any, prisoners were re-

of terrorism is replete with instances of countries and organizations that have capitulated by giving in to the demands of terrorists, effectively rewarding terrorism by supporting the causes for which it was undertaken.¹⁹⁸

At the same time, some attacks are intended as retaliation against the enemy rather than as a means of seeking appeasement for demands. The September 11 attacks, for example, were not preceded by or associated with a demand and an opportunity for negotiation, while with the numerous Iraqi kidnappings, usually there have been demands and an opportunity for appeasement.¹⁹⁹ Kidnapping and abduction of foreigners by Iraqi extremists, as a means of intimidation and publicity, quickly became a favored method of undermining the authority of the new Iraqi government after it took over formal sovereignty from American authority in June 2004.²⁰⁰ Insurgents who participated in a spate of kidnappings following the fall of Saddam Hussein made demands for political concessions directed to various governments, usually to withdraw troops or workers from Iraq in exchange for releasing the hostages, and there were various instances of success.²⁰¹ The pattern escalated. The insurgents came to use a standard technique—threatening to behead the kidnapped foreigners if their countrymen did not pull out.²⁰² The tactic usually involved the release of videos of individual hostages with their captors threatening beheading.²⁰³ This ensured that each incident was given enormous coverage in the international media. In addition to the spread of terror, these abductions produced concrete results

leased? How much, if any, ransom was paid? Was the ransom a “Robin Hood” ransom, or merely to fill the terrorists’ coffers? Where did the released prisoners go? Were the prisoners whose release was demanded involved in previous terrorist attacks? Did the terrorists escape the scene? What was the fate of the hostages? Did tertiary governments offer or refuse asylum or safe haven?

Edward F. Mickolus, *How Do We Know We’re Winning the War against Terrorists? Issues in Measurement*, 25 *Stud. in Conflict & Terrorism* 151, 154–155 (2002).

198. Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 167 (Yale U. Press 2002).

199. Sabrina Tavernise, *12 Killed As Iraqi Police and Rebels Clash in Mosul*, N.Y. Times A9 (Aug. 5, 2004).

200. *Id.*

201. James Brooke, *Hostage’s Death Unleashes Mixed Emotions Back Home*, N.Y. Times A11 (June 24, 2004).

202. *Id.*

203. *Id.*

in that various governments acceded to the demands of abductors.²⁰⁴

For example, in June 2004, terrorists beheaded a South Korean hostage in Iraq, after the South Korean government refused to accede to demands that it halt the deployment of more troops to Iraq.²⁰⁵ The killing garnered substantial media attention and emboldened fifty members of South Korea's National Assembly to endorse a motion to stop the planned deployment, although the country's president was expected to prevail with his plan to send the troops.²⁰⁶ Still, the terrorist attack instilled sufficient fear in the South Korean public so that the incident may have damaged South Korea's president politically.²⁰⁷

A "successful" abduction of a Filipino truck driver resulted in overwhelming public pressure in the Philippines such that in July 2004, the government withdrew fifty-one soldiers and police officers from Iraq to meet the demand of terrorists who threatened to kill the hostage, who was a father of eight.²⁰⁸ The government said it had no choice but to accede to the demands of the Iraqi abductors.²⁰⁹ The government made a decision to take the lesser of two evils, finding that the damage to Manila's relationship with Washington by yielding to the demands of insurgents was easily outweighed by the political backlash against Filipino President Gloria Macapagal-Arroyo.²¹⁰

Following the withdrawal of the Filipino troops, hostage-takers seized workers from Kenya, India, Pakistan, and Egypt, demanding that their employers or foreign troops withdraw from Iraq.²¹¹ One group that identified itself as affiliated with al Qaeda threatened to plant bombs throughout Australia if that nation did not withdraw its troops from Iraq.²¹²

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Carlos H. Conde, *Philippines Viewed As Being Forced to Yield on Hostage*, N.Y. Times A10 (July 16, 2004).

209. *Id.*

210. *Id.*

211. Ian Fisher, *Jordanian Company to Quit Iraq to Save Lives of 2 Hostages*, N.Y. Times A3 (July 28, 2004).

212. James Glanz, *The Reach of War: Iraqi Insurgents Using Abduction As Prime Weapon*, N.Y. Times A3 (July 28, 2004).

A Jordanian company complied with the demands of kidnapers of two of its employees to stop working with American forces in Iraq.²¹³ The owner of the company, a catering and construction firm, said, "I am ceasing operations and pulling out from the company's premises in Iraq for humanitarian reasons, and out of my concern for the safety and the lives of my two employees who were kidnapped in Iraq."²¹⁴

Extremists attacked Saudi Arabian petroleum targets in May 2004.²¹⁵ The purpose of the attack was to protest the presence of foreigners in Saudi Arabia.²¹⁶ An additional motivation was to terrorize the Saudi regime into reversing its efforts to modernize the country and rebuild ties with the United States.²¹⁷ There was causal efficacy in the attack, in that the American Embassy in Riyadh decided to call for all Americans to leave the country.²¹⁸

An Islamic militant group killed twelve Nepalese hostages without asking for any conditions for their release.²¹⁹ The men were laborers, all from poor families, who had come to work in Iraq for large salaries as cooks, cleaners, and builders.²²⁰ In this case, the kidnapping was not done in connection with any demands, but, according to the group, was retaliation against the workers because they were "cooperating" with the American forces in Iraq.²²¹

3. *The Question of Acceding to Terrorist Demands*

Many find the successes of terrorists in inducing governments to capitulate to their demands to be a disturbing trend. A criticism of how nations have rewarded terrorism is seen in the following commentary by Michael Rubin in the *Wall Street Journal*:

213. Fisher, *supra* n. 211, at A3.

214. *Id.*

215. Anthony H. Cordesman, *Al Qaeda's Small Victories Add up*, N.Y. Times A27 (June 3, 2004).

216. *Id.*

217. *Id.*

218. *Id.*

219. Sabrina Tavernise, *12 Hostages from Nepal Are Executed in Iraq, a Militant Group Claims*, N.Y. Times A9 (Sept. 1, 2004).

220. *Id.*

221. *Id.*

France, Belgium and four other European Union members endorsed a U.N. Human Rights Commission resolution condoning “all available means, including armed struggle” to establish a Palestinian state. Hence, six EU members and the commission now join the 57 nations of the Islamic Conference in legitimizing suicide bombers. By their logic of moral equivalence, terror is justifiable because its root cause is Israel’s occupation. That Palestinian terror predates occupation, or that suicide bombings became a tactic of choice only after the initiation of the Oslo process, is too inconvenient to mention.

Unfortunately the U.N. goes beyond giving rhetorical support for terrorism. In a variety of ways, its agencies have been complicit in Middle Eastern terror.²²²

Governments are faced with a daunting dilemma when presented with terrorist demands. The necessity doctrine might be used on behalf of governments to *refuse* to comply with terrorist demands. The conventional wisdom is that to capitulate is a greater evil than allowing terrorists to kill the hostages because capitulation will result in a domino effect. More terrorist acts will occur, as terrorists are emboldened by the success of a single capitulation. Holding fast, then, and sacrificing the hostages, is the lesser evil.

The position of the United States and allied forces on the issue of negotiating with kidnappers in Iraq has been that “conceding to terrorists will only endanger all members of the multinational force, as well as other countries who are contributing to Iraqi reconstruction and humanitarian assistance.”²²³ In other words, granting terrorist demands gives the impression that if they attack the system at vulnerable points, they can win. Vice President Dick Cheney expressed the view that “[t]errorist attacks are not created by the use of strength. They are a result of the perception of weakness This is not an enemy that can be negotiated with or reasoned with or appeased. This is, to put it simply, an enemy that must be destroyed.”²²⁴ Recently, in a

222. Michael Rubin, *The UN's Refugees*, Wall St. J. A12 (Apr. 18, 2002).

223. Tavernise, *supra* n. 219, at A9 (quoting a United States official).

224. Rick Lyman, *Cheney Says Kerry Suffers 'Fundamental Misunderstanding'*, N.Y. Times A10 (Sept. 4, 2004) (quoting Vice President Dick Cheney).

speech on terrorism, President Bush said, "In fact, we're not facing a set of grievances that can be soothed and addressed. We're facing a radical ideology with unalterable objectives to enslave whole nations and intimidate the world, . . . and no concession, bribe or act of appeasement would change or limit their plans [for] murder."²²⁵

The Italian government was faced with a demand by terrorists who abducted an Italian journalist, who was ultimately killed in Iraq.²²⁶ The Italian government said it rejected the terrorists' demand that it withdraw its 3,000 military troops from Iraq within forty-eight hours.²²⁷ The French government refused to revoke a law banning Muslim head scarves in public schools, despite demands by hostage-takers.²²⁸ The demand came after two French journalists were abducted by Islamic extremists who in turn demanded a change in French policy within forty-eight hours as a condition for the release of the hostages.²²⁹

Others think that complying with terrorists' demands is pragmatic.²³⁰ The terrorist attack on a Madrid train station in March 2004 had the result of inducing the government to pull out its troops from Iraq.²³¹ Still, other terrorist attacks persisted in Spain, and in October 2004, police arrested thirteen men in connection with a foiled plot to blow up the national court in Ma-

225. Nathan Guttman & Herb Keinon, *Israel Hails Bush's Islamist Attack*, Jerusalem Post A1 (Oct. 7, 2005) (quoting the speech of President Bush before the National Endowment for Democracy).

226. John F. Burns, *Journalist from Italy Killed in Iraq by Captors*, N.Y. Times A11 (Aug. 27, 2004).

227. *Id.*

228. Elaine Sciolino, *France Won't Meet Demand to Stop Ban on Head Scarves*, N.Y. Times A7 (Aug. 30, 2004). French law bans all "conspicuous" signs of religion, including Muslim head scarves in public schools. *Id.*

229. *Id.*

230. Author Edward F. Mickolus suggested the following approach:

It may be that we should aim at creating a new self-image for the hostage-takers by gaining their commitment to what can be presented as humanitarian policies, such as releasing some of their prisoners or allowing food and medical aid to be supplied. If the terrorist would agree to make incremental moves in this direction, we might be able to keep up the process of commitment to positive choices and eventually make possible the release of all hostages. Such tactics appear to have been successful when applied, be they in terrorist cases or simple criminal holdups gone awry, and may represent an optimal mix of the advantages claimed for the two positions.

Mickolus, *supra* n. 197, at 155.

231. Robin Wright & Bradley Graham, *U.S. Works to Sustain Iraq Coalition*, Wash. Post A1 (July 15, 2004).

drid.²³² Authorities said the plot was organized by a cell of Islamic extremists.²³³

In Nepal, demonstrators engaged in pro-democracy protests, often violent, in violation of a shoot-on-sight curfew, to wrest power from King Gyanendra.²³⁴ The protestors were calling for an end to the Nepalese monarchy. As a result, King Gyanendra announced that he would turn over powers to a prime minister chosen by the country's principal political parties.²³⁵

In India, the general population endorses the notion that it is "inhuman" not to deal with terrorists.²³⁶ Three Indian truck drivers were kidnapped and held hostage, with demands that their employer shut down operations in Iraq.²³⁷ In response to public pressure and media coverage, the company agreed to end operations in Iraq.²³⁸ The Indian government, which has itself battled terrorism from Punjab to Kashmir, has ceded to terrorist demands numerous times.²³⁹ For instance, in 1999, a hijacked Airbus landed in Kandahar, and India's foreign minister flew there to negotiate.²⁴⁰ To free the hostages, India ultimately released three militants.²⁴¹ One of them, Omar Sheikh, was subsequently implicated in the murder of an American journalist, Daniel Pearl, in Pakistan.²⁴²

4. Long-Term Success: Gaining Respectability

Another example of causal efficacy occurs when terrorist organizations gradually gain a kind of political respectability. For example, Hezbollah was long labeled a terrorist organization by the United States because it had sponsored attacks on Israelis

232. Renwick McLean, *Spain: 13 New Suspects in Court Plot*, N.Y. Times A7 (Oct. 29, 2004).

233. *Id.*

234. Somini Sengupta, *Embattled King of Nepal Offers Gesture to Protestors*, N.Y. Times A6 (Apr. 22, 2006).

235. *Id.*

236. Hari Kumar & Amy Waldman, *Worried Families in India Wield Power of Publicity*, N.Y. Times A11 (Aug. 5, 2004).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

and was responsible for attacks such as the 1983 truck bombing in Beirut that killed more than 200 American marines.²⁴³ An American government official described the organization as follows: “They are in the same category as al Qaeda. The administration has an absolute aversion to admitting that Hezbollah has a role to play in Lebanon, but that is the path we’re going down.”²⁴⁴ By 2005, Hezbollah had developed into a major political force in Lebanon, holding thirteen seats in Lebanon’s Parliament and operating numerous social programs for Shiites.²⁴⁵ “European officials say the situation with Hezbollah is analogous to that of the Palestinian group Hamas, which has won local elections in Gaza and the West Bank and has come under pressure to moderate its views and negotiate with Israel.”²⁴⁶ Hamas, the Islamic group that has long been labeled a terrorist organization, has been moving into the mainstream of Palestinian politics. Hamas leaders decided to run candidates in Palestinian legislative elections in July 2005.²⁴⁷ In fact, Hamas won a Parliamentary victory in January 2006 and thereby gained control of the Palestinian government, despite the fact that both Israel and the United States denounce Hamas as “terrorist.”²⁴⁸

The Palestinians gradually gained acceptance as bona fide freedom fighters in part because they formed the Palestine Liberation Organization (PLO) as a government in exile, established diplomatic ties with numerous nations, established a flag, and made it possible to engage in diplomatic discourse. Founded in 1964 as a Palestinian nationalist umbrella organization, the PLO has been dedicated to establishing an independent Palestinian state.²⁴⁹ Over the years it splintered into various militia groups,

243. Steven R. Weisman, *U.S. Called Ready to See Hezbollah in Lebanon Role*, N.Y. Times A1 (Mar. 10, 2005).

244. *Id.*

245. *Id.*

246. *Id.*

247. Steven Erlanger, *Hamas Will Take Part in Vote for a Palestinian Legislature*, N.Y. Times A8 (Mar. 13, 2005).

248. See Scott Wilson, *Hamas Sweeps Palestinian Elections, Complicating Peace Efforts in Mideast*, Wash. Post A1 (Jan. 27, 2006) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/26/AR2006012600372.html>) (noting that both United States and Israeli officials have designated Hamas as a terrorist organization and refuse to work with a Palestinian Authority that includes Hamas).

249. Judith Miller, *Battle within the P.L.O. Threatens a Formal Split*, N.Y. Times A11 (Nov. 18, 1984).

of which the most dominant was Yasser Arafat's Al-Fatah.²⁵⁰ For many years it was the United States' view that the various elements of the PLO advocated, carried out, or accepted responsibility for acts of terrorism. In 1988, Arafat publicly renounced terrorism.²⁵¹ Over the years, various Palestinian groups that had long been labeled terrorist organizations, such as Hamas, moderated their views and negotiated with their political adversaries.

With respect to terrorism in general, some military officials recently started to refer to a "global struggle against violent extremism" rather than "the global war on terror," which had been the slogan of choice in the past.²⁵² But more importantly, General Richard B. Myers, Chairman of the Joint Chiefs of Staff, said in a speech to the National Press Club that the solution to deterring violent extremists will be "more diplomatic, more economic, more political than it is military."²⁵³

Thus, there is ample evidence of both direct and indirect causal efficacy with respect to various types of terrorist attacks.

D. The Legal-Way-Out Factor

The Supreme Court gave a classic statement of the "way-out" factor in a prison escape case, holding that "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the [necessity] defense [] will fail."²⁵⁴ Inherent in the idea of there being a legal way out is that the legal option must be *adequate* to avert the harm sought to be avoided. In a situation in which either a ship will go down or the cargo must be jettisoned, one legal option might consist of simply waiting out the storm, exercising patience and restraint, and hoping that the weather will improve or that help will arrive. This "legal way out" would induce the actor to keep the cargo on board a little longer. But prudence might override such a choice. In such a situation, waiting hopefully for

250. James M. Markham, *P.L.O. Aide Warn Rebels on Seizing Bases in Lebanon*, N.Y. Times A1 (May 31, 1983).

251. Barry Schweid, *A Cold Eye on Arafat*, N.Y. Times G20 (Apr. 29, 1990).

252. Eric Schmitt & Thom Shanker, *New Name for 'War on Terror' Reflects Wider U.S. Campaign*, N.Y. Times A7 (July 26, 2005).

253. *Id.*

254. *Bailey*, 444 U.S. at 410 (quoting Wayne LaFave & Austin Scott, *Handbook on Criminal Law* § 28, 201-202 (West 1972)).

the possibility of a rescue team or a change in weather might be a reckless and irresponsible choice, rather than an *adequate* legal option.

The unavailability of legal alternatives is not a requirement of the defense of necessity in some jurisdictions. For example, a Texas appellate court has held that while the availability of legal alternatives may be relevant in assessing the reasonableness of the actor's conduct, this factor is not crucial and may be dispensed with, provided all other elements of the defense are proven.²⁵⁵

Courts have often held, in the context of civil disobedience cases, that there are *always* reasonable legal alternatives available to avert the harm sought to be avoided by civil disobedients, instead of committing trespass or other crimes to protest policies.²⁵⁶ This line of case law says that activists must pursue alternatives to criminal conduct, such as participating in the political process, distributing literature, making speeches, petitioning legislators, expressing their disagreement with government policy in electronic and print media, and so on.²⁵⁷ However, it could be asserted that it is absurd to suggest that "reasonable" legal alternatives are available to civil disobedients if such options are futile, inadequate, or implausible. Rather, "reasonable" legal alternatives implies that the options are not merely possible, but that they will be effective.

To terrorists, there are no reasonable nonviolent means that offer any hope of successful change in a dreadful situation of injustice. Terrorists believe that they are conscientious and politically, socially, economically, and religiously sensitive people who have for years engaged in various forms of nonviolent protest in good faith, but have found their oppressors to be unmoved and nonresponsive.

255. *Brazelton v. State*, 947 S.W.2d 644, 649 (Tex. Crim. App. 1997); accord *Pennington v. State*, 54 S.W.3d 852, 859 (Tex. Crim. App. 2001) (citing and reaffirming the opinion in *Brazelton*).

256. *E.g. U.S. v. Schoon*, 971 F.2d 193, 198 (9th Cir. 1991) (holding that the necessity defense could not be invoked against obstruction of justice charge stemming from protests against U.S. policies in El Salvador, as legal alternatives will not ever be considered exhausted when the alleged harm can be addressed by Congress).

257. *E.g. U.S. v. Dorrell*, 758 F.2d 472, 432 (9th Cir. 1985); *U.S. v. Brodhead*, 714 F. Supp. 593, 597 (D. Mass. 1989); *Commonwealth v. Hood*, 452 N.E.2d 188, 196 (Mass. 1983); *State v. Diener*, 706 S.W.2d 582, 585 (Mo. App. 1986).

Terrorists believe their tactics are necessary because they find themselves politically impotent; hence, traditional forms of political persuasion are beyond their reach. To terrorists, lawful means of redressing grievances simply do not exist. The American government, for example, will not “negotiate” with al Qaeda and work out some sort of “diplomatic” solution. Thus, there is no alternative but to resort to violence in order to further the terrorist group’s program. To terrorists, then, there is a cost-benefit calculation that inclines them to opt for the tactics of terrorism rather than peaceful tactics of conflict resolution. Other tactics simply hold no promise of reward.

E. The Preemption Factor

The preemption factor is perhaps the main hurdle in the necessity doctrine, insofar as it might be applied to terrorism. The preemption factor requires that, for the necessity defense to be available, there must be nothing in the law that would preclude its application to the situation under consideration.²⁵⁸ The necessity doctrine is generally out of reach in situations in which actors seek to justify the intentional killing of innocents.

Clearly, the world community has consistently shared the view that terrorism, particularly when it targets innocent and unoffending citizens, is nowhere condoned. Thus, in the context of terrorism, the preemption factor precludes any argument based on necessity. Like other kinds of intentional killing of innocents, there is a deontological prohibition that simply holds that there can be no basis in “necessity” that will justify (or excuse) such acts.²⁵⁹ Deontology is the idea that certain acts are morally prohibited, regardless of any beneficial consequences that may attach to them.²⁶⁰ “Thus a deontologist may argue that the killing of an innocent person would be prohibited even if it could be demonstrated with certainty that such an action would save the lives of

258. *Kroncke*, 459 F.2d at 701; *Dorsey*, 395 A.2d at 857; Model Penal Code § 3.02, cmt. 2.

259. Garrett O’Boyle, *Theories of Justification and Political Violence: Examples from Four Groups*, 14 *Terrorism & Political Violence* 22, 24 (Summer 2002).

260. *Id.*

a thousand other equally innocent persons. The act in itself would simply be wrong.”²⁶¹

In common morality, the only persons who may be intentionally killed are those convicted of certain crimes, and those engaged in a forcible violation of society’s just order, whether by an attack from without or by gross criminal conduct within. Nothing can justify intentionally killing other persons who, as the tradition developed, came to be classed together as “innocents”. . . . [Innocents] refers to all those who are not included in one of the two classes whose killing is justifiable according to common morality.²⁶²

The deontological constraint against terrorism is based on the idea that terrorism violates the rights of those who are killed or harmed, and even if there is no actual killing or maiming, the mere threat of harm is condemned because “threats are a species of coercion, making people behave in ways that they would not otherwise choose[.]”²⁶³

Courts have suggested that it is difficult to see how it can be argued that there is a benefit to society in the intentional killing of innocents, even if the action results in an overall saving of lives.²⁶⁴ Lives are not amenable to ready quantification, and therefore, courts are just not comfortable with allowing defendants to assert a necessity defense by “measuring ‘the comparative value of lives.’”²⁶⁵

The minority view is expressed in the Model Penal Code. The Commentary to the Code says,

It would be particularly unfortunate to exclude homicidal conduct from the scope of the [necessity] defense. For, recognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct that results in taking life may promote the very value sought to be protected by the law of homicide. Suppose, for example, that the actor makes a breach in a dike, knowing that this will

261. *Id.*

262. *Id.*

263. Wilkins, *supra* n. 125, at 15.

264. John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 Hous. L. Rev. 397, 405 (1999) (citing *Dudley & Stephens*, 14 Q.B.D. at 287–288).

265. *Id.*

inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be taken in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act.²⁶⁶

Clearly terrorists reject the notion of deontological constraints. Terrorists espouse the belief that

[the] use of . . . terrorism is justified either (a) because we can overthrow the state and institute an egalitarian society in which all people will prosper and equally develop their distinctive human potentialities, or (b) violence will provoke the state into revealing its coercive and oppressive nature as a tool of the capitalist class, whereupon the masses will attain revolutionary consciousness.²⁶⁷

Or, with respect to religious extremists, the thinking might be that they are “acting in accordance with the will of God, that it is their moral and religious duty to wage *jihad* against the infidel in order to preserve and defend Islam itself and to cleanse Islam’s holy sites of the desecration that the Western presence represents.”²⁶⁸ Moreover, as will be discussed below, terrorists do not regard their targets as “innocents.”

F. Clean-Hands Factor

The final factor in the necessity doctrine is the clean-hands factor. Terrorists would seem to satisfy this factor in that the injustices perceived by the terrorists are not situations they have brought about. Rather, the policies and acts on the part of the enemy constitute the source of the evil to be averted. Thus, we might concede that terrorists have “clean hands” in that they were not responsible for the emergence of the grievances in question.

266. Model Penal Code § 3.02, cmt. 3.

267. O’Boyle, *supra* n. 259, at 27.

268. *Id.* at 41.

VIII. THE IDEA OF COLLECTIVE GUILT

As mentioned above in the discussion of the choice-of-evils factor,²⁶⁹ a subcomponent of that factor is the proportionality principle. The overwhelming weight of world opinion is that the targeting of innocent civilians or other indiscriminate targets who are not involved in policy-making can never be justified. The infliction of violence (or even the threat of violence) against those who are not responsible for the grievances sought to be averted would seem to be intrinsically disproportionate.

To terrorists, the proportionality principle is not violated by indiscriminate targeting of civilians because the principle of collective guilt justifies the random targeting of civilians.²⁷⁰ To terrorists, citizens of governments qualify as legitimate targets of political violence because the citizens are guilty of complicity in wrongdoing with the offending government, which itself has perpetrated unjustified political violence.²⁷¹

Collective responsibility is sometimes thought to be an expedient way of meting out justice. We see this often enough when penalties are imposed against a corporation for the wrongdoing of officers, or when a state imposes sanctions against another state even though this will result in a great deal of suffering on the part of citizens who are not in fact responsible for the culpable acts of their leaders. To hold "society in general" responsible for something is a Platonic sort of idea. The social "structure" is an abstract entity that itself cannot literally be held accountable for wrongdoing. On the other hand, the idea of collective responsibility fails to consider that

[a]llowance must be made for ignorance, for the need for leadership, and for the peculiar difficulties which attend the corporate effort required for effective social reform. This does not imply that the individual must simply surrender to the drift of events, or acquiesce passively in the policies of a handful of leaders. There is much that he can do, but ultimately success will depend on a great many factors wholly

269. *Supra* pt. VII(A).

270. Brian Michael Jenkins, *Terrorism and Beyond: A 21st Century Perspective*, 24 *Stud. in Conflict & Terrorism* 321, 324 (2001).

271. *See* Corlett, *supra* n. 47, at 65.

outside his control, no less in a democratic than in a totalitarian country.²⁷²

To terrorists, the notion of collective guilt explains and helps justify the appropriateness of targeting “innocents.”²⁷³ They find a certain moral warrant associated with the targeting of “innocents” because they believe that there are no “innocent” targets among citizens of the offending government. Therefore, they believe the targeting of “innocents” *is* proportional. Collective guilt implies that the citizens of an oppressive and imperialistic government share common interests and values with the government, and hence they share moral and political guilt in the policies of their government.²⁷⁴ In addition, terrorists regard civilians as appropriate targets because primary targets, such as government officials, may be so highly protected as to be insulated from terrorist attacks.

To terrorists such as Osama bin Laden, America itself is the ultimate terrorist. “America’s status as the world’s sole superpower in itself provokes resentment.”²⁷⁵ There is also the sense in many quarters that America imposes its own values on other nations. America is perceived as demanding adherence to its positions on human rights, proliferation, drug trafficking, corruption, money laundering, free trade, and environmental and intellectual property protection.²⁷⁶

A statement posted on an al Qaeda website in 2003 stated, “We have the right to kill four million Americans—two million of them children—and to exile twice as many and wound and cripple hundreds of thousands. Furthermore, it is our right to fight them with chemical and biological weapons.”²⁷⁷ Osama bin Laden has

272. H.D. Lewis, *Collective Responsibility*, in *Philosophy* vol. 24, 3, 14 (1948).

273. For further discussions of collective responsibility, see J. Angelo Corlett, *Responsibility and Punishment* ch. 7 (Kluwer Acad. Publishers 2001); Joel Feinberg, *Doing and Deserving* ch. 8 (Princeton U. Press 1970); Larry May, *The Morality of Groups* (U. of Notre Dame Press 1987); *Collective Responsibility* (Larry May & Stacey Hoffman eds., Savage, Rowman & Littlefield Publishers 1991); Wilkins, *supra* n. 125; 6 *J. of Ethics* 111–198 (2002) (special issue on collective responsibility).

274. For a discussion of the distinction between moral guilt and political guilt, see Wilkins, *supra* n. 125, at 6.

275. Jenkins, *supra* n. 270, at 324.

276. *Id.*

277. Elisabeth Bumiller, *Addressing Cadets, Bush Sees Parallel to World War II*, N.Y. Times A14 (June 3, 2004) (quoting the statement of Sulaiman Abu Ghaith, a spokesman

said, "We do not differentiate between those dressed in military uniforms and civilians: they are all targets in this *fatwa* The *fatwa* includes all who share or take part in killing Muslims, assaulting holy places, or those who help the Jews occupy Muslim land."²⁷⁸ To terrorists, the September 11 attacks were well within proportionality, given that the enemy is an aggressive superpower with great military prowess and has provided military aid and political support to Israel. Therefore, the populace is collectively responsible for the evils of its government.²⁷⁹

On the question of whether there is such a thing as collective guilt, reasonable people will differ. Some think that all people are guilty of each and every wrong done by any human being, a view that Mohandas Gandhi is said to have held.²⁸⁰ On the other hand, many people subscribe to the view that people can be guilty only of those wrongs that they personally have committed.²⁸¹

George Fletcher has pointed out that the phenomenon of collective guilt permeates mainstream thinking in many parts of the world:

When a suicide bomber attacks Israeli children, the Jews consider the entire Palestinian population guilty, directly or indirectly. When Jews move into the West Bank, establishing new settlements, Palestinians accuse the entire Jewish nation of "taking" Palestinian land and creating facts-on-the-ground that render a Palestinian state less feasible. This reciprocal perception of the other side's collective guilt fuels the endless cycle of violence that has tragically dispelled dreams of peace in the region.²⁸²

Fletcher claims that "collective guilt is a plausible, widely-shared, and sometimes healthy response to collective wrongdoing."²⁸³ He

for al Qaeda).

278. O'Boyle, *supra* n. 259, at 40 (quoting Osama bin Laden from May 1998).

279. The tactic of indiscriminate targeting of civilians is sometimes employed by groups that conduct a national or ethnic struggle, because they are fighting against an entire population. When Palestinian terrorists carried out random attacks against the Israeli public, it was because they perceived Israel as their enemy, rather than a particular class of Israelis.

280. Wilkins, *supra* n. 125, at 19.

281. *Id.*

282. George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 *Theoretical Inquiries in L.* 163, 163–164 (2004).

283. *Id.* at 168.

further points out that Palestinian terrorist groups regard all Israelis as collectively guilty for occupying Palestinian “ancestral land” and for perpetuating an ongoing humiliation to Arab honor.²⁸⁴ When Palestinian terrorists carried out random attacks against the Israeli public, it was because they perceived Israel as their enemy, rather than a particular class of Israelis. Fletcher adds, “Israel’s partnership with the United States only exacerbates the image of Jews as exercisers of uncanny powers—able not only to kill the Son of God, but to conquer and manipulate the world’s media and financial systems.”²⁸⁵

The idea of collective guilt is also said to be a Marxist view, which one author describes as follows:

[I]f a society allows or fails to prevent what it well could have prevented without cost to itself, then if that circumstance eventuates in a wrong doing, then society becomes, morally speaking, an accomplice in or cause of the wrong doing. Society becomes collectively responsible for the wrong doing.²⁸⁶

Other scholars, including Alan Dershowitz²⁸⁷ and Nathan Lewin²⁸⁸ have proposed collective punishment of citizens for nurturing a culture that takes pride in suicide bombings. Of course, their discussion is in the other direction, that is, collective guilt for those who are *supportive* of terrorists, rather than collective guilt of the society that terrorists are attacking.

Under this notion of collective guilt, the indiscriminate targeting of civilians amplifies the terrorist component of the violence because members of the public will sustain heightened fear and insecurity in recognizing that an attack can happen at any time, to anyone. The indiscriminate nature of the attacks serves to create an atmosphere of chaos and insecurity and leads to the

284. *Id.* at 166.

285. *Id.*

286. Corlett, *supra* n. 47, at 64.

287. Dershowitz, *supra* n. 198, at 177. Dershowitz relies on a case (the Fall River rape case, well known from the film *The Accused*) in which men in a bar who cheered on rapists were thought to be aiders and abettors of the rape itself. *Id.* at 175–176.

288. Nathan Lewin, *Deterring Suicide Killers*, *Sh'ma: J. of Jewish Resp.* 11–12 (May 2002). Lewin proposes the death penalty for the entire family of suicide bombers. *Id.*

decomposition of society. The people will get the message that no one is safe until the injustice in question is abated.

The logic of indiscriminate targeting of civilians is not different from what motivated the United States to bomb German and Japanese civilian populations systematically in World War II, culminating with the dropping of atomic bombs on Nagasaki and Hiroshima.²⁸⁹ Essentially, it is the same concept as total war, and as mentioned above,²⁹⁰ terrorists believe themselves to be engaged in a total war. Allied forces apparently endorsed the idea that the civilians of the enemy states “were all in one way or another complicit in the war effort and thus were not, after all, innocent.”²⁹¹

Sometimes, spokespersons of terrorist groups will deplore the indiscriminate acts of terrorism of individual terrorists associated with the group. These public statements may or may not be genuine, but they are tactical in that the comments may help avoid outraging potential supporters of the group. For example, Palestinian leader Yasser Arafat condemned the September 11 attacks and offered condolences to the American people and government: “We are completely shocked. It’s unbelievable.”²⁹² But at the same time, young Palestinians danced and distributed candy to celebrate the attacks.²⁹³ The jubilation was also apparent in Egypt and other countries with large Palestinian populations.²⁹⁴ While Lebanese citizens said the attacks were payback for United States policies, Prime Minister Rafik Hariri of Lebanon said that “these tragic actions contradict all human and religious values.”²⁹⁵ One commentator reported the Palestinian belief in the collective guilt of Americans this way: “With a remarkably high unity of opinion, businessmen, laborers, and students said that they condemned the targeting of civilians, but that the people of a nation inevitably suffer for the crimes of their government.”²⁹⁶ A twenty-seven-year-old Palestinian, Khaled Hussein, said, “I felt

289. See *supra* nn. 104–107 and accompanying text.

290. See *supra* nn. 102–103 and accompanying text.

291. Nielsen, *supra* n. 148, at 431.

292. Charles A. Radin, *Attack on America, Leaders Deplore, but People Rejoice*, *Bos. Globe A20* (Sept. 12, 2001).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

bad for the civilians, . . . [b]ut America is fully responsible. It is a superpower, and it should treat the nations fairly, but it does not. . . . This is a reaction to its actions against other nations.”²⁹⁷ A twenty-five-year-old student, Asem Mussafer, said, “America has a long history of aggression, like the aggression against Japan at Hiroshima, like the aggression against Iraq. I feel sympathy with the civilian victims, but we support the message that is sent to the government of America.”²⁹⁸

Thus, for the foregoing reasons, and from the perspective of terrorists, their attacks are not indiscriminate and are morally justified.²⁹⁹ This again brings us to the idea that one person’s terrorist is another person’s freedom fighter.

IX. SELF-DEFENSE

Another justification by terrorists for their action is that they are defending themselves and their own innocents against the unlawful aggression of others. Terrorists think they are helping victims of significant forms of injustice to repel their oppressors, thereby enabling the aggrieved people to establish or re-establish themselves as autonomous.

The idea of self-defense as a justification for terrorism has been expressed by author Burleigh Wilkins, who argues that terrorism is morally justified when (1) one is defending oneself and has first attempted to use all political and legal remedies, and (2) one is selective, whenever possible, by directing terrorist activity only against those members of a group collectively guilty of injustice.³⁰⁰ As to the second point, from the terrorist’s standpoint, all citizens of the offending state are guilty of injustice.

The problem with taking the position that terrorism is a species of self-defense is that in traditional cases, the action of self-defense must be directed at an aggressor who threatens to make an imminent and unlawful attack against the one who invokes

297. *Id.*

298. *Id.*

299. If one is morally justified in doing something, then one has a moral right to the exercise or enjoyment of it. Since terrorists believe they are morally justified, they may well also believe that others have a moral duty not to interfere with the exercise or enjoyment of their moral right to engage in these practices. This notion of moral right is borrowed from Joel Feinberg, *Freedom and Fulfillment* chs. 8–10 (Princeton U. Press 1992).

300. Wilkins, *supra* n. 125, at 28.

self-defense (or a third party closely related to the defending actor).³⁰¹ Also, there is a duty to retreat, and if it is unreasonable to retreat under the circumstances, the act of self-defense must be proportionate, not excessive, to the threat posed.³⁰²

In discussing the duty to retreat, Blackstone says that one

should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor. . . . The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law.³⁰³

Thus, it would seem that terrorists cannot invoke self-defense for two reasons. First, the terrorists are not directing their "self-defense" against anyone who is committing an act of *unlawful* aggression (or making an imminent threat to use unlawful aggression), as there is nothing unlawful or imminent about being a superpower, promoting democracy, supporting Israel, or promoting Western values abroad. Second, even if there is unlawful aggression, there is a duty to retreat so as to avoid the violence before turning upon the assailant.

As to the first point, from the terrorist perspective, the West has engaged in acts that constitute *unlawful* aggression under international law. For example, insurgents in Iraq believe that

301. *E.g. Moran v. Ohio*, 469 U.S. 948, 954 (1984); *State v. Robbins*, 388 N.E.2d 755, 758 (Ohio 1979).

302. *See Johnson v. Hofbauer*, 159 F. Supp. 2d 582, 603 (E.D. Mich. 2001) (articulating that the force used for self-defense must be proportionate to the threat posed); *King v. State*, 171 So. 254, 256 (Ala. 1936) (discussing a person's legal duty to retreat if reasonable under the circumstances).

303. William Blackstone, *Commentaries* vol. 4, **184–185.

the invasion of their country violated numerous precepts of international law and thus constituted unlawful aggression.³⁰⁴ There are many in the world community who concur with the view that the coalition powers did not have a lawful right to invade and occupy Iraq, much less to effect a regime change.³⁰⁵ The legality of the invasion, under international law, has been debated in the literature.³⁰⁶ Extremists believe, in other ways, that there are instances of egregious oppression that call out for a self-defensive response. As Michael Walzer has observed, "It is at least possible to imagine oppression so severe that terrorism aimed systematically at political division might be morally defensible."³⁰⁷

As to the second point—the duty to retreat—in the case of Iraqi insurgents, it is their homeland that has been invaded, so there is nowhere for them to go to avoid what they regard to be unlawful aggression. And with regard to terrorists in other parts of the world, they may well believe that it is unreasonable for them to retreat, because there is nowhere they can go to escape imperialistic aggressions.

From the terrorist's standpoint, since self-defense is generally regarded as a justification, the enemy who is repelled by an act of self-defense may not retaliate in the name of self-defense, and third parties may aid the terrorists who seek to act in self-defense.

304. See Daoub Kuttub, *The Arab TV Wars*, N.Y. Times F44 (Apr. 6, 2003) (discussing the Iraqi point of view that Americans are violating international law by invading Iraq).

305. See J. Maurice Arbour et al., *Military Action in Iraq without Security Council Authorization Would Be Illegal*, 34 Ottawa L. Rev. 1 (2002) (arguing that even if the UN Security Council had authorized the use of force to rid Iraq of weapons of mass destruction, it still would have been illegal under international law to attempt to instill a "regime change"); Mark R. Shulman & Lawrence J. Lee, Student Author, *The Legality and Constitutionality of the President's Authority to Initiate an Invasion of Iraq*, 41 Colum. J. Transnatl. L. 15, 26 (2002) (positing that UN resolutions "did not authorize, intend, or even contemplate the use of force against Iraq for 'moral' reasons or purposes of 'regime change'"); International Commission of Jurists, *ICJ Deplores Moves toward a War of Aggression on Iraq* (Mar. 18, 2003) (available at http://www.icj.org/IMG/pdf/Iraq_war_18_03_03_pdf) (illustrating the ICJ's position that the war in Iraq is illegal).

306. E.g. John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 Pace Intl. L. Rev. 283 (2003) (discussing the legality of the doctrine of anticipatory self-defense in the realm of international law).

307. Michael Walzer, *Obligations* 67 (Harvard U. Press 1970).

X. ARE TERRORISTS RATIONAL AGENTS?

In seeking to understand terrorism, one might consider whether terrorists are rational agents in the first instance. Terrorists often enough are fanatics who think the world would be a better place if things were different, if the freedoms attributable to democracy were radically changed, and so on. They have an extremely selective world view. They believe that their actions are endorsed by God. Many of us would agree that any sort of extremist point of view—whether religious extremism or political extremism—carries with it a flavor of irrationality, or even a psychopathology. Much has been said of the supposed psychopathic personality of terrorists. The popular media view is that terrorists have “diseased minds” or are “psychopaths.”³⁰⁸ Often the diagnosis is based on the simple assumption that normal people are incapable of horrific terrorist attacks.

In assessing their worldview, Hare comments on the question of whether terrorists are rational agents:

Of course most terrorists are not as clear thinking as is required in order to engage in the sort of argument we have been having. They have an extremely selective view of the facts; they do not pay much attention to the facts on which we have been relying, such as the suffering that they are inflicting on others, and the rather dubious and over-optimistic nature of their own predictions [of success]. They give play to particular emotions to an extent which makes them incapable of logical thought. The philosopher cannot say anything that will help further an argument with such people; for he can only reason, and they will not.³⁰⁹

Most of us would agree that it is irrational to claim that the killing of innocents in a terrorist attack is a lesser evil than allowing democratic processes to flourish in the world. Even for those who think the invasion of Iraq constitutes unlawful aggression under international law, the Author believes these people would stop short of endorsing indiscriminate suicide bombing of civilians as justification or as an acceptable mode of retaliation. Most of us

308. Eric D. Shaw, *Political Terrorists: Dangers of Diagnosis and an Alternative to the Psychopathology Model*, 8 Intl. J.L. Psych. 359, 361 (1986).

309. Hare, *supra* n. 101, at 248.

would agree that the suicide bombers' belief that the indiscriminate killing of civilians is pleasing to God and that their acts will be rewarded in heaven, is an irrational interpretation of religious morality.

Despite the fact that terrorists often harbor beliefs that we would regard as irrational, terrorists exhibit rational agency in numerous other ways. For example, rather than acting impulsively, terrorists are usually patient and deliberate. Terrorist acts are usually carefully planned and executed. The September 11 attacks took years of extensive planning, coordination, secrecy, and loyalty among the conspirators and demonstrated a significant level of goal-directedness.

The September 11 terrorist attacks were part of an ongoing terrorist campaign waged over a period of years, orchestrated by the al Qaeda leadership. This campaign included the 1993 attack on United States military personnel in Somalia, the 1998 bombings of United States embassies in Kenya and Tanzania, the unsuccessful attempted bombings in Jordan and Los Angeles in 1999, and the attack on the USS Cole in 2000 that killed seventeen crew members and injured forty others.³¹⁰ As we all know, terrorists do not regard their tasks as completed, and recent events, such as the July 2005 attacks in London, have demonstrated that al Qaeda and Taliban leaders have persisted in their vow to destroy America and its allies.³¹¹

Terrorists have a well-articulated basis for the hatred, anger, and resentment they harbor toward the enemy. They have some political, religious, or economic reform as their ultimate aim, which is an indication of some rationality in their purpose. Terrorists are intent on producing results that are to some extent catastrophic.³¹² The targets chosen are likely to have a psychological impact on the enemy—public transportation and public places, for example. Terrorists know that the publicity generated by their attacks will help bring attention to their causes, and at

310. Beard, *supra* n. 138, at 587–588 n. 95.

311. *Id.* at 588.

312. Tyler Riamo, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 Am. U. Intl. L. Rev. 1473, 1474 (1998–1999) (stating that “[t]he danger of terrorism . . . increasingly threatens American lives and property as terrorists seek more powerful weapons and increasingly lethal tactics to achieve their goals”).

least will instill terror in the targeted audience, and hence inflict significant damage on the enemy's well-being. We might say that terrorists are as rational, premeditated, deliberate, and careful in planning as are large-scale drug smugglers or other high-level criminal entrepreneurs.

Terrorists want to induce widespread fear and reaction among civilians so as to disrupt government functions and weaken public confidence.³¹³ Tactics are therefore aimed at instilling fear in the minds of the international community and especially the targeted community. The tactics involved need to be sufficient to instill fright and paralyze the infrastructure of the targeted group. While civilians are the immediate targets of violence, the ultimate target is the nation's very existence.³¹⁴

Recent events suggest that it is *not* irrational for terrorists to believe their attacks will persuade the enemy to capitulate. As noted above,³¹⁵ there have been numerous instances of causal efficacy in attaining terrorist objectives. However, in most instances, terrorist attacks will not result in capitulation by the enemy, but instead will produce public sympathy for the targets, not the terrorists.

The personal qualities required for terrorism may actually screen out persons with psychopathology. Opportunities for diagnostic interviews with political terrorists are relatively rare. But in a 1986 study of imprisoned terrorists, little in the way of psychopathology was seen as the source of terrorist motivation.³¹⁶ The root of a terrorist's personality is much more complex than can be adequately described by diagnostic labels. As stated in the manual of the American Psychiatric Association regarding the boundaries of mental disorder, "When the disturbance is limited to a conflict between an individual and society, this may represent social deviance, which may or may not be commendable, but is not by itself a mental disorder."³¹⁷

313. David Aaron Schwartz, Student Author, *International Terrorism and Islamic Law*, 29 Colum. J. Transnatl. L. 629, n. 2 (1991).

314. See Robert H. Kupperman & Robert A. Friedlander, *Terrorism and Social Control: Challenge and Response*, 6 Ohio N.U. L. Rev. 52, 52 (1979) (articulating that a major terrorist goal is to make government so oppressive that it will "engender popular opposition" and lead to the collapse of the government).

315. See *supra* pt. VI(C).

316. Shaw, *supra* n. 308, at 360.

317. Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* 6

Being in a terrorist group is a solution to the frustration some may feel in not finding a niche in traditional society. Through the terrorist group, the member gains a new role in society, albeit a negative one, which compensates for past losses. Group membership provides a sense of power, an intense and close interpersonal connection, social status, potential access to wealth, and a share in what may be a grandiose but noble social design.³¹⁸ The members of the group, many of whom are otherwise alone and alienated, find acceptance among others who feel the same way. Their inner doubts are quelled and shored up with an ideology, and they at long last feel accepted.³¹⁹

People do not ordinarily join groups—extremist or otherwise—unless there is some reward for doing so.³²⁰ For some in the third world, becoming part of a terrorist group not only improves one's self-esteem and increases peer approval, but provides tangible benefits such as shelter, clothing, and a structured environment.³²¹ Terrorist recruits often come to define themselves by the group and its values and intentions.

Terrorist members may start to see others outside the group as having negative traits and behaviors, and this can lead to the stereotyping of members of other countries or the dehumanizing or demonizing of anyone who is outside their culture. Recruits may perceive the outside world, external events, and the actions of others with a certain bias, particularly when the group is largely isolated and society must rely on the leaders for information and current events. Information received about current events may be filtered and distorted in a manner that meets the terrorist leaders' needs and motivations.

The impact on terrorist recruits is reduced accountability for violence. Individuals acting under the auspices of a group may feel that their personal level of responsibility is reduced or infused through the group's collective viability. Also, an individual member is more likely to engage in violent conduct than he would outside of the group context.

(3d ed., APA 1980) (emphasis omitted).

318. Shaw, *supra* n. 308, at 366.

319. *Id.*

320. Marisa Reddy Pyncheon & Randy Borum, *Assessing Threats of Targeted Group Violence: Contributions from Social Psychology*, 17 *Behav. Sci. & L.* 339, 349 (1999).

321. *Id.*

Terrorists attempt to blind their adherents to any sense of humanity for the other side. They want the adherents to believe that all truth rests with the terrorists and that the use of unrestrained violence is a lawful and moral tool to deploy.

Thus, there appears to be significant evidence to rebut Hare's claim that terrorists are "incapable of logical thought."³²²

XI. CONCLUSION

It might be ludicrous to suggest that terrorism could *ever* be morally justified. How could an act that is so indiscriminately violent be morally justified? If we condemn unjust wars and disproportionate attacks during military operations, if we condemn the targeting of civilians in the context of war, and if we condemn the indiscriminate attacks on the enemy's infrastructure, are we not also committed to condemning any terrorism in which violence, or the threat of violence, is inflicted upon innocent persons?

The condemnation of terrorism is not a denunciation of revolutionaries or guerrilla warfare or other efforts to throw off the yoke of an oppressive regime. It is only a reiteration of the limits of violence that the international community is willing to permit. A legitimate political struggle can become the subject of international condemnation if the mode of violence becomes unjust or disproportionate.

But to terrorists, there is a different notion of what counts as unjust or disproportionate violence. The killing of "innocents" is not murder, but a kind of vindication against the illegal policies for which the "innocents" are collectively responsible.

Terrorists view themselves as out-of-the-mainstream advocates of a revolutionary struggle who have little or no political capital. They view themselves as the victims rather than the aggressors in the struggle. From their perspective, they are seeking to avert perceived injustices or to regain territory that the terrorists believe belongs to them. They are seeking some other vindication of rights against governments that are too powerful to challenge by conventional warfare or by peaceful, diplomatic means. To them, they are freedom fighters, the enlightened ones in a mass of the unenlightened. Those who participated in the Sep-

322. Hare, *supra* n. 101, at 248.

tember 11 terrorist attacks regarded themselves as among the chosen, indeed, as heroes who were destined to be rewarded in heaven.

Terrorists may view themselves as above the prevailing morality, or as possessing a superior morality. The struggle itself is a moral struggle, in which good and evil are in conflict. The evil is the enemy. They view the morality of the enemy to be inferior to their own morality. Their participation in the struggle is an obligation, a duty, not a voluntary choice. The exigencies of their struggle require them to reject “normal” standards of behavior.

But when people seek to overcome tyranny and begin killing the very people in whose name they claim to fight, revolution is in danger of destroying its own values. Since the very basis of revolution is the overcoming of the evil that enslaves and tyrannizes a group, it presupposes the sanctity of human life. Revolution, which begins as a protest against human suffering, sometimes ends by ignoring and even promoting it. Camus sees this issue with striking clarity in the introduction to *The Rebel*, his monumental work on the nature of human rebellion and its political expression in revolution, when he asks “whether all rebellion must end in the justification of universal murder, or whether, on the contrary, without laying claim to an innocence that is impossible, it can discover the principle of reasonable culpability.”³²³

Will terrorism go away? Terrorism is the first form of violence that emerges when conflicts escalate, and for many, it is an efficient way of rectifying grievances. Terrorism is a means to an end, a species of armed struggle. Terrorists such as Osama bin Laden must feel encouraged, emboldened, and euphoric with the causal efficacy of their missions—in not only spreading terror within societies and causing massive socio-economic repercussions against the world’s sole superpower, but in the case of insurgency in Iraq, in actually effecting policy changes on the part of various governments and contractors. Until such time as the world resembles a kind of Utopia where peace, goodwill, and respect are universally normative, one might seriously question whether terrorism can be controlled or eradicated.

323. Albert Camus, *The Rebel: An Essay on Man in Revolt* 11 (Anthony Bower trans., Random H. 1956).