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Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists

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DETENTION AS TARGETING: STANDARDS OF CERTAINTY AND DETENTION OF SUSPECTED TERRORISTS

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DETENTION AS TARGETING: STANDARDS OF CERTAINTY AND DETENTION OF SUSPECTED TERRORISTS

*Matthew C. Waxman**

To the extent that a state can detain terrorists pursuant to the law of war, how certain must the state be in distinguishing suspected terrorists from nonterrorists? This Article shows that the law of war can and should be interpreted or supplemented to account for the exceptional aspects of an indefinite conflict against a transnational terrorist organization by analogizing detention to military targeting and extrapolating from targeting rules. A targeting approach to the detention standard-of-certainty question provides a methodology for balancing security and liberty interests that helps fill a gap in detention law and helps answer important substantive questions left open by recent Supreme Court detention cases, including Boumediene v. Bush. Targeting rules include a reasonable care standard for dealing with the practical and moral problems of protecting innocent civilians from injury amid clouds of doubt and misinformation, though the application of this standard in the detention context must account for differences such as a temporal dimension, available procedural mechanisms, and political and strategic context. Applying a targeting law methodology, this Article offers a law of war critique of past and current U.S. government detention policies. It recommends several ways to remedy them, including through an escalating standard of certainty as time in detention elapses, comparative consideration of accuracy-enhancing adjudication procedures, and greater decisionmaking transparency.

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INTRODUCTION

Consider a January 2006 incident in which the CIA allegedly tried to kill with a missile al Qaida deputy Ayman Zawahiri and other suspected al Qaida members believed to be meeting at a house in a remote Pakistani village. According to many reports, Zawahiri was not actually present, and among the eighteen or so people killed were probably some half-dozen Islamic extremists as well as perhaps a dozen civilians.¹ What if instead of hitting the house with a missile, the U.S. military had good reason to suspect that most, though perhaps not all, people staying in the house were al Qaida terrorists, and, even worrying that some of them might be guiltless, it sent them all to Guantanamo? Putting aside the issue of whether the missile strike itself is a legal option, somehow, curiously, the predictable civilian deaths of the missile attack seem a tragic yet natural consequence of military force while the hypothetical detention of everyone present—a more humane, less injurious application of military force—would be widely regarded as illegitimate and lawless.

As a legal matter, how accurate must the United States be in ascertaining whether those it captures and detains long-term as enemy terrorists at Guantanamo and elsewhere really are so? This Article begins to answer that question.

For the foreseeable future, the United States and its coalition partners will continue to capture and detain alleged al Qaida members and other suspected terrorists. Unfortunately, despite multiple levels of screening by U.S. forces, other government agencies, and now in some

1. Pamela Constable & Dafna Linzer, *Confusion Shrouds Pakistan Attack*, Wash. Post, Jan. 18, 2006, at A10; Thomas Omestad, *Pakistani Leader Softens Criticism of U.S.*, U.S. News & World Rep., Feb. 14, 2006, at www.usnews.com/usnews/news/articles/060214/14pakistan.htm (on file with the *Columbia Law Review*).

instances courts, some of those captured and detained for long periods, and in some cases subjected to harsh interrogation, are likely to be civilians with little or no connection to terrorism, erroneously swept up and mistakenly held. To put the central question another way, what is the standard of certainty a state must exercise in sorting out suspected terrorists from nonterrorists for the purposes of detention?²

Amid all the controversy about the adequacy of procedural protections at Guantanamo and elsewhere, this substantive question has gone largely ignored. The Supreme Court's recent decision in *Boumediene v. Bush*, for example, held that detainees at Guantanamo are entitled to constitutional habeas corpus rights to challenge their classification as "enemy combatants," but it did not address the certainty with which the state must prove detainees' status.³ And neither the law of war, which the U.S. government asserts is the relevant body of law for regulating such detention, nor criminal law, which many critics assert is the proper body of law to apply, provides a satisfactory answer.⁴ At worst, there is a gap in the law; at best, the practical problem of distinguishing members of a major, global terrorist network from innocent bystanders strains either body of law.

This Article offers a way to fill that gap derived from basic law of war principles. While that body of rules does not explain how accurate a party to a conflict must be in separating suspected fighters from civilians for the purposes of detention, it says a lot about a closely analogous problem (or, one might argue, a larger version of it): the problem of identifying and striking military targets while protecting civilians and civilian property. Indeed, the challenge of differentiating enemy terrorist fighters from the surrounding civilian population is a common challenge of target identification and the ability to apply force precisely: Is the individual an enemy fighter (i.e., a combatant) and therefore subject to the application of force (i.e., capture and detention)? My central claim is that, in looking to the law of war as a possible starting point, one should focus not on *detention law*—the body of international law primarily concerned with the treatment conditions under which captured enemy fighters are

2. "Terrorism" is hard to define; as the saying goes, one man's terrorist is another's freedom fighter. For the purposes of this paper, I restrict my analysis to al Qaeda and terrorist networks affiliated with it, because those are the enemies against which the executive branch considers itself at war. See Memorandum from George Bush, President of the U.S., to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees para. 1 (Feb. 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf> (on file with the *Columbia Law Review*).

3. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined.").

4. See Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 *Stan. L. Rev.* 1079, 1081 (2008) (explaining that neither traditional criminal law nor traditional law of war model adequately handles modern terrorism problems).

held (an important issue but one that I do not address in this paper)—but on *targeting law*.

This Article argues that detention decisions resemble targeting decisions in important ways and that an examination of targeting law is a useful analytical framework for thinking about how standards of certainty and enforcement mechanisms might develop in the detention context, including rules for adjudicating habeas claims. Even if one does not accept the premise that the law of war is the proper legal framework, the insights derived from its closer examination are useful for developing and refining a better one.

One might expect that in taking this analytical approach I will argue for expansive executive discretion. The law of war paradigm is commonly paired with operational flexibility and resistance to judicial or other review. To the contrary, this Article shows that the logic of targeting law demands robust substantive and procedural checks on detention.

In doing so, this Article explores two related questions: First, why does the law—particularly the law of war—accommodate frequent mistakes in the targeting context, while similar forms of error in the detention context, like misidentification or “collateral damage,” are widely condemned as lawless? Second, to what extent do ongoing debates about the procedural protections suspected terrorists are due mask a deeper issue of what substantive standard of certainty or accuracy states should exercise in wielding their most coercive powers?⁵

Part I examines the two major competing paradigms for regulating detention—criminal law and the law of war—and why neither satisfactorily regulates the accuracy of detention decisions in the context of fighting terrorist networks like al Qaida. Part II argues that the “reasonable care” standard and methodologies of targeting law, which evolved to deal with the practical and moral problems of protecting innocent civilians from injury amid clouds of doubt and misinformation, also work well in the detention context. Part III refines a targeting approach to detention and uses it to critique the U.S. government’s current terrorist detention review schemes. Once targeting law is properly applied, the appropriate standard of certainty should escalate as time in detention elapses; should consider whether alternative, more accurate adjudication mechanisms are available; and should be applied transparently. The Article concludes by returning to the law-of-war/criminal-law dichotomy and the way in which a targeting law approach brings them closer together, arguing that the insights drawn from targeting law can help institutionalize durable state tools for combating transnational terrorist networks within the rule of law.

5. See generally Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 *Colum. L. Rev.* 1013, 1016 (2008) (detailing how most court decisions challenging “war on terror” policies, including detention, have focused on procedural claims rather than substantive rights).

I. WHAT IS THE APPROPRIATE “STANDARD OF CERTAINTY” FOR DETAINING SUSPECTED TERRORISTS?

Consider the following examples:

- From December 2004 to Spring 2005, the U.S. Department of Defense declared that thirty-eight of the nearly 600 detained enemy combatants held at Guantanamo were not enemy combatants after all; insufficient information linking them with al Qaida or Taliban forces meant that they should go free. This formal “Combatant Status Review Tribunal” process followed the Supreme Court’s decision in *Hamdi v. Rumsfeld*, holding that a U.S. citizen detained in the United States as an “enemy combatant” fighting with al Qaida was entitled to a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.⁶ The Tribunal occurred after multiple other layers of individualized reviews by the Department of Defense and other U.S. government agencies, and after several dozen detainees had already been freed from Guantanamo.⁷
- In December 2005, the *Washington Post* reported that the CIA had held incommunicado and interrogated for months a German citizen who, it turned out, was not the man it was seeking after all—it was a case of mistaken identity.⁸ A few weeks later the Associated Press reported that the CIA Office of the Inspector General was reviewing up to ten cases of similar mistaken identity.⁹
- A Turkish native of Germany, Murat Kurnaz, was released from Guantanamo in August 2006 after being held over four years, allegedly despite assessments by German and American intelligence agencies doubting his supposed links to terrorist cells or enemy fighters.¹⁰
- In September 2006, the Canadian government released its investigatory report on the case of Maher Arar, a dual Canadian-Syrian national whom the United States deported to Syria based on erroneous information linking him to terrorism. Arar alleges he was subsequently tortured by Syrian authorities.¹¹

6. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

7. See Gordon England, Sec’y of the Navy, Briefing on Combatant Status Review Tribunal (CSRT) (July 9, 2004), at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2777> (on file with the *Columbia Law Review*) [hereinafter England, Briefing].

8. See Dana Priest, Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in “Rendition,” *Wash. Post*, Dec. 4, 2005, at A1.

9. See Katherine Shrader, Associated Press, CIA Probes Renditions of Terror Suspects, *Hous. Chron.*, Dec. 28, 2005, at A3.

10. See Carol D. Leonnig, Evidence of Innocence Rejected at Guantanamo, *Wash. Post*, Dec. 5, 2007, at A1; Pete Yost, German Man Held 4 Years, but No Link to al-Qaida Found, *Seattle Times*, Dec. 6, 2007, at A3.

11. See Ian Austen, Canadians Fault U.S. for Its Role in Torture Case, *N.Y. Times*, Sept. 19, 2006, at A1.

In the course of carrying out its counterterrorism policy, the U.S. government has erroneously detained civilians in Afghanistan, Guantanamo, and elsewhere. That has generated intense criticism from many quarters, including courts,¹² the Congress,¹³ the media,¹⁴ non-governmental organizations,¹⁵ and legal scholars¹⁶ and commentators.¹⁷ An apparently substantial rate of errors (or merely possible errors) leads to accusations that the entire system is fundamentally flawed and should be replaced with criminal justice or robust procedural protec-

12. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 466 (D.D.C. 2005) (“The purpose of imposing a due process requirement is to prevent mistaken characterizations and erroneous detentions, and the government is not entitled to short circuit this inquiry by claiming ab initio that the individuals are alleged to have committed bad acts.”), vacated sub nom. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), rev’d, 128 S. Ct. 2229 (2008).

13. See, e.g., Senator Patrick Leahy, Statement on the Detention Center at Guantanamo Bay, Cuba (June 30, 2005), at <http://leahy.senate.gov/press/200506/063005b.html> (on file with the *Columbia Law Review*) (“[T]he Administration’s unilateralism in its decisions about Guantanamo have compromised American principles and ideals and weakened our moral leadership in the world.”).

14. See, e.g., Tim Golden, For Guantanamo Review Boards, Limits Abound, N.Y. Times, Dec. 31, 2006, at A1 (reporting that Guantanamo review boards “have often fallen short” in efforts to follow military procedures in reviewing detainees’ status as “enemy combatants”); Corine Hegland, Empty Evidence, Nat’l J., Feb. 4, 2006, at 28 *passim* (investigating shortcomings of Guantanamo detention procedures); Tom Lasseter, Many Detainees Had Flimsy Ties to Terror, Seattle Times, June 15, 2008, at A10 (describing investigation’s conclusion that U.S. imprisoned detainees on basis of “flimsy or fabricated evidence”); Stuart Taylor, Jr., Falsehoods About Guantanamo, Nat’l J., Feb. 4, 2006, at 13, 13 (stating that high percentage of Guantanamo detainees were wrongfully seized noncombatants).

15. See, e.g., Michael Ratner, Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and the Rule of Law, 24 Cardozo L. Rev. 1513, 1520 (2003) (stating, as president of Center for Constitutional Rights, that “[t]hese stories of the innocent . . . demonstrate the importance of a legal process for determining the status of those imprisoned on Guantanamo”); Kenneth Roth, The Law of War in the War on Terror, Foreign Aff., Jan./Feb. 2004, at 2, 5 (2004) (expressing view as executive director of Human Rights Watch that “[e]rrors, common enough in ordinary criminal investigations, are all the more likely when a government relies on the kind of murky intelligence that drives many terrorist investigations”).

16. See, e.g., David Cole & Jules Lobel, Less Safe, Less Free 51–53 (2007); Kent Roach & Gary Trotter, Miscarriages of Justice in the War Against Terror, 109 Penn. St. L. Rev. 967, 1032 (2005) (“[T]here is good reason to believe that some innocent people have been and are likely still detained in the current war against terrorism . . . Democracies should only punish the guilty; it is terrorists who punish the innocent.”).

17. See, e.g., Joanne Mariner, Geriatric Terrorists on Guantanamo, FindLaw’s Writ, Nov. 4, 2002, at <http://writ.news.findlaw.com/mariner/20021104.html> (on file with the *Columbia Law Review*) (“Even though the recent releases do not prove the innocence of the remaining detainees, they do demonstrate, most compellingly, the weaknesses of the decision-making process that guides these detentions.”). For a critical and widely circulated report analyzing the unclassified information regarding detainees held at Guantanamo, see Mark Denbeaux & Joshua Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data, available at <http://law.shu.edu/aaafinal.pdf> (last visited Aug. 17, 2008) (on file with the *Columbia Law Review*).

tions, which are seen as more consistent with Western legal traditions and better able to avoid mistaken imprisonment of innocents.¹⁸

But what is a legally appropriate, *substantive* standard by which to judge detention decisions? The answer depends on whether one characterizes the fight against al Qaida and affiliated terrorist networks as a problem of large-scale criminality or as a problem of warfare.

If it is an issue of criminality on a grand scale, the standard-of-certainty question is relatively easy: American criminal law generally demands the highest scrutiny of detention, requiring suspects to be deemed guilty of the alleged acts beyond reasonable doubt.¹⁹ This perspective proudly elevates liberty interests above security interests—“let ten guilty men run free rather than mistakenly convict one innocent man”²⁰—and therefore may be fatally impractical for defeating international terrorist networks capable of attacks of a scale previously achievable only by organized states.

If it is an issue of warfare, or something other than pure criminal law, the applicable standard of certainty is unclear. The U.S. government has insisted that the law of war provides the authority and the appropriate framework for regulating some of its detention policies. As explained in a 2005 submission to a United Nations committee:

The United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. There is no question that under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. Like other wars, when they start we do not know when they will end. Still, we may detain combatants until the end of the war.²¹

But how careful does the state have to be in exercising this authority? The law of war has little to say about how certain a detaining power must be in determining whether an individual really is an enemy fighter, as opposed to an innocent bystander. This deficiency has contributed to

18. See, e.g., Human Rights First, Human Rights First Analyzes DOD's Combatant Status Review Tribunals, at http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (last visited Aug. 17, 2008) (on file with the *Columbia Law Review*) (“[T]he new hearings fail to satisfy the Supreme Court's rulings, and are otherwise inadequate to meet basic requirements of national and international law.”).

19. See *infra* notes 23–33 and accompanying text.

20. See William Blackstone, 4 Commentaries *358 (“[I]t is better that ten guilty persons escape, than that one innocent suffer.”).

21. U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1999, Addendum (United States of America) Annex 1, at 47, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), available at http://www.state.gov/g/drl/rls/45738.htm#part_one (on file with the *Columbia Law Review*) [hereinafter Committee Against Torture Report].

criticism of the entire Bush Administration approach; many see the murkiness of the law of war as providing *carte blanche* to detain at will.²²

Before exploring how this gap might be filled, let us step back and review the two main legal perspectives that are most often brought to bear on the problem.

A. *Two Paradigms: Criminal Law Versus the Law of War*

Even a low number of false positives would be problematic measured against the American criminal justice system, which requires proof beyond reasonable doubt to convict and lock away suspects.²³ This extremely high proof standard helps ensure a low rate of erroneous convictions while also symbolizing for society the great significance of criminal conviction.²⁴ Its demanding scrutiny reflects a value judgment that it is better to accept a high rate of false negatives (i.e., letting the guilty go free) than a high rate of false positives (i.e., convicting the innocent). Writing for the Court in *Addington v. Texas*, Chief Justice Burger explained that “[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.”²⁵

This notion of “guilt” and the ensuing punitive purposes of criminal conviction and imprisonment are understood to justify this very high proof standard.²⁶ In some circumstances American criminal law allows restrictions of liberty, including detention, on less than proof beyond reasonable doubt. Arrests can be made on “probable cause,”²⁷ for example,

22. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 677–78 (2004) (arguing that U.S. claims about legality of Guantanamo detentions are based on loose readings of law of armed conflict); Christopher Greenwood, *The Law of War (International Humanitarian Law)*, in *International Law* 789, 793 (Malcolm D. Evans ed., 2003) (questioning United States’s assertion that “the law of war applies to its military operations against Al-Qaeda”).

23. I focus here on the American criminal justice system, but the general point is that if terrorism is treated as a crime, the relevant standard of certainty is the criminal conviction standard for the applicable jurisdiction. See generally Thomas V. Mulrine, *Reasonable Doubt: How in the World Is It Defined?*, 12 Am. U. J. Int’l L. & Pol’y 195 (1997) (comparing standards of guilt across U.S. and international jurisdictions).

24. See *Addington v. Texas*, 441 U.S. 418, 423 (1979) (“The standard [of proof] serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1306 (1977).

25. *Addington*, 441 U.S. at 423–24.

26. In noncriminal detention contexts, the American legal system sometimes permits lower burdens of proof. See *infra* note 44.

27. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (holding that information that would warrant man of reasonable caution to believe that felony had been committed is sufficient basis for arrest in absence of evidence sufficient to convict); *Henry v. United States*, 361 U.S. 98, 102 (1959) (holding that evidence required to establish guilt

and arrestees can be held pending trial on a “clear and convincing” showing that no release conditions would reasonably assure community safety.²⁸ But such liberty restrictions are generally short-term, and as a doctrinal matter they are distinguished from punitive liberty restrictions.²⁹

In practice, even a high proof standard does not eliminate erroneous convictions. In holding that the beyond reasonable doubt standard is constitutionally required, the Supreme Court acknowledged in *In re Winship* that no conviction standard will eradicate risk of mistaken injury to innocents.³⁰ Justice Harlan explained in his concurrence that “in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened.”³¹ Empirical studies confirm that non-negligible numbers of innocents still get convicted under this standard³² and that jurors’ interpretations of the certainty requirement vary considerably.³³ Nevertheless, the beyond reasonable doubt standard substantially mitigates the dangers to innocents’ life and liberty.

But from the perspective of the Bush Administration and many others who see certain forms of transnational terrorism as a threat warranting military response, criminal law’s beyond reasonable doubt standard is inappropriate for assessing an individual’s membership in a global terrorist network.³⁴ Legal and practical reasons inform this position.

is not necessary to arrest if facts and circumstances known to arresting officer warrant belief that offense has been committed).

28. See *United States v. Salerno*, 481 U.S. 739, 743–44 (1987) (“The District Court . . . conclud[ed] that the Government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person.”).

29. See *id.* at 747 n.4 (“We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”).

30. See *In re Winship*, 397 U.S. 358, 363–64 (1970).

31. *Id.* at 370 (Harlan, J., concurring).

32. See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 *Colum. L. Rev.* 55, 57 (2008) (citing data showing that 208 incarcerated individuals have been exonerated based on DNA evidence since 1989).

33. See Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 *Am. Crim. L. Rev.* 45, 51–52 (2005) (documenting interpretations among jurors, judges, and commentators, ranging from “beyond any doubt,” to “no doubt,” to “moral certainty”); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 *Tex. L. Rev.* 105, 119–32 (1999) (exploring effects of highly varied reasonable doubt instructions given to jurors).

34. A number of scholars argue that counterterrorism operations could rise to the level of “armed conflict” under international law, such that the laws of war apply, but they often disagree on how those laws apply in the particular case of al Qaida. John Yoo defends the Bush Administration’s approach. See John Yoo, *War by Other Means* 231 (2006) (“We responded with all the diplomatic and military tools we had at our disposal. I think the costs were worth the greater security these policies brought us.”). W. Michael Reisman argues that some terrorist attacks might justify direct armed response, as one

As a legal matter, the Bush Administration has declared that al Qaida members and affiliates can be detained not as criminals but as enemy combatants, pursuant to the international law of war. As former U.S. State Department Legal Adviser William H. Taft IV explained:

[T]he law of war recognizes that it is not necessary to charge a detained person with a crime to keep him off the battlefield while hostilities continue. Preventing his further participation in the conflict will, presumably, hasten its end and could significantly reduce the risk of additional casualties to our population. Such preventive detention obviously has no place in our concept of criminal law enforcement, but it has long been accepted in the law of war and, again, seems sensibly to apply to the conflict with al Qaeda.³⁵

responds against a state launching similar attacks. See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *Hous. J. Int'l L.* 3, 57 (1999) (arguing that some instances of terrorism can “only be dealt with politically or militarily”). Philip Bobbitt argues that it is more appropriate to talk about ongoing “wars” against terror than it is to talk about a single “war.” See Philip Bobbitt, *Terror and Consent* 236 (2008) (“Wars against Terror will pursue three intertwined objectives: to preempt twenty-first century market state terrorism, to prevent WMD proliferation when these weapons would be used for compellence rather than deterrence, and to prevent or mitigate genocide, ethnic cleansing, and the human rights consequences of civilian catastrophes . . .”). Judge Richard Posner takes a functionalist approach, rejecting a formalistic distinction between “peace,” where wrongdoers are treated as criminals, and “war,” where wrongdoers are treated as enemies, and recognizing that terrorist organizations today pose threats that may justify warlike responses. See Richard A. Posner, *Not a Suicide Pact* 11 (2006) [hereinafter Posner, *Not a Suicide Pact*] (“I argue that the terrorist threat is *sui generis*—that it fits the legal category neither of ‘war’ nor of ‘crime.’”). Adam Roberts argues that some parts of the United States and Allied response to the September 11, 2001 attacks constitute a war, or wars, though he questions how the United States has interpreted and applied the laws of war, including with regard to detention. See Adam Roberts, *The Laws of War in the War on Terror*, 32 *Isr. Y.B. on Hum. Rts.* 193, 200–01 (2002). Roy S. Schöndorf argues that conflicts with terrorist organizations like al Qaida may constitute “wars,” but require a new law of war category. See Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 *N.Y.U. J. Int'l L. & Pol.* 1, 64–65 (2004) (assuming law of war applies but describing modifications to traditional rule of “distinction” that could make it appropriate to counterterrorist context). Curtis Bradley and Jack Goldsmith discuss the legislative aspects of the war on terrorism. See generally Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *Harv. L. Rev.* 2047 (2005). For critiques of the paradigm viewing the conflict with al Qaida as a “war,” see, e.g., Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in the Age of Terrorism* 13–14 (2006) (arguing that describing counterterror measures as “war” is inaccurate and dangerous because it distorts nature of threat and legitimizes inappropriate responses); Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 *Case W. Res. J. Int'l L.* 349, 350 (2004) (“The claim of global war is a radical departure from mainstream legal analysis.”).

35. William H. Taft IV, *War Not Crime*, in *The Torture Debate in America* 223, 225 (Karen J. Greenberg ed., 2006); see also Michael B. Mukasey, U.S. Att’y Gen., *Remarks Prepared for Delivery at the American Enterprise Institute for Policy Research* (July 21, 2008), at <http://justice.gov/ag/speeches/2008/ag-speech-0807213.html> (on file with the *Columbia Law Review*) [hereinafter Mukasey Remarks] (arguing that those who believe

Note that Taft refers to the primarily preventive purpose of detention under the law of war, as opposed to the primarily, though not exclusively, punitive purpose of imprisonment in the criminal justice context. Intelligence gathering through questioning of those in custody constitutes another important reason for detention in warfare, and especially in fighting terrorist networks.³⁶

Note also that this legal theory based on a state of armed conflict limits itself to transnational terrorist organizations whose activities rise to a certain level of violence. While Bush Administration rhetoric about a “Global War on Terror” is sometimes thought to be intended as justification to attack or detain any terrorist, anytime, anywhere, the legal theory attached to it is much narrower: Only al Qaida and its allies (such as the Taliban and those terrorist organizations affiliated with al Qaida) have engaged in acts sufficient to rise to the level of armed conflict with the United States.³⁷ In that regard, the detention issue is closely tied to the issue of how broadly we should define the al Qaida network itself, an issue I touch on momentarily.³⁸

The Supreme Court in *Hamdi v. Rumsfeld* accepted much of this reasoning, recognizing the executive branch’s authority to detain enemy combatants—at least those captured in the course of operations in Afghanistan—pursuant to the congressional “Authorization for Use of Military Force” against those responsible for the September 11 attacks.³⁹ While *Hamdi* ultimately held that a U.S. citizen accused of supporting terrorist forces hostile to the United States must be given notice and a hearing before a neutral tribunal, the Court did not disagree with the executive branch that at least part of the fight against al Qaida and its allies constitutes an armed conflict such that active combatants may be detained long-term, not as a penal sanction but to ensure that they do not rejoin the conflict.⁴⁰

As a practical matter, in some cases it may be impossible to link suspected terrorists bent on catastrophic violence to specific acts or planning networks beyond reasonable doubt because the intelligence information upon which those suspected links rely is unreliable, would be inadmissible at criminal trial (e.g., because it is hearsay), or could not be exposed in court without dangerously revealing intelligence sources and

Guantanamo detainees should be charged with crime have forgotten “these individuals were captured in an armed conflict, not in a police raid”).

36. See Mukasey Remarks, *supra* note 35.

37. See John B. Bellinger III, State Dep’t Legal Advisor, Address at the London School of Economics on Legal Issues in the War on Terrorism (Oct. 31, 2006), at <http://www.state.gov/s/1/rls/76039.htm> (on file with the *Columbia Law Review*) (arguing that state of “armed conflict” exists with respect to al Qaida and Taliban).

38. See *infra* Part I.B.

39. 542 U.S. 507, 518–21 (2004) (plurality opinion).

40. See *id.* at 519 (“Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, . . . Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).

methods.⁴¹ Although the successful prosecutions of Zacharias Moussaoui and perpetrators of the 1993 World Trade Center bombings⁴² show that it is sometimes possible to convict al Qaeda terrorists, those cases involved individuals present in the United States and specific terrorist plots that had already materialized. By contrast, war zones like Afghanistan and western Pakistan, where many of the detainees held in Guantanamo and Afghanistan were captured, make challenging crime scenes, and military forces and intelligence agents are not generally trained or equipped to prepare or support criminal investigations, nor would we want them in many circumstances to concentrate on such tasks as forensics collection.⁴³

B. *A Gap in the Law in Need of Filling*

In some sense, the criminality-versus-warfare dichotomy is a false choice.⁴⁴ The Bush Administration has employed the law of war para-

41. See Kenneth Anderson, *The Military Tribunal Order: What To Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 *Harv. J.L. & Pub. Pol'y* 591, 607–09 (2002) (discussing practical difficulties of trying suspected terrorists); Lee A. Casey & David B. Rivkin, Jr., *Rethinking the Geneva Conventions*, in *The Torture Debate in America*, supra note 35, at 203, 211 [hereinafter Casey & Rivkin, *Geneva Conventions*] (noting that “battlefields make poor crime scenes” because evidence is difficult to gather and introduce in court); Michael B. Mukasey, *Jose Padilla Makes Bad Law*, *Wall St. J.*, Aug. 22, 2007, at A15 (describing how prosecution can serve as “rich source of intelligence” for terrorists, even if evidence can overcome hearsay bar); Richard A. Posner, *The Constitution vs. Counterterrorism*, *Wall St. J.*, Aug. 22, 2006, at A12 (arguing that judicial system as it currently exists cannot handle terrorist prosecutions). But see Richard B. Zabel & James J. Benjamin, Jr., *Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court* (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (on file with the *Columbia Law Review*) (detailing successful federal prosecutions of suspected terrorists since 2001); Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 *Chi. J. Int'l L.* 499, 501–03 (2005) (arguing that criminal law is sufficient to combat terrorism); Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, *Foreign Aff.*, May/June 2008, at 9, 15–16 (same).

42. See Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, *Wash. Post*, May 4, 2006, at A1; Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, *N.Y. Times*, Jan. 9, 1998, at A1.

43. See *Hamdan v. Rumsfeld*, Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Daniel Dell’Orto, Principal Deputy General Counsel, Department of Defense), at http://judiciary.senate.gov/hearings/testimony.cfm?id=1986&wit_id=5506 (on file with the *Columbia Law Review*).

44. Although the criminal law and law of war are the best developed and most commonly invoked paradigms to deal with terrorism, a third notional category exists that might be labeled “civil” or “administrative.” See, e.g., Benjamin Wittes, *Law and the Long War* 151–82 (2008) (discussing problems of detention and trial); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 *Yale J. Int'l L.* 369, 389–92 (2008) (noting existence of three models of detention under international law, including “administrative” detention); Jack L. Goldsmith & Neal Katyal, *The Terrorists’ Court*, *N.Y. Times*, July 11, 2007, at A19 (calling for establishment of national security court to oversee system of preventive

digm to authorize and regulate many of its actions, though this need not exclude the simultaneous use of criminal law to fight terrorism. Prosecutions through federal courts continue against isolated al Qaida figures, and the Administration intends to conduct war crimes prosecutions through military commissions for others.⁴⁵ Moreover, while some aspects of counterterrorism, like the prosecutions and extraditions of some al

detention); Editorial, *Workable Terrorism Trials*, Wash. Post, July 27, 2008, at B6 (proposing model of handling terrorism-related cases using specialized national security court). For a discussion of the variety of forms administrative or civil detention might take, see Matthew C. Waxman, *Administrative Detention: The Integration of Strategy and Legal Process* 9–26 (Brookings Inst. Series on Counterterrorism and American Statutory Law, Working Paper No. 2, July 24, 2008), available at http://www.brookings.edu/papers/2008/0724_detention_waxman.aspx (on file with the *Columbia Law Review*) [hereinafter Waxman, *Administrative Detention*].

I do not treat it on par with the criminal or law of war paradigms because it might be useful only in a subset of detention cases and because the creation of a new administrative detention scheme would still raise the difficult substantive question posed in this Article. But a brief note on this approach is in order.

In some cases, American law permits even long-term detention based not (as in criminal law) on retrospective culpability nor (as in the law of war) on one's status in an enemy organization with which the state is in conflict. Rather, the detention is based on an individual's supposed future danger to himself or others. In *Kansas v. Hendricks*, for example, the Supreme Court upheld a Kansas statute allowing civil commitment of individuals who were convicted of or charged with a sexually violent offense and, due to a "mental abnormality," were likely to engage in certain acts of sexual violence. 521 U.S. 346, 357–58 (1997). This statutory scheme might be a particularly apt analogue because, as is often supposed about religiously extremist terrorists, it was premised on a view that some sexual predators cannot be deterred from future violence. See *id.* at 351, 362–63 ("Such persons are therefore unlikely to be deterred by the threat of confinement.").

The domestic and international legal bases for such an approach to terrorist detentions are unclear, and the legal constraints might depend on a number of factors, including whether such detentions took place inside or outside the United States. In *Addington*, the Supreme Court held that in a civil proceeding brought under state law, Fourteenth Amendment due process required only a clear and convincing evidence standard to involuntarily commit someone to a mental hospital indefinitely. *Addington v. Texas*, 441 U.S. 418, 433 (1979). But some states have imposed the criminal law standard of proof beyond reasonable doubt legislatively or judicially, reasoning that the deprivations of liberty, including attendant stigmatization, in civil commitment cases are comparable to those in criminal cases. See, e.g., *Conservatorship of Hofferber*, 616 P.2d 836, 848 (Cal. 1980) (stating involuntary commitment based on mental illness or dangerousness "involves loss of liberty and substantial stigma," generally necessitating proof beyond a reasonable doubt); *Superintendent of Worcester State Hosp. v. Hagberg*, 372 N.E.2d 242, 245–46 (Mass. 1978) (finding standard of proof for involuntary commitment to be beyond reasonable doubt). And in *Zadvydas v. Davis*, the Court made clear that indefinite administrative detention of a removable alien would raise constitutional due process concerns, though it noted that a statutory scheme directed at suspected terrorists might change its analysis. 533 U.S. 678, 690–91 (2001) (suggesting in dicta that preventive civil detention of suspected terrorists might not violate due process). The Court also distinguished circumstances in which an alien were held outside U.S. territory. See *id.* at 692–94.

45. See Chesney & Goldsmith, *supra* note 4, at 1103, 1118–19 (listing examples of ongoing criminal prosecutions against al Qaida members and describing military commission structure).

Qaida suspects since September 2001, will clearly involve criminal law, others, such as combat operations against al Qaida-affiliated groups that continue in Afghanistan, will clearly involve the law of war.

The issue is what to do with the vast category of activities in the middle—namely the detention of enemy combatants—that do not fit neatly into either framework.

In thinking about what standard of certainty should govern long-term detentions of suspected al Qaida members, it is useful to put the criminal paradigm aside for the moment.⁴⁶ If one thinks it should be the exclusive basis for detaining terrorism suspects long-term, the law is relatively clear and well-developed. If, however, it is inapposite to some cases or fatally ineffectual—a debate I do not attempt to settle here—we need to evaluate alternatives.⁴⁷

46. Judge Posner poses this question but does not provide a clear answer: Requiring proof beyond a reasonable doubt in criminal cases causes many guilty defendants to be acquitted and many other guilty persons not to be charged in the first place. We accept this as a price worth paying to protect the innocent. But ordinary crime does not imperil national security; modern terrorism does, so the government's burden of proof should be lighter, though how much lighter is a matter of judgment.

Posner, *Not a Suicide Pact*, *supra* note 34, at 64–65.

47. Nor does international human rights law answer the standard of certainty question, though many legal authorities argue that it governs detention of suspected terrorists. See, e.g., U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 18, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (criticizing U.S. detention practices in combating terrorism as possibly violating international human rights law); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 *Harv. Hum. Rts. J.* 123, 136 (2006) (arguing that extraordinary rendition of terrorism suspects not formally convicted of crime violates human rights law); see also Hakimi, *supra* note 44, at 386–88 (discussing whether international human rights law permits noncriminal detention for security reasons outside traditional warfare contexts). The International Covenant on Civil and Political Rights (ICCPR), for example, prohibits “arbitrary arrest or detention” and mandates that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Art. 9, Dec. 16, 1966, 999 U.N.T.S. 171. But it fails to define “arbitrary” or what level of uncertainty might fall below that standard.

To the extent one looks to human rights law on this question, the ultimate answer may still come back to interpreting the law of war. By way of analogy, in the *Nuclear Weapons Case*, the International Court of Justice considered whether nuclear attacks would violate the right to life guaranteed by the ICCPR and stated that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war.” *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case)*, 1996 I.C.J. 226, 240 (July 8). It went on to state, however, that “[t]he test of what is an arbitrary deprivation of life . . . then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” *Id.*

Within some contexts in which the United States detains suspected terrorists as enemy combatants, the International Committee of the Red Cross (ICRC) has taken the view that neither the law of war nor human rights treaty law provides sufficiently clear or comprehensive procedural safeguards to persons detained for security reasons. Thus, the ICRC has developed a set of principles and safeguards that should govern security detention, based on law of war and human rights law treaty rules, as well as on nonbinding

This Article focuses on the law of war paradigm. For now it remains the dominant paradigm in U.S. government practice. And even when Congress and the Supreme Court have pushed back against the executive's assertions of wartime powers since 2001, they have implicitly accepted the notion that the law of war provides an appropriate regulatory framework for at least a large subset of suspected terrorist detentions.⁴⁸ It remains unclear how, exactly, this framework should be applied in this new kind of conflict. After *Boumediene*, for example, federal courts need to fashion substantive and procedural rules for evaluating Guantanamo habeas claims. Closer examination of the law of war's logic yields important insights that can either guide that legal evolution or serve as the basis for new legislation. Moreover, most would agree that the legal regime governing detention of suspected al Qaida terrorists should be *at least* as protective of innocents as the law of war.

To return, then, to my central question: If the law of war paradigm is to apply to suspected al Qaida terrorists, how careful must the state be in determining whether captured individuals are fighters in an enemy organization and can, pursuant to these traditional warfare rules, be held until the conflict with al Qaida ends? The law of war does not provide a clear answer. The general right to detain makes sense in traditional warfare; one does not want to release captured enemy fighters, only to fight them later on the battlefield. Beyond this general canon and very detailed rules contained in the Geneva Conventions regulating how captured enemy fighters must be treated while detained, however, the law of war contains little guidance on critical questions such as how cautious a detaining power must be in making individual determinations of who is and is not an enemy fighter in the first place.⁴⁹ The issue then becomes how the law of war might evolve or be supplemented with additional do-

standards and best practice. These principles, however, do not address the substantive standard of certainty issue. See generally Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 *Int'l Rev. Red Cross* 375 (2005) (detailing ICRC principles and safeguards).

48. Both the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd (Supp. V 2005)), and the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948-950 (2006)) incorporate law of war-based standards for regulating the treatment of war on terror detainees. See *infra* notes 138-139 and accompanying text.

49. One near exception appears in the Fourth Geneva Convention, which lays out some rules for internment of those believed to pose security threats in occupied territory. For example, Article 78 allows for internment of individuals for "imperative reasons of security" and requires review of individual detentions on those grounds at least every six months. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 973 U.N.T.S. 336 [hereinafter Fourth Geneva Convention]. Even if this provision, which usually protects civilians (as opposed to combatants who take part in hostilities), were applicable, it offers no guidance on the standard of certainty to be applied periodically.

mestic or international law to regulate the standard of certainty for detention judgments.

Let us pause for a moment on a companion question: standard of certainty of *what*? In other words, who should be considered an “enemy combatant” or “fighter” subject to these detention rules?⁵⁰ The Bush Administration has used the following definition of those eligible for detention at Guantanamo:

An “enemy combatant” . . . shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.⁵¹

This definition is one of many that could be derived from the law of war,⁵² and it is therefore useful for my analytic purposes, even though some have questioned the expansiveness with which the Bush

50. See Waxman, *Administrative Detention*, supra note 44, at 5–7.

51. Memorandum from the Deputy Sec’y of Def. to the Sec’y of the Military Dep’ts Chairman of the Joint Chiefs of Staff Under Sec’y of Def. for Policy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, encl. 1, at 1 (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (on file with the *Columbia Law Review*). This is similar to the definition accepted by the Court in *Hamdi*. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (plurality opinion) (accepting definition of enemy combatant as “[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship” (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 475 (4th Cir. 2003))). The Military Commissions Act of 2006 contains a broader definition, but that definition appears to be for military commissions jurisdictional purposes, not the scope of detention authority itself. Military Commissions Act § 948a (defining “unlawful enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)”).

52. The law of war contains definitions of certain classes of combatants that are entitled to particular protections, such as prisoner-of-war status upon capture, see, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention], but it generally defines the broad category of “combatants” only in the negative. Protocol I of the Geneva Conventions says that “[c]ivilians shall enjoy the protection [from attack] unless and for such time as they take a direct part in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Common Article 3 of the Geneva Conventions protects “[p]ersons taking no active part in the hostilities.” Third Geneva Convention, supra, art. 3(1). These provisions imply that combatancy derives from “direct” or “active” participation on behalf of an enemy in an armed conflict, which is itself a subject of great controversy. See ICRC, *Direct Participation in Hostilities* (Dec. 31, 2005), available at <http://icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument> (on file with the *Columbia Law Review*) (describing series of meetings to clarify meaning of “direct participation in hostilities”).

Administration has applied it.⁵³ My central question, then, fixes on the state's certainty that an individual was a member or supporter of a particular organization, or in some cases certainty that he committed a belligerent act or directly supported hostilities on that organization's behalf. But one can easily conceive of broader or narrower definitions.

Generally, the broader the definition (i.e., the more distant and indirect the relationship between an individual and a particular terrorist organization or its hostile acts), the more difficult it will be to distinguish fighters from civilians; the narrower the definition (e.g., imagine one limited to those who directly participated in a terrorist attack or those who formally acknowledge allegiance to a particular terrorist organization), the easier it will be to resolve doubt in individual cases. And in some cases, the way "enemies" is defined could radically affect the standard-of-certainty question. A very narrow definition—say, those who carry weapons—may be easy to administer and prove. Some very broad conceptions—say, those who harbor devotion to a hostile ideology—may often be impossible to prove to high levels of certainty. This analytic inextricability of the standard-of-certainty question and the substantive issue to be proven plagues not only the law of war paradigm but also the criminal law paradigm:

Winship's insistence on the reasonable-doubt standard is thought to express a preference for letting the guilty go free rather than risking conviction of the innocent. This value choice, however, cannot be implemented by a purely procedural concern with burden of proof A normative principle for protecting the "innocent" must take into account not only the certainty with which facts are established but also the selection of facts to be proved. A constitutional policy to minimize the risk of convicting the "innocent" must be grounded in a constitutional conception of what may constitute "guilt." Otherwise

53. See, e.g., *Al-Marri v. Pucciarelli*, No. 06-7427, slip op. at 25 (4th Cir. July 15, 2008) (en banc) (Motz, J., concurring) (interpreting Supreme Court precedent as supporting conclusion that "enemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government'"); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 *Harv. L. Rev.* 2653, 2655–58 (2005) (arguing that mere membership without evaluation of "the role the member assumed in the group" is insufficient to merit classification as "enemy combatant"). Judge Wilkinson adopts a more restrictive interpretation of "enemy combatant" than the Bush Administration's in *Al-Marri*, where he reasons that to be classified as an enemy combatant a person must

(1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization.

Al-Marri, slip op. at 179 (Wilkinson, J., concurring in part and dissenting in part). Interestingly, some critics also turn to the law of targeting by way of analogy to draw bounds around the category of "enemy combatants." See, e.g., Brief for the *Boumediene* Petitioners at 36–43, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1195) (arguing that detention is authorized only for those who may properly be targets of military force).

“guilt” would have to be proved with certainty, but the legislature could define “guilt” as it pleased, and the grand ideal of individual liberty would be reduced to an empty promise.⁵⁴

This suggests that if substantive offenses are expanded too far legislatively, even American criminal law’s standard-of-certainty requirements alone may fail to protect against false positives in any meaningful way.

So certainly the concept of “enemy combatant” itself needs further refinement. But this issue need not be resolved definitively here because the arguments in the Article provide a framework for considering appropriate standards of certainty however that definitional question is ultimately answered.

No matter how one defines “enemy combatant,” there are two reasons why a well-articulated standard-of-certainty rule probably has not previously evolved as a natural part of the law of war. Both reasons now pose legal challenges in the fight against transnational terrorist networks.

First, traditional warfare between professional soldiers has historically made identification relatively (though not always) easy. The Geneva Conventions and their predecessor conventions and customary legal codes grew out of a system of official armies which, by their nature, facilitated identification of foe: A person wearing the uniform of the opponent was almost undoubtedly an enemy combatant, subject to detention if captured.⁵⁵ Indeed, as I expand upon later, the law of war, including the Geneva Conventions and their predecessor conventions, impose requirements to wear the distinctive insignia and other indicia of one’s combatant status and affiliation precisely in order to facilitate the identification process.⁵⁶ To be sure, even in state-versus-state warfare the enemy soldier identification problem is not eliminated. In the first Gulf War, for example, U.S. forces conducted about 1,200 hearings before military officer panels for captured Iraqi individuals thought to be pro-Saddam fighters and found about 900 of them to be displaced civilians, who were promptly released.⁵⁷ But these difficulties were by far the exception in traditional armed conflicts.

Al Qaida and other terrorist organizations do not generally identify their membership. They do just the opposite, operating in the shadows, blending in with local populations. Indeed, one way in which terrorists sow panic within rival societies is through doubt as to who among that

54. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 *Yale L.J.* 1325, 1347 (1979).

55. Cf. Taft, *supra* note 35, at 225 (noting potential need to modify law of armed conflict as applied to war on terror to ensure that those detained are actually enemy combatants).

56. See generally W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under International Humanitarian Law of Armed Conflict*, 9 *Case W. Res. J. Int’l L.* 39, 43 (1977) (analyzing “the contemporary international law criteria applicable to irregular combatants and their ensuing status in law”).

57. Dep’t of Def., *Conduct of the Persian Gulf War* 578 (2002) [hereinafter *Dep’t of Def., Persian Gulf War*].

society is a threat. In these respects, terrorist networks take the identification problems long posed by guerrilla warfare to new heights.⁵⁸ Especially over the last half century, drafters and practitioners of the law of war have wrestled with how to treat insurgents and guerrilla fighters, who may be hard to distinguish from local civilians. Again, most of the legal development in this area has focused on treatment of those captured, aiming both to regulate the guerrilla behavior and to prevent atrocities (like the massacres by German forces of Western European townspeople in response to attacks by partisans⁵⁹) that have historically been sparked by frustration in combating them. But even most guerrilla armies, at least during combat, are distinguishable from civilians by their weapons, clothing, and other identifiable features. Terrorists, by contrast, may never be distinguishable by physical features alone.⁶⁰

A second reason why clear, durable law of war rules for regulating individual determinations of combatants versus noncombatants have not evolved is probably that the relatively low stakes of errors historically made it less important to resolve the issue with precision. Even in cases where combatant recognition was difficult in traditional state-versus-state warfare, the misidentification problem lacked many of the consequences of individual judgments in today's conflict with al Qaida and transnational terrorist networks. This was especially true in modern conflicts among parties that followed all of the Geneva Conventions' prisoner-of-war rules, which set high standards for the care and treatment of captured soldiers. When wars last months or years, at the end of which prisoners will be released or repatriated, erroneous detention is unfortunate but not calamitous.⁶¹

The likelihood that the conflict with al Qaida will last many, many years, however, exposes those detained as enemy combatants to indefinite or lifelong incarceration. While several hundred detainees have been re-

58. See Posner, *Not a Suicide Pact*, supra note 34, at 60 ("The danger of erroneously identifying an individual as an enemy of the United States is therefore much greater than in a conventional war."); Roberts, supra note 34, at 202 (calling principle that attacks should not be directed against civilians "difficult to apply in counter-terrorist operations" because terrorists are often indistinguishable from civilians); Schöndorf, supra note 34, at 64–65 ("[T]he fact that the military action takes place in the territory of a non-involved state may justify adopting additional cautionary rules in order to avoid targeting individuals belonging to that state by mistake . . .").

59. See Charles S. Maier, *Targeting the City: Debates and Silences About the Aerial Bombing of WWII*, 87 *Int'l Rev. Red Cross* 429, 433 (2005) ("[S]ome German commanders resorted to civilian reprisals as well as executions of captured partisans.").

60. The Israeli Supreme Court recently made this point in upholding Israel's Internment of Unlawful Combatants Law. See *CrimA 6659/06 Anonymous v. State of Israel* [2008] 20–22 (Isr.), translation available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (on file with the *Columbia Law Review*) ("[U]nlawful combatants do not as a rule carry any clear and unambiguous indication that they belong to a terrorist organization.").

61. Consider that in the first Gulf War the conflict was probably over before those detainees adjudged to be civilians incidentally swept up by U.S. forces could be set free.

leased or transferred from Guantanamo to date, several hundred remain and the U.S. government argues they can be held until the end of the war with al Qaida,⁶² which no one expects within at least the next decade or two, if ever. The prospect of a conflict with no clear end strains the traditional rules of warfare and vastly multiplies the injury of errors.⁶³ Furthermore, it has been widely reported and in some cases acknowledged that detained suspected terrorists have been exposed to aggressive interrogation techniques that wear on them physically and psychologically.⁶⁴ The susceptibility of those in detention to harsh interrogation and perhaps severe abuse means that those judged to be enemy fighters might be exposed to vastly greater harms than those detained in traditional state-versus-state wars in which the Geneva Conventions' prisoner-of-war rules (including a prohibition on coercive interrogation) apply.⁶⁵

It is not so surprising, then, that the pre-9/11 law of war never developed clear answers to the standard-of-certainty question. The closest the law of war comes to answering it directly is contained in a provision of the Third Geneva Convention:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of [the combatant categories established by the Geneva Conventions], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.⁶⁶

Some have argued that this provision means that when there is doubt whether a captured individual is an enemy fighter, he is entitled to a hearing before a tribunal; therefore, the argument goes, suspected al Qaida and Taliban combatants in U.S. custody at Guantanamo and elsewhere should have been entitled upon capture to such review.⁶⁷ But even if this interpretation is correct, it does not resolve the question this Article seeks to answer. Not only does this provision expressly presume a "belligerent act"—which is often the act that, if known to be true, answers the very problem we seek to solve—but it merely prescribes (most generally) a procedural mechanism for adjudicating doubtful cases, without

62. See Committee Against Torture Report, *supra* note 21, at 47.

63. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2238 (2008) ("[G]iven that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, [the risk of error] is a risk too significant to ignore.").

64. See, e.g., James Risen, David Johnston & Neil A. Lewis, Harsh C.I.A. Methods Cited in Top Qaeda Interrogations, *N.Y. Times*, May 13, 2004, at A1 (describing concern over U.S. intelligence agencies' interrogation tactics).

65. Third Geneva Convention, *supra* note 52, arts. 13, 17.

66. *Id.* art. 5(2).

67. See, e.g., W. Michael Reisman, *Rasul v. Bush: A Failure to Apply International Law*, 2 *J. Int'l Crim. Just.* 973, 976 (2004) ("[U]nder the letter and spirit of Geneva III . . . , the United States should have established explicit competent tribunals under Article 5(2) to determine the status of the detainees in order to ensure, in so far as possible, that innocent people were not being detained.").

establishing the substantive standard the procedural mechanism should apply.

If we assume the criminal law standard is inapplicable or unworkable, and the law of war does not provide clear rules and standards, how should this legal gap be filled? Put another way, what substantive standard should regulate states' determinations that an individual is a member of a given enemy terrorist organization, such that he can be stripped of his liberty for a long time?

II. DETENTION AS A FORM OF TARGETING

Maybe this problem is not unique to fighting terrorists after all. Doubts about the identity of those being subjected to military force are commonplace in warfare, and the law of war has evolved over centuries to deal with them. Military forces routinely injure or destroy life and property amid uncertainty—sometimes substantial uncertainty—as to who, exactly, will sustain the blow of their military might. Specifically, *targeting law* regulates the attack and bombardment of supposed military personnel and objects where doubt shrouds their identity and the effects—intended and unintended—on nearby, innocent civilians. This Part traces the contours of targeting law and explains its policy and moral bases. It then argues that detention decisions can be understood analogically as targeting decisions, sharing many of the same policy and moral issues. Targeting law therefore offers one promising way to fill the standard-of-certainty gap.

A. *Operating in Clouds of Doubt: Targeting Law in Warfare*

The number of Afghan civilians who have been mistakenly bombed or killed by U.S. forces since September 11, 2001 is many times higher than the number of civilians erroneously detained at Guantanamo or elsewhere in fighting al Qaida and the Taliban.⁶⁸ Meanwhile, several thousand civilians are believed to have been killed by coalition military operations during the first few months of fighting in Iraq in 2003,⁶⁹ and, by way of additional comparison, about 500 civilians are believed to have died as a result of two and a half months of airstrikes over Serbia in 1999, including a particularly tragic incident in which more than seventy flee-

68. Cf. Carlotta Gall, U.S. and NATO Forces Kill 13 Afghans in Strikes Said To Be Mistakes, N.Y. Times, July 21, 2008, at A11 (reporting on accidental deaths of innocent Afghan civilians caused by U.S. and NATO missile and mortar strikes); Thom Shanker, Civilian Risks Curbing Strikes in Afghan War, N.Y. Times, July 23, 2008, at A1 (reporting that high civilian casualties in Afghanistan have led to tighter rules governing military air attacks).

69. See Memorandum from Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, to the International Criminal Court 6 n.12 (Feb. 9, 2006), at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (on file with the *Columbia Law Review*) [hereinafter Moreno-Ocampo Memo] (estimating "6,900 civilian casualties during the military operations from March to May 2003").

ing refugees were bombed and killed after being misidentified as conveying Serbian forces.⁷⁰

The general, if reluctant, acceptance of these tragic injuries raises a question: Why are detention errors widely seen as lawless while other errors (like targeting errors) are often seen as unfortunate but regular byproducts of combat? After all, a decision to detain someone suspected of being an enemy combatant closely resembles a targeting exercise: It is a judgment that the individual is part of an enemy military organization and therefore subject to the application of military force, in this case physical incapacitation. Before thinking, then, about detention amid imperfect information, let us step back and review the way international law has developed to deal with targeting problems.

The modern law of military targeting rests heavily on two central principles. First, only combatants and military objectives are lawful targets; attacks aimed at civilians and “civilian objects” are prohibited. This is known as the principle of *distinction*. Regarded as longstanding, cardinal customary law,⁷¹ this principle was expressed in the 1874 St. Petersburg Declaration⁷² and has since been elaborated in the First Additional Protocol to the Geneva Conventions (“Protocol I”),⁷³ which the United States, although not a party to it, has pledged to follow to the extent its terms reflect customary international law.⁷⁴ Second, even military objectives may not be attacked if doing so is likely to cause incidental civilian casualties or damage (“collateral damage”) that would be excessive in relation to the military advantage expected from the attack. This is known as the principle of *proportionality*,⁷⁵ again widely regarded as a basic, customary legal tenet. The former principle assumes that the attacker can determine which objects are military and which are civilian. The latter principle accommodates a certain level of incidental injury to innocent civilians. While there is widespread agreement on these funda-

70. See Bradley Graham, *Military Turns to Software To Cut Civilian Casualties*, Wash. Post, Feb. 21, 2003, at A18 (describing significant collateral damage caused by U.S. airstrikes and consequent efforts to improve airstrike targeting procedures).

71. See *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case)*, 1996 I.C.J. 226, 257 (July 8) (“States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”).

72. See *Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Dec. 11, 1868, 138 Consol. T.S. 297, 298 (“[T]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”).

73. See Protocol I, *supra* note 52, art. 48 (“Parties to a conflict shall at all times distinguish between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

74. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 *Am. U. J. Int’l L. & Pol’y* 419, 420 (1987).

75. See Greenwood, *supra* note 22, at 797 (describing principle of proportionality with respect to targeting).

mental principles, specific attacks and incidents of civilian injury often trigger controversy over whether they were followed.⁷⁶

In applying the principles of distinction and proportionality to planning and conducting an attack, the attacker must exercise care to verify that a target is indeed a military target and attack it so as to reduce the likelihood of incidental injury to civilians and civilian property. But the precise level of care the attacker must use in both efforts—verifying the identity of the target and reducing anticipated collateral damage—has proven difficult to define. In his classic work on the ethics of warfare, Michael Walzer confronts this issue but acknowledges that “[e]xactly how far [a party] must go” in accepting costs to itself in minimizing foreseeable harms to civilians “is hard to say”:

Do civilians have a right not only not to be attacked but also not to be put at risk to such and such a degree, so that imposing a one-in-ten chance of death on them is justified, while imposing a three-in-ten chance is unjustified? In fact, the degree of risk that is permissible is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on. It is best, I think, to say simply that civilians have a right that ‘due care’ be taken.⁷⁷

But this just raises the question of what care is due.

B. *Targeting Law’s “Reasonable Care” Standard*

Throughout this past century, during which much of the modern law of war was codified, international convention drafters have struggled with how to define targeting’s standard of certainty. Although the text of international treaties might appear at first blush to require exceedingly high standards of care, the practice and interpretation of states is better understood as a “reasonable effort” standard, where reasonableness is judged in terms of costs to the attacker of performing more rigorous analysis or expending scarce military resources.

Protocol I to the Geneva Conventions states that in the course of attacks “constant care shall be taken to spare the civilian population, civil-

76. This last point was made very well in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (1999) [hereinafter Prosecutor’s Report, NATO Bombing in Yugoslavia]:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

Id. para. 48.

77. Michael Walzer, *Just and Unjust Wars* 156 (3d ed. 1977).

ians and civilian objects.”⁷⁸ It also requires those who plan an attack to “[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . but are military objectives.”⁷⁹ Planners must also “[t]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”⁸⁰

The responsibility to “do everything feasible” and “take all feasible precautions” in carrying out these mandates, however, is generally interpreted to be not a fixed and always highly exacting duty—like, say, the beyond reasonable doubt approach of criminal law—but a balancing one: Parties are obliged to balance humanitarian concerns for civilians with military needs. That is, “[a]n attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces.”⁸¹

This “reasonable care” standard, based on practicalities of particular circumstances, has been expounded in international case law,⁸² commentaries,⁸³ and scholarly works.⁸⁴ It also reflects common state practice,⁸⁵ since one would expect a rule to rarely be followed if it were too costly or put a party’s military operations in too much jeopardy. As one British

78. Protocol I, *supra* note 52, art. 57(1).

79. *Id.* art. 57(2)(a)(i).

80. *Id.* art. 57(2)(a)(ii).

81. Dep’t of Def., *Persian Gulf War*, *supra* note 57, at 615.

82. See, e.g., *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment and Opinion, ¶ 57 (Dec. 5, 2003), available at <http://www.un.org/icty/galic/trialc/judgement/galtj031205e.pdf> (on file with the *Columbia Law Review*) (describing Protocol I prohibitions on “indiscriminate attacks” against civilians as “well-established rule of customary law applicable in all armed conflicts”).

83. See, e.g., 1 Jean-Marie Henckaerts & Louise Doswald-Beck, ICRC, *Customary International Humanitarian Law* 54 (2005) (describing “obligation to take all ‘feasible’ precautions,” taking into account “humanitarian and military considerations,” before executing military attack); ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 681–82 (1987) [hereinafter ICRC *Commentary on Protocol I*] (calling for “common sense and good faith” interpretation of Protocol in order to prevent unnecessary civilian casualties”); see also Françoise Hampson, *Military Necessity*, in *Crimes of War* 251, 251 (Roy Gutman & David Reiff eds., 1999) (defining military necessity as “legal justification for attacks” on military, not civilian, targets).

84. See, e.g., Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 126 (2004) (“[N]o absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith.”); Michael N. Schmitt, *Precision Attack and International Law*, 87 *Int’l Rev. Red Cross* 445, 455–56 (2005) (describing standard as “reckless disregard” or indiscriminateness in either execution or tactics).

85. See A.P.V. Rogers, *Zero-Casualty Warfare*, 82 *Int’l Rev. Red Cross* 165, 176–78, 180–81 (2000) (describing states’ obligations to take all practicably possible precautions to avoid civilian injuries).

military-legal scholar puts it: “Target verification requires reasonable care to be exercised. The precise degree of care required depends on the circumstances”⁸⁶ Even the International Committee of the Red Cross Commentary on Protocol I acknowledges that the “do everything feasible” requirement in targeting ultimately reduces to an obligation of “common sense and good faith.”⁸⁷

While it is impossible to pin down a precise formula for calculating reasonableness, factors such as time constraints, risks, technology, and resource costs emerge over time as key considerations in the legal analysis.⁸⁸ Those factors all bear on one’s ability to prosecute the war effectively and achieve victory at acceptable expense. Targeting is then generally viewed from two sides of the same reasonableness coin: Did a belligerent exercise sufficient effort to discern the identity of targets and plan the attack in a way designed to reduce incidental injury to civilians? And was there more that the belligerent could have done to verify the identity of the target and reduce collateral damage?

Time constraints, risks, technology, and resource costs are, among other factors, often key to this analysis because the law of war recognizes that although belligerents could almost always take further precautions, they cannot be expected to disregard their own survival and ability to combat effectively in the short and long term.⁸⁹ The pace of events and the need to take decisive actions quickly may limit the care belligerents can exercise while still fighting successfully. Warfare is always dangerous for the belligerents, and soldiers constantly internalize certain hazards to themselves; the law of war obligates them to take dangers to civilians into account, but it does not require them to ignore their own security. Were additional intelligence or the use of more precise weapons cost-free, it would be natural to expect belligerents to do more to confirm the iden-

86. *Id.* at 181.

87. ICRC Commentary on Protocol I, *supra* note 83, at 682.

88. See, e.g., *United States v. List (The Hostage Case)*, Case No. 7 (Feb. 19, 1948), reprinted in *11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 1230, 1253 (1997) (“Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”); see also Rogers, *supra* note 85, at 176 (discussing conflicting humanitarian and military interests that attackers must consider during targeting); Schmitt, *supra* note 84, at 461–62 (“As with doing everything feasible to verify a target, the requirement to resort to precision attack is not absolute.”).

89. See Greenwood, *supra* note 22, at 800:

The requirement that, in choosing the weapons and methods of attack which will be used, the commander should have regard to which of those weapons and methods will be most likely to avoid or reduce incidental civilian losses is particularly important. It does not mean that the commander must always use the most discriminating weapon which his country possesses. . . . [H]e is entitled to take account of considerations such as the quantity of a particular weapon at his disposal, the likely future demands on his weapon stocks, the time within which a particular weapon can be brought to bear, and the degree of risk to his own forces.

tivity of targets and calibrate their attacks; but information and precision come with prices measured in personnel, dollars, and other scarce resources that good sense and strategic logic demand be husbanded in warfare.

A widely cited application of this reasonableness approach to targeting is the al Firdos bunker incident during the 1991 Persian Gulf War. During that conflict, American military planners identified this Baghdad complex as an Iraqi military command and control center. Unknown to coalition planners, however, Iraqi civilians were apparently inhabiting the upper levels as sleeping quarters. Coalition forces bombed the bunker, allegedly resulting in several hundred civilian casualties.⁹⁰ Could coalition forces have waited longer and sought additional information about the nature of these building complexes? Or used more precise weaponry and tactics for destroying what were believed to be military command nodes? Of course, but only at greater risks to themselves. This action has generally been deemed in accordance with the law of war because the attackers acted in good faith based upon information reasonably available at the time of the attack.⁹¹

In such tragic cases, debates will rage about whether military forces exercised reasonable care. And, as I explain below, the lack of determinative precision is one significant weakness that needs to be considered in importing targeting law to a detention context.⁹²

Nonetheless, the reasonable care rule in targeting makes good sense for three reasons: (1) It pragmatically balances military necessity with humanitarian interests; (2) it helps align distribution of legal responsibility with moral culpability; and (3) it combines with companion rules to reinforce incentives for parties to comply with the law and protect civilians.

1. *Military Effectiveness.* — First, the law of targeting has developed to confront the problem that in the conduct of warfare, attackers invariably face situations in which imperfect information precludes discrimination between military and civilian objects with near-perfect accuracy; targeting law recognizes that in the course of attacking legitimate military targets, civilians and civilian objects will inevitably be harmed, too. Especially, though not only, in the heat of battle, and as a result of incomplete information or the “fog of war,” targets will be misidentified. Civilian targets will be mistaken for military ones and destroyed. In the course of attacking legitimate military targets, civilian objects and persons will often get caught in the crossfire. Error is inevitable in war, and the law recognizes that. It seeks to regulate it, not eliminate it.

90. See John Mintz, *Air War on Iraq Would Be Similar to Desert Storm: U.S. Is Planning Attack that Limits Civilian Deaths*, Wash. Post, Feb. 15, 1998, at A1 (describing al Firdos incident and efforts to avoid similar incidents).

91. See Dep’t of Def., *Persian Gulf War*, *supra* note 57, at 615–17 (explaining that later reviews of attack assessed it as reasonable under the circumstances).

92. See *infra* Part III.C.

Imposing too strict a standard might constrain military decisionmaking, which requires difficult and often quick judgments, to the point where a party could no longer achieve success. Waiting until a target's identity could be verified with near certainty (imagine a beyond reasonable doubt rule for targeting) would expose an attacking party to unacceptable risks and delays, and would mean refraining from many attacks where such verification is impractical.⁹³ The law of war obligates an attacker to internalize some of the likely injury to civilians, but in practice no party is likely to do so to the point that it erodes its own political support to prosecute the war.⁹⁴

2. *Moral Culpability*. — A second reason, besides the necessities of war's messiness and complexity, that the law of war has evolved around a reasonable care standard is that an attacker's ability to discriminate accurately between military and civilian objects and to limit collateral damage is a product of *both* parties' actions: the steps the attacker takes to verify targets and select means designed to reduce civilian suffering, and the defender's actions to segregate and demark military from civilian objects.⁹⁵ In that regard, both parties share moral responsibility for incidental injury to civilians, their respective shares depending on the good faith steps they take to minimize the likelihood of that injury. An attacker can reduce the chances of misidentifying a target or causing collateral damage by, for example, getting closer to it before firing or striking during the daytime, when it is easier to identify targets. But the defender, in deciding how and where to situate its military forces or arms, can also increase or decrease the likelihood of mistaken identity or collateral damage.⁹⁶ Storing weapons in crowded areas or disguising ammunition depots as food supplies, for example, puts crowds and food supplies at risk.

93. See Rogers, *supra* note 85, at 181 ("In the event of doubt about the nature of the target, an attack should not be carried out, with a possible exception where failure to prosecute the attack would put attacking forces in immediate danger.")

94. See W. Michael Reisman, *The Lessons of Qana*, 22 *Yale J. Int'l L.* 381, 396 (1997) [hereinafter Reisman, *Lessons of Qana*] (describing Israeli attack on U.N. compound in Lebanon and conflicting imperatives of retaliating with proportionate degree of force while retaining support of country's internal constituency).

95. See generally W. Hays Parks, *Air War and the Law of War*, 32 *A.F. L. Rev.* 1 (1990) (discussing emergence of responsibility of both parties to conflict within law governing air power).

96. The ICRC stressed the importance of these reciprocal obligations after a spate of NATO military attacks in Afghanistan resulted in civilian casualties that NATO blamed in part on Taliban forces' refusal to distinguish its fighters from innocent villagers. See News Release, ICRC, *Afghanistan: ICRC Deplores Increasing Number of Civilian Victims* (Oct. 27, 2006), at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/afghanistan-news-271006?opendocument> (on file with the *Columbia Law Review*) (emphasizing duty, under international humanitarian law, to take precautions to protect civilians and their property); see also Associated Press, *NATO Chief Says Taliban Used Civilians As Shields*, *St. Louis Post-Dispatch*, Oct. 28, 2006, at A28 (reporting NATO Secretary-General Jaap de Hoop Scheffer's allegations attributing civilian deaths resulting from NATO attacks to Taliban practices of using civilians as human shields).

A reasonableness approach to precautionary obligations acknowledges that mistaken identification of targets and collateral damage result from both parties' actions. Reasonableness is measured not just in terms of efforts to verify military targets and strike them with discriminate precision, but also in terms of adjustment to enemy behavior designed to keep civilians and civilian property in or out of harm's way. Facing intense criticism over the human suffering resulting from its attack on Lebanon, including widespread charges that it was violating its international legal obligations to exercise care in distinguishing combatants from civilians,⁹⁷ the Israeli government and its supporters stressed this division of responsibility argument in support of its 2006 counter-Hezbollah operations. They argued that Israel's conduct in bombing targets within urban Lebanese areas was reasonable in light of Hezbollah's practice of hiding and arming itself among civilians there.⁹⁸ Putting aside the debate over whether some of Israel's military responses targeted civilians or exacted a civilian toll disproportionate to Hezbollah's military threat, Hezbollah's decision to launch attacks from civilian neighborhoods contributed foreseeably to at least some Lebanese civilian injuries, and Israel's actions should be evaluated with that in mind.⁹⁹ Absolving Hezbollah of any responsibility for those injuries (for which Israel paid an immense diplomatic price) risks further incentivizing tactics that put civilians in harm's way.

3. *The Adversary's Incentives.* — This last point helps show a third, related reason why the reasonableness approach to targeting makes sense: It diminishes incentives for the other side to put civilians deliberately in harm's way. This notion is best understood in terms of the complementary rule that while the attacker must take reasonable steps to discriminate between military and civilian objects, the defender must take reasonable steps to make that discrimination possible. Article 58 of

97. Among those suggesting Israel violated the laws of war were the U.N. High Commissioner for Human Rights, Louise Arbour, and the International Committee of the Red Cross. See Tom Regan, UN Warns Hizbullah, Israel of "War Crimes" Liability, *Christian Sci. Monitor*, July 20, 2006, at <http://www.csmonitor.com/2006/0720/dailyUpdate.html> (on file with the *Columbia Law Review*) (surveying international reactions to Israeli strike).

98. See Steven Erlanger, With Israeli Use of Force, Debate over Proportion, *N.Y. Times*, July 19, 2006, at A1 (quoting Israeli Foreign Minister Tzipi Livni as justifying disproportionate casualties in Lebanon attack by saying, "Terrorists use the population and live among them It's difficult to target like a surgery. Unfortunately, civilians sometimes pay the price of giving shelter to terrorists."); Moshe Yaalon, The Rules of War, *Wash. Post*, Aug. 3, 2006, at A27 (defending Israeli military action and noting strategic use of civilians by Hezbollah).

99. Jan Egeland, the U.N. Humanitarian chief, called the Israeli strikes "disproportionate" and in violation of the laws of war, but also pinned some blame for collateral civilian damage on Hezbollah: "[M]y message was that Hezbollah must stop this cowardly blending . . . among women and children I heard they were proud because they lost very few fighters and that it was the civilians bearing the brunt of this." UN Official Says Hezbollah Using Civilians to Hide, *Chi. Trib.*, July 25, 2006, at 10.

Protocol I, for example, spells out the duty parties have to “[a]void locating military objectives within or near densely populated areas.”¹⁰⁰ An absolute duty on an attacker to avoid civilian injury—one that ignores the steps the defender takes or does not take to improve the safety of non-combatants—would tempt the defender to place its military resources and personnel amid civilian crowds, or “human shields.” Participants at the 1923 Hague Rules of Air Warfare Draft Conference wrestled unsuccessfully with a form of this dilemma: They wanted to immunize cities from aerial bombardment, but if they did so by completely prohibiting their attack they would create an incentive for states to move strategically valuable assets (such as military industries) into densely populated areas for protection, thereby inviting attacks on the very cities they sought to shelter.¹⁰¹

A reasonable care rule that recognizes reciprocal duties to keep civilians out of harm’s way mitigates the defender’s incentives to breach its own duty to protect civilians. A breach of the defender’s duty to separate its military forces from civilians does not excuse the attacker from his discrimination and proportionality responsibilities, but it factors into assessment of whether the attacker’s efforts are reasonable under the circumstances.¹⁰²

For those hoping that the law of war would regulate actions with great clarity and predictability, the reasonable care rule is disquieting. It vests belligerents with considerable discretion in multifaceted balancing and legitimizes even large-scale injury to innocent civilians under certain circumstances. But rather than imposing unworkable constraints, it obliges belligerents to internalize injuries to innocent civilians in ways that balance competing interests and account for the realities of warfare.

100. Protocol I, *supra* note 52, art. 58.

101. See Parks, *supra* note 95, at 27–28.

102. This was an argument Israel raised in defending its conduct of the recent war against Hezbollah:

The rules of war boil down to one central principle: the need to distinguish combatants from noncombatants. Those who condemned Israel for what happened [in the bombardment of residential areas] at Qana [Lebanon], rather than placing the blame for this unfortunate tragedy squarely on Hezbollah and its state sponsors, have rewarded those for whom this moral principle is meaningless and have condemned a state in which this principle has always guided military and political decisionmaking.

Yaalon, *supra* note 98. (Yaalon was formerly the chief of staff of the Israel Defense Forces.) In other words, an assessment of whether Israel’s precautionary steps were adequate should consider Hezbollah tactics designed to make precise target discrimination impossible. Otherwise Hezbollah’s tactics are rewarded. Michael Walzer has made similar observations:

When Palestinian militants launch rocket attacks from civilian areas, they are themselves responsible—and no one else is—for the civilian deaths caused by Israeli counterfire. But (the dialectical argument continues) Israeli soldiers are required to aim as precisely as they can at the militants, to take risks in order to do that, and to call off counterattacks that would kill large numbers of civilians.

Michael Walzer, *War Fair*, *The New Republic*, July 31, 2006, at 15, 16.

C. Detention As a Form of Targeting

In sum, targeting rules have evolved to a reasonable care approach, recognizing that an attacker cannot be expected to eliminate inadvertent civilian injury while battling aggressively without reasonable reciprocal efforts by the defender to keep civilians out of harm's way. No such similar rule is generally recognized to govern detention. The law of war probably has little to say directly on point to the standard of certainty for detention because throughout much of modern military history the problem was unlikely to arise in its current form.¹⁰³ Taking as an investigative assumption that the criminal conviction standard is inapplicable—either because the inquiry addresses supposed status as a member of an enemy organization with which the United States is at war rather than criminal guilt or innocence, or because the magnitude of the threat requires some other kind of preventive detention regime—how careful must a state like the United States be in classifying someone as an “enemy combatant” or similar category subject to long-term detention?

Targeting law provides a useful analytical starting point for filling this gap. After all, the problem of differentiating enemy terrorist fighters from among the surrounding civilian population is really a problem of targeting: Is the individual an enemy fighter (i.e., a military target) and therefore subject to attack with force (i.e., capture and detention)?¹⁰⁴ Targeting law has evolved to deal with the problem that, in order to neutralize enemy fighting forces, military planners and operators must routinely use military force—including powerful lethal force—against individuals and targets *believed to be* affiliated with the enemy. Depending on the circumstances, these planners and operators may lack critical information and time to verify their targets, and may accordingly harbor significant doubt as to the identities of those they are about to attack. The law of war allows for some rate of error—sometimes a high rate of error—so long as the party acts in good faith reliance on reasonable efforts to verify military targets and contain attacks to them. In practice this means that many civilians and civilian objects are attacked by mistake, either because they are erroneously thought to be enemy forces or because they get caught in the crossfire directed at true military targets.

Erroneous detentions of innocent civilians mistaken for terrorists might then be thought of as the common tragedy in warfare of mistaking

103. See Greenwood, *supra* note 22, at 797 (“The question who, or what, is a legitimate target is arguably the most important question in the law of war So far as people are concerned, the law is, at least, reasonably clear.”); see also *supra* notes 55–65 and accompanying text (explaining why additional rules on this issue are necessary in nontraditional warfare).

104. See *supra* notes 58–60 and accompanying text (explaining difficulty of distinguishing terrorists from civilians).

a civilian object for a military one.¹⁰⁵ Or in some cases erroneous detentions might be thought of as a form of collateral damage, in that they result from overbroad detention policies that sweep up bystanders alongside terrorists (though this logic has dangerous implications¹⁰⁶). Not only does targeting law provide a useful analogical framework for thinking about detention accuracy and errors, but it might even be seen as encompassing detention decisions, such that targeting rules should govern directly.

Indeed, detention decisions arguably ought to require a *lower* standard of certainty than many conventional military targeting decisions, since errors in the detention context are generally less severe than in the targeting context, where the cost of error is often death.¹⁰⁷ Note that because enemy fighters are legitimate military targets, sometimes those whom the U.S. government captures and detains could, as a legal matter, perhaps be attacked and killed instead (subject, however, to other law of war rules, such as the proportionality rule and the prohibition against killing those who have surrendered).¹⁰⁸ According to the *U.S. Naval Handbook*, military forces “must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and other information

105. Importantly, this approach also requires defining what is meant by “al Qaida,” its affiliated terrorist network, and its military capability—an issue I introduced above, see *supra* notes 49–51 and accompanying text, but do not answer in this paper.

106. See *infra* note 117 (explaining danger of justifying mass detentions).

107. Though to some, indefinite and possibly lifelong detention might seem a fate worse than death.

108. The Israeli government’s policy of “targeted killings” is a controversial application of this principle, with much of the controversy stemming, as in the case of U.S. detention policy, from a disagreement over whether the law of war is the appropriate framework for regulating actions. As the former Israeli judge advocate and now legal scholar Amos Guiora has explained:

[T]ragic mistakes do occur and innocent women and children have died during the course of a targeted killing. In all fairness, there are two explanations for this occurrence: 1) Wanted terrorists are more than aware of their status and calculate (sometimes mistakenly so) that the [Israeli Defense Forces] will not target them when they deliberately surround themselves with women and children (one should add in clear violation of international law forbidding ‘human shielding’); 2) Operational mistakes, while highly regrettable, are a reality of armed conflict. While Kofi Annan has recently been quoted as remarking that the loss of one innocent life makes any response to terrorism disproportionate, this statement is not consistent with the laws of armed conflict, which allow for collateral damage, or unintended harm, that is proportionate to the harm prevented. Moreover, a terrorist should not be granted immunity simply because he can surround himself with non-terrorists (human shielding).

Amos Guiora, Targeted Killing As Active Self-Defense, 36 Case W. Res. J. Int’l L. 319, 328–29 (2004). The Israeli Supreme Court considered some international legal aspects of targeted killings in HCJ 769/02 *The Public Committee Against Torture in Israel v. Government of Israel* [2005] ¶ 21 (Isr.), translation available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm (on file with the *Columbia Law Review*).

available at the time.”¹⁰⁹ So, for example, in June 2005 U.S. military forces bombed Abu Musab al Zarqawi, the regional al Qaida leader in Iraq.¹¹⁰ And many detainees at Guantanamo were, in fact, first shot and wounded on the battlefields of Afghanistan.

Detention errors are also generally reversible, whereas targeting errors are not; those mistakenly detained can be released, but those mistakenly bombed cannot be brought back to life. The reversibility of detention decisions again arguably points toward a lower standard of certainty for detention than targeting.¹¹¹

In the fight against transnational terrorist networks, however, these claims about the low stakes and reversibility of detention errors may not hold true because the costs of erroneous detention have escalated dramatically. The likely duration of the conflict with al Qaida means that detentions could be indefinite or lifelong.¹¹² The specter of aggressive interrogation also raises considerably the stakes of errors, though it is hard to compare the harms of being erroneously exposed over time to tough interrogation tactics or even illegal abuses with other injuries that result from military force.

In any event, the same three reasons why the reasonable care rule makes sense in the targeting context could be used to justify, at least as a starting point, a similar approach for detention decisions.

1. *Military Effectiveness Arguments.* — First, a reasonable care standard would balance military necessity with humanitarian interests, in this case balancing the need to incapacitate suspected enemy fighters with liberty values. Just as the law of war allows an attacking party to aim attacks broadly enough to destroy or disable the enemy’s forces even if it means incidentally injuring some civilians and civilian property, perhaps our military and intelligence agencies should have similar leeway to fight enemy terrorist networks effectively, including the power to sweep and detain broadly enough to ensure that no problematic number or proportion of terrorists remains free. Overbroad detentions are arguably

109. Dep’t of the Navy, *The Commander’s Handbook on the Law of Naval Operations* ch. 8.2.2 (2007), available at [http://www.nwc.navy.mil/cnws/ild/documents/1-14M_\(Jul_2007\)_\(NWP\).pdf](http://www.nwc.navy.mil/cnws/ild/documents/1-14M_(Jul_2007)_(NWP).pdf) (on file with the *Columbia Law Review*).

110. A more controversial incident occurred in November 2002, when the CIA allegedly killed with a missile attack six suspected al Qaida members traveling in their jeep in Yemen. See BBC News, CIA “Killed al-Qaeda Suspects” in Yemen, Nov. 5, 2002, at http://news.bbc.co.uk/2/hi/middle_east/2402479.stm (on file with the *Columbia Law Review*). More recently, it has been reported that U.S. forces used military gunships to target al Qaida operatives in Somalia. See Andrew England, Somalia Air Strike “Missed al-Qaeda Targets,” *Fin. Times*, Jan. 12, 2007, at 6.

111. A similar reversibility argument is sometimes made in the context of the death penalty, where some have argued that there should be a higher standard for conviction than “beyond reasonable doubt” in capital cases because erroneous executions can never be corrected. See, e.g., Lillquist, *supra* note 33, at 53–66 (discussing justifications for standard of proof in criminal cases and examining which, if any, would justify higher standard of proof in capital cases).

112. See *supra* note 63 and accompanying text.

militarily counterproductive, fomenting resentment among local populations.¹¹³ But the same can be said for overbroad bombardment, and in the latter case militaries and their political leaderships are traditionally granted wide latitude, subject to international legal bounds, to calibrate what they see as the right balance.

The Bush Administration essentially imported the value judgment underlying targeting law in arguing in *Hamdi* that executive branch decisions about whom to detain are fundamentally identical to other battlefield judgments: “Capturing and detaining enemy combatants is a quintessential and necessary aspect of the *use* of military force, not to mention a customary and necessary means of *defeating* the enemy.”¹¹⁴ It continued:

A commander’s wartime determination that an individual is an enemy combatant is a quintessentially military judgment Especially in the course of hostilities, the military through its operations and intelligence-gathering has an unmatched vantage point from which to learn about the enemy and make judgments as to whether those seized during a conflict are friend or foe.¹¹⁵

While the debate in *Hamdi* centered on procedural mechanisms for verifying the classification of detainees as enemy fighters or innocent civilians and the institutional competence of courts to weigh in, this procedural and institutional debate masks a deeper disagreement about how much error is tolerable. Note the similarity between the government’s characterization of detention decisions and how the law of war treats battlefield targeting decisions.¹¹⁶

In other words, one reason we might import a targeting-like reasonable care rule to the detention context is that, as with military targets, we accept some erroneous detention of civilians as an evil necessary to equip military forces with the ability to rid the battlefield of hostile fighters. That is, we might make a similar value calculus that in particular circumstances the concern with erroneously depriving some innocents of their liberty must yield to the exigencies of counterterrorism operations, just as sometimes the concern with killing civilians or destroying their property must so yield.

113. See *infra* notes 220, 222–223 and accompanying text (examining historical instances of radicalization sparked by overbroad detention policy).

114. Brief for the Respondents at 20, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

115. *Id.* at 25.

116. In *Hamdi* the government did not articulate clearly what the executive’s own internal standards were for combatant determinations. After arguing against any judicial review of such decisions, it argued in the alternative for a “some evidence” standard of review: Even if some judicial review of detentions is appropriate, it should be limited to an inquiry into whether the military could point to any empirical basis for its determination. 542 U.S. at 527 (plurality opinion).

One could take this a step further and say that, as with attacking other military targets, the degree of required certainty in identification for detaining an individual should be a function of the specific threat posed by the particular, suspected terrorist. Under a proportionality analysis, military planners would be more justified in bombing a strategically significant target—say, a suspected nuclear-armed missile launcher—amid doubts about the collateral damage likely to ensue than they would be in bombing a less significant target—say, a building suspected of housing only spare parts for military transport vehicles—amid comparable doubts. Perhaps, similarly, the level of doubt the law accommodates in detaining a suspected terrorist should vary with the intensity of the threat that a particular individual is believed to pose.¹¹⁷ We might, for example, want to allow greater doubt in detaining an al Qaida member suspected to be trained in chemical and biological weapon production than someone trained merely in the use of an AK-47. Or one could add to this case-by-case analysis the expected value of intelligence to be gained through interrogation: A suspected mastermind planner would be expected to yield more valuable information than, say, a Taliban foot soldier, so perhaps the former should be subject to detention under a thicker cloud of doubt than the latter.¹¹⁸

In practice, however, such individualized analysis would usually be unworkable. With the exception of senior members of terrorist networks or terrorists armed with weapons of mass destruction, it would be difficult to assess suspected terrorists' particular threat intensity or intelligence value.¹¹⁹ Terrorists do not lend themselves to assessable, stratified danger levels the way that some other military targets do, and the specific threat level or intelligence value of a particular individual may often be

117. I note at this point, though, a concern that conceiving of detention as targeting and detention of innocents along with terrorists as "collateral damage" might dangerously be used to justify mass detentions. Although using a proportionality analysis to help justify detaining everyone in the vicinity might make sense in extreme cases of, for example, an unidentified terrorist believed to have a suitcase nuclear bomb in a crowded neighborhood, a targeting approach generally would not justify overbroad detention practices. First, proportionality is only one of a number of legal rules that should constrain detention; detentions themselves require some independent legal basis, in this case either a belief that a particular individual is an enemy combatant or some other authority. In this regard detentions differ from other military targeting in that detaining individuals not believed to be legitimate military targets is off limits, absent other legal grounds for doing so, whereas in many conventional targeting contexts it is lawful to intentionally strike known civilians along with military targets so long as proportionality is satisfied. Second, as explained in *supra* notes 78–80 and accompanying text, targeting rules require comparative analysis of more precise means of achieving an objective with lower civilian injury, which in most cases would exclude mass detention.

118. And, as mentioned earlier, the appropriate level of certainty should perhaps vary with the harshness of interrogation to which an individual might be subjected. See *supra* notes 64–66 and accompanying text.

119. Consider, for example, that the 9/11 hijackers shared a profile with probably hundreds of al Qaida members, yet were capable of inflicting thousands of casualties and billions of dollars worth of damage.

come apparent only long after detention has begun and interrogations yield information. In the case of terrorist leaders or those with weapons of mass destruction, where the threat level *can* be assessed as extremely high, the information deficit that lies at the heart of the problem—Are we sure we have the right guy?—will probably be minimal anyway.

2. *Moral Arguments.* — Besides helping to balance liberty interests with the military necessities of fighting a war, a reasonable care approach to detention would also help align legal and moral responsibility, paralleling targeting law. As in the targeting context, the ability to discriminate accurately between military and civilian personnel will depend on both parties' actions, a phenomenon that al Qaida seeks to exploit by deliberately blurring the distinction between its fighters and civilians. "The concealed combatant certainly has an advantage over the uniformed soldier, but the advantage comes at a price that others must pay. It inevitably leads to increased casualties among the civilian population . . ." ¹²⁰ In other words, concealment of one's combatant identity or membership in an enemy force externalizes some of the risk of being targeted to innocent civilians. A reasonable care approach akin to targeting could impose some legal responsibility for erroneous detention on those who make accurate discrimination difficult in the first place.

Although the Bush Administration's screening processes and disinclination toward judicial review have been widely criticized, nowhere does the public debate explore what share of moral responsibility al Qaida should bear for erroneous detentions.¹²¹ Al Qaida's practice of intermingling fighters among civilians—indeed, throughout societies in cells—is widely cited as contributing to civilian deaths and injuries in Afghanistan and other places where U.S. and coalition military forces have launched military strikes, including bombardment.¹²² But rarely, if ever, does anyone assign some blame to al Qaida for erroneous detentions, even though erroneous bombardment and detention of civilians thought to be terrorists are both due in part to al Qaida's refusal (for obvious reasons) to designate clearly its personnel.¹²³ This anomaly is curious because

120. *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict* 44 (W. Michael Reisman & Christos Antoniou eds., 1996).

121. I address this point further *infra* Part II.C.3.

122. See, e.g., Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. Rev. 1, 40–42 (2005) (identifying "collateral damage incidents" caused by "concealment tactics" in Afghanistan).

123. The Israeli Government made a similar point in a case before its Supreme Court brought by Palestinian militants challenging detention practices in Operation Defensive Wall, a military operation against terrorist infrastructure in the West Bank. It argued (unsuccessfully) that the Court should be more lenient with regard to the timing of judicial review of detentions because "the terrorists had been carrying out their activities in Palestinian populations centers, without bearing any symbols that would identify them as members of combating forces and distinguish them from the civilian population, in utter violations of the laws of warfare." HCJ 3239/02 Marab v. IDF Commander in the West

many of those who criticize U.S. government screening processes as unilaterally underprotective of innocents do morally condemn, for example, regimes that use civilian “human shields” to protect military sites from attacks or that refuse to differentiate their soldiers from civilians.¹²⁴

If a defender who deliberately mixes civilian and military personnel and assets bears some responsibility for resulting injury to those civilian persons and property, so it seems should a defender who blurs distinctions between its armed forces and local civilians by refusing to abide by the international legal requirements to clearly identify its forces as such. Paralleling obligations of a defender to avoid commingling military objects and civilians is a longstanding legal obligation to distinguish one’s soldiers from noncombatants. The obligations on a military force to distinguish its fighting force from civilians are reflected in the Geneva Conventions, which reserve prisoner of war status for “regular armed forces” or others who comply with requirements to, among other things, wear distinctive insignia and carry their weapons openly.¹²⁵ These requirements go directly to the duty to distinguish oneself as a combatant: Distinctive insignia like military uniforms and openly carrying weapons mark military personnel as combatants, facilitating more precise target discrimination by other belligerents.

If al Qaida and its affiliates operate without distinctive insignia or easily visible weapons—that is, if they refuse to identify themselves as combatants and instead seek to blend in with local populations—then perhaps they should share responsibility for erroneous detentions that arise from the very blurring of combatants and noncombatants that they deliberately create. A reasonable care approach to detention decisions that recognizes greater allowable error when the adversary deliberately complicates identification helps to shift responsibility appropriately.

Bank [2002] IsrSC 57(2) 349, 372–73, translation available at http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf (last visited Sept. 5, 2008) (on file with the *Columbia Law Review*).

124. Compare James Ross, Human Rights Watch, Supreme Court to Bush: You’re Not Above the Law, Salon, June 13, 2008, at http://www.salon.com/opinion/feature/2008/06/13/gitmo_bush/print.html (on file with the *Columbia Law Review*) (criticizing Bush Administration, in piece written by Human Rights Watch’s legal policy director, for “detaining hundreds of people who were later released without charge”), with Human Rights Watch, The Crisis in Kosovo (2000), available at <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (on file with the *Columbia Law Review*) (concluding, in report on NATO bombardment of Serbia in 1999, that “Yugoslav military forces may share the blame for the eighty-seven civilian deaths at Korisa: there is some evidence that displaced Kosovar civilians were forcibly concentrated within a military camp there as a human shield”), and Press Release, Human Rights Watch, Civilians Must Not Be Used to Shield Homes Against Military Attacks (Nov. 22, 2006), available at http://hrw.org/english/docs/2006/11/22/isrlpa14652_txt.htm (on file with the *Columbia Law Review*) (condemning Palestinian uses of civilian human shields).

125. See Third Geneva Convention, supra note 52, art. 4(A)(2). These requirements date back far beyond the Geneva Conventions and are found, for instance, in the Brussels Declaration of 1874 and the Hague Conventions of 1899 and 1907. See Mallison & Mallison, supra note 56, at 44–45.

3. *Incentives Arguments.* — With these reciprocal duties to protect civilians in mind, a reasonable care approach to detention could reinforce incentives to comply with the law of war and to avoid putting innocents in greater danger. Assigning all legal responsibility for erroneous detentions to the detaining state arguably increases opposing parties' incentives to blend military forces in with civilians.¹²⁶

The obligation to mark one's soldiers as such requires those soldiers to assume some greater risk of attack, but it also reduces the risk to civilians. As a disincentive to breach these duties to distinguish soldiers from civilians, the law of war is often interpreted to deny prisoner of war privileges and protections to those fighters who do breach.¹²⁷ That is one reason the United States refused to ratify Protocol I, which would provide prisoner of war privileges to irregular forces and guerrilla fighters who, like many terrorists, often do not distinguish themselves from civilians. As this U.S. government position was explained in 1987:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war [Its] provision[s] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.¹²⁸

Though it is unrealistic to suppose that a clearer and more robust legal framework, no matter what it says, would significantly modulate al Qaida members' behavior, a reasonable care approach to detention that shifted some legal responsibility for erroneous detentions to those parties who hide their military forces among local civilian populations might increase the political costs to terrorist networks (or at least those forces allied with them) that reject a duty to distinguish military personnel from

126. For an excellent analysis of such incentive concerns, see generally Derek Jinks, *Protective Parity and the Law of War*, 79 *Notre Dame L. Rev.* 1493 (2004) (arguing that individualized approach, more than protective status categories, would encourage fighters to distinguish themselves from civilian population).

127. See Mallison & Mallison, *supra* note 56, at 57–58 (“The purpose of [the requirement that arms be carried openly] is to prevent irregulars, at the risk of forfeiting their privileged status as prisoners of war upon capture, from perfidiously misleading the enemy by concealing their own identity.”); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 *Chi. J. Int'l L.* 493, 510 (2003) (describing courts' tendency to adopt view that distinguishing oneself from civilian population is requirement for prisoner of war privileges); Tori Pfanner, *Military Uniforms and the Law of War*, 86 *Int'l Rev. Red Cross* 93, 119 (2004) (“Fighters, who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy.” (quoting Abraham Sofaer, 2 *Am. U. J. Int'l L. & Pol'y* 415, 466 (1987))).

128. Message to the Senate Transmitting the Protocol, 23 *Weekly Comp. Pres. Doc.* 91, 92 (Jan. 29, 1987); see also Editorial, *Denied: A Shield for Terrorists*, *N.Y. Times*, Feb. 17, 1987, at A22 (expressing support for Reagan Administration's position).

civilians. A reasonable care approach similar to that of targeting—an approach that recognizes that the reasonableness of a state’s screening practices depends in part on the actions by the other side—might also shape public opinion (both globally and locally) toward counterterrorism operations in ways that relieve states from some condemnation for erroneous detentions, and therefore reduce terrorist behavior that is likely to induce such errors.

Such incentive arguments rely critically on the assumption that the legal regime affects the cost-benefit calculus of terrorists.¹²⁹ This is a questionable assumption with respect to many state actors, let alone terrorist organizations, which usually seek to overturn rather than comply with legal order. But to the extent that legal rules shape public expectations, they might have marginal but important effects on political pressures facing states combating terrorist networks—pressures that are explored in the following Part.

III. STANDARDS OF CERTAINTY FOR DETENTIONS: REFINING THE TARGETING APPROACH

Having analogized detention decisions to targeting and proposed targeting law as a possible approach for regulating detentions, this Part explores more thoroughly how such a regime would work and offers a resulting critique of Bush Administration policy and its reforms to date. Three key differences between detention and targeting emerge that require refinement of this approach or yield insights for how it should be applied. First, detention has a temporal dimension that targeting lacks; detention errors play out over time—and can be reversed. Second, some practical opportunities to resolve doubt in detention contexts do not exist in targeting; in detention contexts a state may be more capable of building and using adjudication mechanisms that generate highly accurate results without severely undermining security and military effectiveness. Finally, political factors and other nonlegal incentives are arrayed differently in the detention context than they are in targeting. As a result, targeting rules may be more effectively self-enforcing than would be similar detention rules. Each of these refinements offers a critique of existing U.S. government practice and ways to improve it.

At first blush, the “reasonable care” principles of targeting law may seem to justify Bush Administration detention policies and practices up to the recent Supreme Court decision in *Boumediene v. Bush*, which held that constitutional habeas corpus rights apply to detainees held at Guantanamo.¹³⁰ This justification might especially be directed at Guantanamo, where, following the Supreme Court’s June 2004 decision in *Hamdi*,¹³¹ the Defense Department established formal tribunals to

129. See *infra* notes 215–216 and accompanying text.

130. 128 S. Ct. 2229, 2262 (2008).

131. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

reconfirm the combatant status of each detainee (or, one might say, reverify that each is a military target).¹³² Three-officer tribunals were required to examine each detainee's case based on all reasonably available information, including information from U.S. military and intelligence agencies as well as from the detainee's home country.¹³³ The officer panels were instructed to base their determinations on a preponderance of evidence standard—a curious instruction because, as this paper argues, the law of war is not clear on this issue.¹³⁴ Several dozen of the nearly 600 Guantanamo detainees at that time were freed as a result of this revalidation process. The Defense Department also established and continues to conduct annual review board proceedings, akin to parole boards, again handled by three-officer tribunals reviewing all available information, that reassess the continuing threat posed by each detainee, which could presumably include a reassessment of the detainee's status as an enemy combatant (i.e., military target).¹³⁵ Neither process provides detainees access to lawyers (though detainees are assigned military officer “personal representatives” to help them present their cases¹³⁶). These tribunals supplemented prior screening procedures near the point of capture in Afghanistan or elsewhere in the global battle against al Qaida. In the course of these review processes, military adjudicators are required to examine all information available from military and intelligence

132. See News Release 651-04, Dep't of Def., Combatant Status Review Tribunal Order Issued (July 7, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html> (on file with the *Columbia Law Review*) (announcing formation of Combatant Status Review Tribunal).

133. See Memorandum of Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal 1-2 (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (on file with the *Columbia Law Review*) [hereinafter Wolfowitz Memorandum].

134. See *id.* at 3 (requiring preponderance of evidence standard). As far as I can tell, there exists no public explanation for why this standard was selected, though it was probably drawn directly from Department of Defense regulations governing similar tribunals established pursuant to Article 5 of the Third Geneva Convention. See Headquarters of Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997). Article 5 of the Third Geneva Convention provides that “[s]hould any doubt arise as to whether persons, having committed a belligerent act . . . [are entitled to prisoner-of-war status], such persons shall enjoy [such protections] until such time as their status has been determined by a competent tribunal.” Third Geneva Convention, *supra* note 52, art. 5.

135. See Memorandum of Dep't of Def., Designated Civilian Official Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, encl. 3, at 4 (Sept. 14, 2004), available at <http://www.defense.gov/news/Sep2004/d20040914adminreview.pdf> (on file with the *Columbia Law Review*) (“The ARB will make its assessment as to whether there is a reason to believe that an enemy combatant continues to pose a threat to the United States or its allies following review of all reasonably available relevant information . . .”).

136. See Wolfowitz Memorandum, *supra* note 133, at 1.

sources, just as military commanders planning targeting operations would do.¹³⁷

Congress implicitly endorsed these Guantanamo review procedures in limiting the scope of federal court jurisdiction to review them in the 2005 Detainee Treatment Act¹³⁸ and the 2006 Military Commissions Act.¹³⁹ In *Boumediene v. Bush*, however, the Supreme Court held that constitutional habeas corpus rights apply to Guantanamo detainees and that the CSRTs combined with statutorily restricted judicial review are inadequate substitutes for those rights.¹⁴⁰ As explained further below, the Court did not articulate clearly a set of substantive and procedural protections that would pass muster.¹⁴¹

Outside Guantanamo, the processes by which the Defense Department reviews detention decisions regarding individuals in U.S. military control are less formal, but seem—again, at first blush—to conform to a “reasonable care” judgment similar to that found in the targeting context. In Afghanistan, for example, panels of U.S. military officials review the initial decision that a detained individual is an enemy combatant. This review is based on all available and relevant information, and the determination is reassessed annually.¹⁴²

Besides these military detention programs for enemy combatants, in September 2006, President Bush also publicly disclosed the existence of a CIA-run detention and interrogation program for “high-ranking” detainees, such as al Qaida masterminds Khalid Sheik Mohammed, Abu Zubaida, and Ramzi Bin al-Shibh.¹⁴³ But the government has confirmed few details of the program beyond its mere existence. In particular, no information is publicly available on how CIA detainees are selected and

137. See Committee Against Torture Report, *supra* note 21, at 53–54 (noting requirement that tribunal recorder and detainee’s personal representative search all government files for evidence that detainee should not be designated as enemy combatant and report findings to tribunal).

138. See Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741–43 (2005) (codified at 10 U.S.C. § 801 (2006)).

139. See Pub. L. No. 109-366, § 950g, 120 Stat. 2600, 2622 (2006) (codified at 10 U.S.C. § 950g).

140. See 128 S. Ct. 2229, 2262, 2270–74 (2008).

141. See *infra* notes 185–186 and accompanying text.

142. See Committee Against Torture Report, *supra* note 21, at 57 (noting right of detainees in Afghanistan to annual review procedure, with first taking place within ninety days of detainment); Declaration of Colonel James W. Gray ¶¶ 11–13, *Al Maqaleh v. Gates*, No. 06-CV-01669 (JDB) (D.D.C. Mar. 3, 2007) (discussing review process for detainees in Afghanistan); Declaration of Colonel Rose M. Miller ¶¶ 10–12, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C. Nov. 19, 2006) (discussing detainment procedures and review process for enemy combatants detained in Afghanistan).

143. See President George W. Bush, President Discusses Creation of Military Commissions To Try Suspected Terrorists (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (on file with the *Columbia Law Review*) (discussing U.S. response to September 11, 2001 attacks).

screened, and through what procedural mechanisms their cases are reviewed.

Putting aside the opaque CIA program, how the U.S. military conducts its combatant-verification analysis at Guantanamo and elsewhere bears strong initial resemblance to the way it would conduct verification of targets. As Deputy Secretary of Defense Gordon England explained in announcing the establishment of the Combatant Status Review Tribunal Process: “[W]e’ll look at all the data dealing with their classification as an enemy combatant, . . . [a]nd the standard . . . will be reasonableness. It will be what would a reasonable person conclude.”¹⁴⁴ Compare this with the U.S. Defense Department’s law of war analysis of its Gulf War air campaign, which states:

An attacker operating in the fog of war may make decisions that will lead to innocent civilians’ death In reviewing an incident such as the attack of the [al Firdos bunker], the law of war recognizes the difficulty of decision making amid the confusion of war. *Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.*¹⁴⁵

Or compare it to the reservations to Protocol I taken by many European and other U.S. allies, which stress that targeters’ tough judgments must be assessed on the basis of the information reasonably available to them at the time of the strike.¹⁴⁶

144. England, Briefing, *supra* note 7.

145. Dep’t of Def., Persian Gulf War, *supra* note 57, at 616 (emphasis added).

146. See, e.g., United Kingdom Reservations/Declarations to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, July 2, 2002, available at <http://www.icrc.org/IHL.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (on file with the *Columbia Law Review*) (“Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.”); Australia Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, June 21, 1991, available at <http://www.icrc.org/ihl.nsf/NORM/10312B4E9047086EC1256402003FB253?OpenDocument> (on file with the *Columbia Law Review*) (“[M]ilitary commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time.”); Germany Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 para. 4, Feb. 14, 1991, available at <http://www.icrc.org/ihl.nsf/NORM/3F4D8706B6B7EA40C1256402003FB3C7?OpenDocument> (on file with the *Columbia Law Review*) (“[T]he decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.”); Canada Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Nov. 20, 1990, available at <http://www.icrc.org/ihl.nsf/NORM/172FFEC04ADC80F2C1256402003FB314?OpenDocument> (on file with the *Columbia Law Review*) (“[M]ilitary

Superficially, the close resemblance of detainee review procedures to targeting practices seems to offer strong support for how the U.S. government currently handles detentions of suspected terrorist network members. This approach arguably balances military interests, including the need to keep dangerous fighters off the global battlefield and reluctance to bog down scarce military resources in litigation, with humanitarian interests in avoiding erroneous detentions of civilians. If this were about attacking the individuals in custody from a distance rather than about detaining them, the confidence level these procedures achieved would often justify the attack.

Probing deeper, however, several important differences between targeting and detention emerge. The law should account for these differences. Exploring each key difference between targeting and detention casts doubt on whether Bush Administration practices to date would satisfy a properly constituted reasonableness standard. It also yields insights for how the law should develop and how the reasonableness approach of targeting might be improved to better balance military and humanitarian (liberty) interests in the detention context.

A. *The Temporal Dimension of Detention*

A key difference between detention and targeting relates to the instantaneity and irreversibility of most military targeting: Whereas targeting decisions are often momentary, detention decisions play out over time and can be undone. There is a temporal dimension to detention that does not exist in targeting.

1. *Detention Injuries over Time.* — As detentions move through time, the military benefits to the detaining power of keeping an enemy fighter off the battlefield and the injury to an erroneously detained civilian both

commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and such decisions cannot be judged on the basis of information which has subsequently come to light.”); New Zealand Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 para. 2, Feb. 8, 1988, available at <http://www.icrc.org/IHL.nsf/d49c744360dad07c1256314002ee738/8fec3861203abe21c1256402003fb53b!OpenDocument> (on file with the *Columbia Law Review*) (“In relation to Articles 51 to 58 inclusive, . . . military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.”); Netherlands Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 para. 6, June 26, 1987, available at <http://www.icrc.org/ihl.nsf/NORM/E6EF925C67966E90C1256402003FB532?OpenDocument> (on file with the *Columbia Law Review*) [hereinafter Netherlands Reservation] (“[M]ilitary commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.”).

continue to accrue. But available information about a detained individual may change over time. Interrogation of detainees thought to be enemy fighters may yield identifying or alibi information about them or others in custody, and detaining authorities may otherwise learn new intelligence information about those in their control. In other words, the ignorance surrounding detentions may dissipate as time elapses, while injury accumulates.¹⁴⁷

This difference from targeting might seem to distinguish the nature of the problems so fundamentally as to render the targeting analogy inapposite. But adding a time dimension to a targeting-type reasonable care analysis rescues the analogy. Detention should be thought of not as a single decision—hold or release—but as an initial decision to detain and then a perpetual series of decisions to continue to hold. At any given time, the continued detention of an individual would reflect the judgment by the detaining power that the individual was—and remains, based on information available at any given time—an enemy fighter. As time passes, the detaining power has a continuing responsibility to reevaluate periodically an enemy combatant determination.

But assuming that the standard of certainty remains reasonable due care played out over time, what level of accuracy would a detainee reasonably be due? And how, if at all, would that expected level of certainty change over time? One approach would be to say that the standard of certainty remains constant, and as new information comes to light or the picture of a detained individual's true deeds, affiliations, and intentions becomes clearer, the detaining power should reexamine under the same standard its confidence in its combatant status determination. Under the targeting analogy, this would be akin to a series of airstrike sorties against what is believed to be a military command post. After attacking the site on one day, the attacker could try again the following day, having taken care to assess any additional information about the target it acquired in the meantime, such as new satellite images. The same substantive rule is essentially applied again and again, but as information improves the attacker might be obligated to avoid the target due to diminished confidence in its military character. In the same way, individual detentions could be subjected to periodic review to validate the underlying justification: that the individual is believed to be a member of the enemy fighting force.

In Guantanamo and Afghanistan, the U.S. military review processes do account for the temporal dimension of detention decisions to some extent, repeating periodically the combatant identification analysis. Each detainee's case is reassessed at least once per year to determine whether his detention remains justified.¹⁴⁸ During 2005, for example, about 460

147. In some cases doubt about a detainee may rise as time goes on, for instance if identifying information is later discredited.

148. See Rear Admiral James McGarrah, Dir., Office for the Admin. Review of the Det. of Enemy Combatants, Defense Department Special Briefing on Administrative

Guantanamo detainee cases were reviewed and fourteen more detainees (not counting the dozens already released) were declared eligible for release because the government no longer believed they posed a significant threat.¹⁴⁹ In other words, judgment based on what the government argues is reasonably available information is exercised not only initially but also periodically thereafter.

Such repetitious review is one way to deal with the indefinite—though almost certainly long-term—nature of the conflict with al Qaeda.¹⁵⁰ The corresponding likelihood of uncertain but likely long duration of individual suspects' detention is one of the most troubling aspects for those skeptical or critical of the U.S. government's approach to counterterrorism,¹⁵¹ and periodic review helps address those concerns.¹⁵²

2. *Demand an Escalating Standard of Certainty.* — The experience at Guantanamo and elsewhere, however, demonstrates that the temporal dimension interplays differently with detention than with targeting. Several things happen the longer an individual remains detained. First, the humanitarian costs—to the detained individual, his family, and his community—rise. Even a short-term detention, of course, can inflict devastating physical and mental trauma; sadly, though, widespread trauma is inevita-

Review Boards for Detainees at Guantanamo Bay, Cuba (July 8, 2005), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3171> (on file with the *Columbia Law Review*) [hereinafter Def. Dep't Special Briefing] (“[O]ur Administrative Review Board process ensures that each detainee’s case is heard at least annually to assess whether or not the detainee continues to pose a threat to the United States . . . or whether there are other reasons that might warrant continued detention.”).

149. Dep't of Def., Administrative Review Board Summary, available at <http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf> (last visited Sept. 7, 2008) (on file with the *Columbia Law Review*).

150. This repetitious targeting-like analysis also resembles the statutory approach the Israeli government adopted for detaining certain suspected terrorists and militants as enemy combatants. Under its Incarceration of Unlawful Combatants Law of 2002, the Israeli military must petition a court to detain a member of designated enemy groups by showing “reasonable cause to believe that a person being held . . . is an unlawful combatant and that his release will harm State security,” and then similarly justifying his continued detention to the judge every six months. See Incarceration of Unlawful Combatants Law, 5762–2002, 32 *Isr. Y.B. on Hum. Rts.*, 389, 389–92 (2002). The Israeli Supreme Court recently upheld this statute in *CrimA 6659/06 Anonymous v. Israel* [2007] 48 (*Isr.*), translation available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (on file with the *Columbia Law Review*).

151. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (“[G]iven that the consequences of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.”); *Brooks*, *supra* note 22, at 725–29 (2004) (“As it stands, . . . the indefinite nature of the conflict means that these detainees may remain in detention indefinitely, neither charged nor released, with no access to counsel and no international or judicial monitoring of conditions.”).

152. See *Bradley & Goldsmith*, *supra* note 34, at 2123–27 (proposing that individualized assessments, based on each “detainee’s past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile,” would ameliorate uncertain duration of detention).

ble during wartime. Detention involves the loss of autonomy, privacy, and time, as well as the psychological strain of submission to military forces and uncertainty about one's fate.¹⁵³ In one of the most sharply critical federal court rulings against the U.S. government in a war on terrorism case to date, District Court Judge Joyce Hens Green remarked:

[T]he government has conceded that the war could last several generations, thereby making it possible, if not likely, that "enemy combatants" will be subject to terms of life imprisonment at Guantanamo Bay [T]he uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.¹⁵⁴

As time elapses, not only do humanitarian costs of erroneous detention mount, but we drift farther from the type of military decisionmaking that typically warrants deference under the law of war in order to protect military effectiveness (and in cases like those at Guantanamo, we move geographically farther from the battlefield, too). At the moment of capture, military necessities dominate: Amid imperfect information, engaged forces need latitude to combat and destroy or capture those they believe are threatening them. The criminal justice standard of "beyond reasonable doubt" is sometimes described as beyond doubt that would make one hesitate.¹⁵⁵ But a soldier in the field often cannot afford to hesitate without putting himself and those around him in mortal danger.

Yet information about a detained individual should generally improve as time elapses,¹⁵⁶ and as it does we can also reasonably expect more careful review without hampering military operations. In *Hamdi*,

153. Upon the release of twenty Pakistani detainees from Guantanamo, a Pakistani official remarked: "Their lives have been destroyed. Their families have gone through psychological trauma, since they were not terrorists; they were just low-level Taliban fighters." Charlie Savage, *US Releases 20 Detainees, Transfers 20 More to Cuba*, *Boston Globe*, Nov. 25, 2003, at A1. The rate at which the humanitarian costs rise—in a sense, the marginal cost of another temporal increment of detention—arguably declines over time, since the early stages of detention may be the most jarring. But certainly the humanitarian costs of detention escalate when one moves from a short-term to an indefinite detention in a war unlikely to end anytime soon. Consider the report by British psychologists and psychiatrists regarding damage to the mental health of British prisoners detained under the United Kingdom's 2001 antiterrorism legislation, in which they opine that "[t]he indefinite nature of detention is a major factor in their [mental] deterioration." Ian Robbins et al., *The Psychiatric Problems of Detainees Under the 2001 Anti-Terrorism Crime and Security Act 3* (2004), available at <http://www.statewatch.org/news/2004/nov/belmarsh-mh.pdf> (on file with the *Columbia Law Review*).

154. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465–66 (D.D.C. 2005), vacated sub nom. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), rev'd, 128 S. Ct. 2229.

155. See Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979, 982 (1993).

156. Although time generally increases certainty by allowing for more thorough deliberation, some factors push the other way. For example, the memory of witnesses would probably degrade over time.

Justice O'Connor expressly rejected the government's position that burdensome procedural and independent review requirements would hamper military operations and decisionmaking once a detainee was removed from the immediate combat environment,¹⁵⁷ an observation that turns in part on temporal proximity to combat. The law of war permits military decisionmakers substantial leeway to balance competing demands—humanitarian, political, tactical—without second-guessing decisions that seem reasonable at the time because otherwise, effective military operations would grind to a halt. But in the case of long-term detention, combat operations with respect to a particular individual have halted. This suggests that at least some of the military necessities that weigh against humanitarian protection at the initial moment of capture decline over time.¹⁵⁸

As time passes, then, the balance between humanitarian costs and military necessities that the law of war seeks to mediate tips toward the humanitarian interests. The care due in screening true terrorists from false suspects would rise accordingly. This requires a fluid analysis, adjusting the required certitude of detainees' identities as combatants or noncombatants to justify detention, just as one would adjust the required certitude to justify striking military targets, depending on the circumstances.

The legal framework governing detention of terrorist network members should account for this shifting weight by gradually increasing the level of confidence necessary to continue to hold someone. The reasonableness standard of certainty to be exercised in screening terrorists from nonterrorists should rise to account for changes in the military-necessity-versus-liberty balance. The fluid balancing logic could be taken too far; constantly tailoring new combatant determination mechanisms and standards to fit the many different circumstances of the fight against al Qaida would not be manageable. But, for example, bifurcating the system of review of enemy combatant detention decisions along the temporal dimension would at least better balance military and humanitarian interests. Initial detention decisions, including those made in a combat zone, could be conducted as they are now, using a sort of "best judgment" or "preponderance of evidence" analysis based on available intelligence and military reports. Then, after some period of time—and there will be many views as to what is an appropriate duration, so let us say for pur-

157. *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion) ("The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized."); see also *Boumediene*, 128 S. Ct. at 2237 ("[T]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction [to hear detainees' claims].").

158. Cf. *Boumediene*, 128 S. Ct. at 2247 (finding that Suspension Clause alongside writ of habeas corpus functions as safeguard of detainee rights).

poses of argument six months¹⁵⁹—a substantially stricter review would be conducted. This latter review would be designed to minimize further the likelihood of erroneous continued detentions by employing a high standard of adjudication, perhaps “clear and convincing” or even something approaching “beyond reasonable doubt.”

Contrast the different approaches that responsible militaries take in verifying targets in the immediate heat of battle versus in the planning of campaigns ahead of time. As Michael Schmitt notes, “Obviously, the more time-sensitive a target, the less the opportunity to [assess] the target or plan the attack, and the fewer the attack options (systems, tactics, etc.) that will be available.”¹⁶⁰ A soldier or pilot who comes under fire will fire back without elaborate and time-consuming deliberations. On the other hand, military planners plotting attacks in advance will and must conduct more rigorous analysis because they can do so without subjecting themselves to undue risks. For illustration, consider this description by the International Criminal Court prosecutor of British targeting rules and procedures, in the context of dismissing complaints of indiscriminate attacks in Iraq:

[L]ists of potential targets were identified in advance; commanders had legal advice available to them at all times and were aware of the need to comply with international humanitarian law, including the principles of proportionality; detailed computer modeling was used in assessing targets; political, legal and military oversight was established for target approval; and real-time targeting information, including collateral damage assessment, was passed back to headquarters.¹⁶¹

Such elaborate precautions for checking and rechecking are possible only when belligerents have the luxury of time and resources to conduct them. In the detention context, it is similarly more reasonable to expect highly exacting scrutiny of detention cases as time passes. We can expect both better information about the suspected terrorist through interrogation and investigation, and mitigation of combat or operational exigencies.

In other words, context, including the available time for accurately and precisely attacking suspected military objects, helps determine the appropriate, or “reasonable,” expected level of certainty in targeting law, and it can do the same in detention law. The law and practice of military targeting demands that belligerents, when they have the luxury of time, adjust their procedures for verifying the nature of possible targets. De-

159. As mentioned earlier, the Fourth Geneva Convention, in laying out rules for internment of those believed to pose security threats in occupied territory, allows for internment of individuals for “imperative reasons of security” but requires review of individual detentions on those grounds at least every six months. See Fourth Geneva Convention, *supra* note 49, art. 78.

160. Schmitt, *supra* note 84, at 451.

161. Moreno-Ocampo Memo, *supra* note 69, at 6.

tion law should incorporate the temporal dimension in this way as well.

Whatever standard of certainty applies initially, subsequent reviews of individual detentions can serve as corrective mechanisms for prior false positives. Repetitious review resembles a series of targeting decisions repeated over time.¹⁶² And, as I also mentioned earlier, a key difference between detention and many forms of military targeting is that detention errors can be undone.¹⁶³ The availability of corrective mechanisms, however, means that the standards governing a series of decisions whether to continue to detain an individual might be thought of in combination rather than in isolation, and this creates additional opportunities for using standards of certainty to balance humanitarian and security interests. A moment ago I discussed a system in which initial detention decisions would require a preponderance of evidence substantiating enemy affiliation followed six months later by a stricter clear-and-convincing review. Suppose now that the later standard were raised to something like “beyond doubt.” Then it might be reasonable to lower the initial decisionmaking standard, maybe to a “some evidence” standard, because the overall balance of humanitarian and security interests across time could be held in place. The better corrective systems operate, the more leeway we might allow the state in its initial decisionmaking.¹⁶⁴ On the other hand, if experience indicated that later review procedures were ineffective at correcting erroneous detentions, a stricter initial review would be warranted to remedy the imbalance.

The key point is not that the temporal dimension of detention dictates a particular standard of certainty. Rather, if the logic underlying targeting rules is to be applied seriously to detention, time factors into the reasonableness inquiry in a number of ways. Most obviously, security and military burdens of more exacting review decline, while humanitarian costs accumulate and at some point may rise substantially. The law ought to require repetitious review to recalibrate this balance. An escalating standard of certainty is one way to do so, intended generally toward achieving a balance at any given moment. Or, the multiple reviews and opportunities for correction can be viewed systemically across time, intended to achieve a balance across that same timeframe.

162. See *supra* note 150 and accompanying text (describing periodic review procedures in Israel and U.S.).

163. See *supra* note 111. Correcting an erroneous detention by releasing the individual does not, however, by itself “undo” the harm already suffered. Some have proposed monetary compensation schemes as remedies for that harm. See, e.g., Ackerman, *supra* note 34, at 51–54 (“Public morality requires . . . a substantial money payment for each day spent in jail . . .”).

164. Cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008) (“Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.”).

B. *Alternative Adjudication Mechanisms*

The first critique relates to the second: The reasonableness of adjudications labeling an individual a terrorist network member or an innocent civilian should take into account whether more accurate alternative adjudication mechanisms are available.

1. *Procedural Versus Substantive Standards.* — In the targeting context, the law of war leaves decisionmaking to the reasonable judgment of military operators not only because a rule of reasonableness needs to balance military effectiveness with humanitarian interests, but also because the operators themselves are generally best positioned to make targeting judgments through unilateral analysis of available data. During military combat, many targeting decisions must be made on the spot or under tight time constraints. Opportunities to communicate with the prospective target without ruining the element of surprise or putting oneself in mortal danger arise rarely. By contrast, in nonmilitary detention contexts—such as criminal prosecution or civil confinement—-independent (e.g., judicial) scrutiny coupled with adversarial process is considered more likely to generate not just fairer but also more accurate results.¹⁶⁵ In thinking about the appropriate standard of certainty to be exercised, it is important to consider available and practical mechanisms for applying it. Conversely, consideration of available mechanisms and the degree of certainty they may be capable of generating should inform the analysis of viable standards of certainty.

Here the procedural and substantive aspects of the issue intertwine. Does it make sense, one might ask, to consider establishing additional procedural protections for detention decisions without first considering what standard of certainty those protections are designed to enforce? Many legal analyses of the fight against terrorism and the application of international or constitutional law have tended to focus on the procedu-

165. See Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L. Rev. 1007, 1008 (“[O]ur system of justice is founded on the presumption that the truth is more likely to emerge from the contest between zealous advocates.”). This argument formed the basis of opposition to section 1005(e) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified at 10 U.S.C. § 801 (2006)), restricting habeas corpus jurisdiction at Guantanamo. See, e.g., P. Sabin Willett, *Op-Ed., Detainees Deserve Court Trials*, Wash. Post, Nov. 14, 2005, at 21 (“[Courts] are slow, but they are not beholden to the defense secretary, and in the end they get it right.”). But others observe that adversarial process may sometimes suppress truthfinding. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1036 (1975) (“[M]any of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.”); Frank J. Macciarola, *Finding the Truth in an American Criminal Trial: Some Observations*, 5 Cardozo J. Int’l & Comp. L. 97, 98 (1997) (observing that American criminal justice system often subordinates goal of determining truth to other values).

ral dynamics rather than take on the underlying substantive standard-of-certainty question.¹⁶⁶

2. *The Need for Comparative Analysis.* — The substantive standard of certainty issue, however, cannot be completely divorced analytically from the procedural issues, because the substantive reasonableness of decision-making depends in part on whether alternative decisionmaking schemes are available that better balance military and humanitarian (including liberty) interests. This point is similar to one made by Justice O'Connor in *Hamdi*, though there it was part of a classic procedural due process analysis. In weighing what procedural guarantees were due a citizen-detainee, she noted:

“[T]he risk of an erroneous deprivation” of a detainee’s liberty interest is unacceptably high under the Government’s proposed rule, while some of the “additional or substitute procedural safeguards” suggested by the District Court are unwarranted in light of their limited “probable value” and the burdens they may impose on the military in such cases.¹⁶⁷

The Court similarly noted in *Boumediene*:

Although we hold that the [Detainee Treatment Act] is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent Certain accommodations can be made to reduce the burden habeas

166. See generally Martinez, *supra* note 5 (detailing how most court decisions challenging “war on terror” policies, including detention, have focused on procedural claims rather than substantive rights). This is true especially in the discussion of new administrative detention proposals for handling suspected terrorists. See, e.g., Wittes, *supra* note 44, at 151–82 (describing difficulties of designing administrative detention scheme); Goldsmith & Katyal, *supra* note 44 (proposing system of preventive detention overseen by national security court composed of life-tenured federal judges). See generally Waxman, *Administrative Detention*, *supra* note 44 (arguing that almost exclusive focus in administrative detention debates on procedural issues is misguided).

In their study of legal dilemmas posed by the fight against transnational terrorist networks, for example, Philip Heymann and Juliette Kayyem conclude that suspected al Qaida detainees should be accorded formal hearings to determine whether detention is justified, but only partially address the standard-of-certainty question. They articulate different sets of procedural protections for various categories of captured terror suspects depending on whether the individual is a United States person and whether he is captured in the United States, in a zone of active combat, or outside the United States but not in a zone of active combat. Except in zones of active combat, Heymann and Kayyem urge a criminal law approach, relying on a probable cause standard for capture and a beyond reasonable doubt standard for long-term detention. But they analyze the procedural aspects of these systems, not the substantive standards. On more traditional battlefields—zones of active combat, like Afghanistan—they would ascribe the least robust procedural protections. There, they argue, a suspected terrorist is entitled to a tribunal hearing to determine if he is engaged or actively supporting those engaged in hostilities against the United States. But they do not articulate a specific standard to be applied. See Philip B. Heymann & Juliette N. Kayyem, *Protecting Liberty in an Age of Terror* 41–52 (2005).

167. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–33 (2004) (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

corpus proceedings will place on the military without impermissibly diluting the protections of the writ.¹⁶⁸

In other words, the level of error we consider morally and practically acceptable depends in part on whether, consistent with other priorities, more accurate results are even possible, and this requires looking at alternative ways to adjudicate individual cases.¹⁶⁹

Of course, to say that a scheme “better” balances competing interests presumes some value judgment of their relative importance. In the criminal law context, for example, American law protects individual liberty through strict rules of law enforcement and guaranteed rights to procedural safeguards. These mechanisms are designed not only to get at the truth of one’s suspected guilt but also to minimize the likelihood of “false positives” while constraining state powers prone to abuse.¹⁷⁰ Blackstone’s maxim that it is better to set free ten guilty criminals than to convict one innocent person reflects a Western legal tradition premised on the intolerance of mistaken conviction.¹⁷¹ But the dangers of “false negatives” may be much higher in fighting al Qaida and the Taliban than in the criminal justice context, especially when U.S. forces remain actively engaged in combat and when even a small number of terrorists are capable of massive-scale attacks. The U.S. government has publicly highlighted the risks that the existing review processes create of erroneously freeing dangerous fighters who hoodwinked reviewers, noting that several dozen released Guantanamo detainees are strongly believed to have gone back to fighting the United States and its coalition partners.¹⁷² Such risks are valid military considerations to weigh in setting the right kind of review. But harmonizing these review processes with the targeting law approach also requires balancing risks of erroneously freeing fighters against risks of erroneously detaining nonfighters.

168. *Boumediene*, 128 S. Ct. at 2276.

169. Here, especially, the definitional issue identified earlier, see *supra* notes 51–54 and accompanying text, comes into play: Some notions of “enemy combatant”—or any category subject to detention—will be more susceptible to proof and certainty by the state than others. Certain objective factors that may be relevant, like possession of weapons or declared allegiance to a group, will be easier to validate and assess with confidence than others, like intentions or doctrinal beliefs.

170. See Macciarola, *supra* note 165.

171. For some, the ten-to-one ratio fails to go far enough in protecting innocents. Treatises on American criminal law have also invoked twenty-to-one and even ninety-nine-to-one ratios in explaining this principle. See Newman, *supra* note 155, at 980–81.

172. See U.S. Dep’t of Def., JTF-GTMO Information on Detainees 4 (Mar. 4, 2005), available at <http://www.defenselink.mil/news/Mar2005/d20050304info.pdf> (on file with the *Columbia Law Review*). Recently the Defense Department released a report stating: “Our reports indicate that at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention.” U.S. Dep’t of Def., *Former Guantanamo Detainees Who Have Returned to the Fight* (July 12, 2007), available at http://www.nefafoundation.org/miscellaneous/FeaturedDocs/DOD_fmGitmo.pdf (on file with the *Columbia Law Review*); see also Alissa Rubin, *Former Guantanamo Detainee Tied to Attack*, N.Y. Times, May 8, 2008, at A8.

Let us ask the question differently, then, and from a perspective initially generous to security interests: Consistent with whatever level of assurance that seems appropriate from a security standpoint that terrorists are not inadvertently released, could the state establish procedural protections—such as a right to a hearing, represented by counsel, before a judicial magistrate—that would be expected to generate more accurate screening of true enemy fighters from erroneously held civilians? If the answer is yes, then the next question is at what cost: Is it possible to provide such procedural protections without weighing down U.S. military forces and other counterterrorism agencies with burdens that interfere with their other missions? Would such procedures endanger U.S. forces, such as by disclosing sensitive intelligence? Would the resource needs of such processes sap the military and undermine its effectiveness, or would it be practical to conduct these processes on a large scale?¹⁷³

Recall that these are the types of questions demanded by targeting law, which requires that the attacker conduct a comparative analysis and choose the available means and method that minimize, consistent with certain other concerns, the likelihood of incidental injury to civilians.¹⁷⁴

From a legal point of view, [an attacker] needs not only to assess what feasible precautions can be taken to minimize incidental loss, but also to make a comparison between different tactics or weapons so as to be able to choose the least damaging course of action compatible with military success.¹⁷⁵

173. Consider, in that regard, this observation by the Supreme Court in *Johnson v. Eisentrager*, in holding that German prisoners of war convicted of war crimes by a military commission could not seek federal habeas corpus review:

Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

339 U.S. 763, 779 (1950). This view stands in stark contrast to a view of the Israeli Supreme Court described in *supra* note 150.

174. In this way, targeting law may be more protective than constitutional due process law. Cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2286 (2008) (Roberts, C.J., dissenting) (“The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures—coupled with the judicial review specified by the DTA—provide the ‘basic process’ *Hamdi* said the Constitution affords” (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion))).

175. Rogers, *supra* note 85, at 177; cf. *Netherlands Reservation*, *supra* note 146, para. 2 (“It is the understanding of the Government of the Kingdom of the Netherlands that the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”).

Or, put another way, “[t]he technology available to an attacker determines whether an action is feasible, reasonably expected, or apparent, as well as when choice is possible. In other words, belligerents bear different legal burdens of care determined by the precision assets they possess”¹⁷⁶ In practice and interpretation, what we might call this “state of the art” principle, like the other requirements described above, allows the attacker to weigh costs to himself in selecting among his arsenal, to include weighing added operational burdens and perhaps, though more controversially, additional risk exposure to his own forces. But this means the reasonableness of decisionmaking must be judged in relation to whether greater certainty is possible through alternative decisionmaking mechanisms and at what cost.

As detention is to targeting, screening processes are to weapons for attacking targets. Just as a party attacking targets is obligated to choose weapons and methods likely to reduce unintended civilian injury as much as possible, so a party detaining combatants should be obligated to establish processes designed to reduce mistaken detentions as much as possible without undermining military success.

This encompasses two temporal aspects. First, with respect to individual detentions, as time and distance from the heat of battle increase, so should the rigor with which discrimination between combatants and noncombatants is conducted, because greater precision at relatively low cost becomes reasonably possible.¹⁷⁷ This added thoroughness might entail additional procedural protections for suspected terrorists, since these accuracy-enhancing procedures become more practical as time elapses.¹⁷⁸ Second, with respect to detentions viewed collectively, as the state accrues experience and better knowledge of past errors and their causes, it is better positioned to adjust and improve procedures to reduce errors further.

In that regard, the answer to the central question of this Article—should the law incorporate a reasonable care standard, similar to the one used in targeting law, to govern detention of suspected terrorists?—may be less about the substantive standard to be applied than about what is reasonable in the context of ongoing military and intelligence operations against terrorist networks.

In contrast to initial detention decisions, it is especially in the arena of continuing, longer-term detention that U.S. government actions seem to come up short when measured against this comparative logic of the law of war. The military review processes at Guantanamo and elsewhere involve heavy efforts to compile and analyze available information to arrive

176. Schmitt, *supra* note 84, at 460.

177. See *supra* notes 156–159 and accompanying text.

178. In a similar way, Richard Posner sees habeas corpus as appropriate for detained terrorist combatants not only as a matter of traditional rights or as a check against executive abuse, but as an accuracy-enhancing mechanism. See Posner, *Not a Suicide Pact*, *supra* note 34, at 60–61.

at judgments as to an individual's status as a member of al Qaida or one of its allies. But the law of war in the targeting context judges the reasonableness of such efforts in relation to other available mechanisms, and this analysis does not appear to have taken place with rigor. The review processes at Guantanamo and elsewhere will be inadequate at least until they are compared to alternatives.

Again, the substantive and procedural aspects of this question merge. The law of targeting dictates that in exercising reasonable precautions, an attacker must choose the means and methods likely to reduce errors.¹⁷⁹ The reasonableness of the resulting errors turns in part on whether the attacker fairly accepted some costs to itself in choosing methods designed to reduce costs to innocent bystanders. In the detention context, one of those methods is to establish and use procedures for assessing an individual's identity, his affiliation with al Qaida, and his claims to the contrary. To the extent that the state could establish procedural safeguards believed likely to reduce erroneous detentions—such as providing detainees with a lawyer and an adversarial hearing¹⁸⁰—the law of targeting would analogically demand that they be used unless the resulting costs and risks outweigh the extra humanitarian benefits.

3. *The Weakness of Hamdi and Boumediene.* — As noted earlier, Justice O'Connor went partway toward harnessing this analysis in *Hamdi*, though there it was done as part of a classic procedural due process analysis. In weighing what procedural guarantees were due a citizen-detainee, she weighed the supposed probative value of proposed procedural mechanisms against their burdens on military effectiveness.¹⁸¹

But Justice O'Connor's analysis failed to take the reasonableness inquiry far enough. Seen through the lens of targeting law, it is questionable whether the detention review processes that the U.S. government consequently adopted would continue to strike the right balance in the future, as circumstances evolve or as the government better understands the causes of past errors that might be alleviated through procedural improvements. Reasoning from targeting law can also help fill some of the procedural and substantive legal gaps that *Boumediene* leaves open.

Justice O'Connor's opinion suggested that due process (and remember that *Hamdi* involved a constitutional analysis, not a law of war analysis) for a U.S. citizen-detainee could be satisfied by the type of military tribunals authorized by U.S. Army regulations for determining the status of enemy detainees who assert prisoner-of-war status under the Geneva

179. See *supra* notes 82–87 and accompanying text.

180. Cf. *United States v. Salerno*, 481 U.S. 739, 751 (1987) (noting that right to counsel and adversarial process mandated in Bail Reform Act were “specifically designed to further the accuracy of [the] determination [of the likelihood of future dangerousness]”).

181. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–35 (2004) (plurality opinion) (applying procedural due process test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Convention.¹⁸² These procedures are also the ones traditionally used by the military in making battlefield decisions as to whether captured individuals are combatants or civilians and to what legal status (for example, prisoner of war) each detained person is entitled. They include, among other protections: notification of a detainee's rights, a right to call witnesses who are reasonably available, and a right to address the tribunal, which is comprised of three officers and applies a preponderance of evidence standard.¹⁸³ The Bush Administration responded to Justice O'Connor's *Hamdi* opinion by adopting procedures for Guantanamo modeled closely on those battlefield tribunals.¹⁸⁴ Now that *Boumediene* has held that existing procedures at Guantanamo combined with limited judicial review pursuant to the Detainee Treatment Act and Military Commissions Act still fail to satisfy constitutional habeas corpus rights,¹⁸⁵ the question remains how to fill out the contours and details of proper review.¹⁸⁶ Once again, it is beyond the scope of this Article to define exactly what the stricter review (not only the substantive standard of certainty or proof but also the procedural contours) should look like, because its terms would need to be analyzed empirically in light of their accuracy-enhancing effects and against their negative impact on military effectiveness.¹⁸⁷ But we now have an additional test for evaluating proposals. Applying targeting law, one limitation of Justice O'Connor's analysis and the government's response is the dubious comparative analysis of procedural mechanisms, specifically as applied to the context of an enemy terrorist organization. Why, for example, should we assume that military procedures designed primarily for state-versus-state warfare, as opposed to a different set of procedures, are well suited for conflict with transnational, decentralized organizations embedded within civilian populations?

A second limitation of Justice O'Connor's *Hamdi* analysis and the limited additional guidance of *Boumediene*, however, is that they represent

182. *Id.* at 538.

183. See Army Reg. 190-8, *supra* note 134, § 1-6.

184. Def. Dep't Special Briefing, *supra* note 148 (adopting provisions based on Army Reg. 190-8).

185. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275-76 (2008).

186. Lower courts are now wrestling with this issue as they establish burdens and standards of proof. See *supra* note 3.

187. Instructive here is the following statement by the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia:

The obligation to do everything feasible [to distinguish between military objectives and civilian persons or objects] is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations. Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used.

Prosecutor's Report, NATO Bombing in Yugoslavia, *supra* note 76, para. 29.

a single snapshot in time—an attempt to strike a universal balance of military and humanitarian interests applicable to all detainees at Guantanamo at any point in their detention. They do not, as yet, mandate enhanced procedural mechanisms as conditions allow, for example as time in detention passes and the security situation vis-à-vis al Qaida evolves. Nor, over time, do they incorporate new empirical information about what has worked effectively and what has not in making combatant determinations. Would the benefits of enhanced protection against detention of innocents outweigh the harm to military operations if the state held periodic formal hearings before a judicial magistrate?¹⁸⁸ How about with assistance of counsel?¹⁸⁹ Or instead of adversarial hearings, would such protections be enhanced more than military operations would be hampered by requiring an ex parte hearing before a judge, like the arrangement established by the Foreign Intelligence Surveillance Act for obtaining certain types of privacy-invasive warrants?¹⁹⁰ Targeting law demands that the reasonableness of judgments be assessed in terms of such available “state of the art” technological, or by analogy procedural, options for improving accuracy. In that regard U.S. government policy to date comes up short. The framework of targeting law can help guide further refinement of existing processes, whether administrative or through habeas review.

C. *Enforcement Pressures and Incentive Structures*

One might object to applying targeting law to detention on the grounds that targeting law frequently fails to meaningfully prevent human injury. First, in many eyes, even relatively responsible militaries

188. Procedural due process cases are illustrative here. Compare, for example, *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (requiring evidentiary hearings where veracity and credibility of claimants are key), with *Parham v. J.R.*, 442 U.S. 584, 607–09 (1979) (refusing to require judicial-style hearings for certain juvenile civil commitments because they were unlikely to improve practice of relying on medical expert submissions). In *Board of Curators of the University of Missouri v. Horowitz*, the Court held that a medical school need not conduct formal hearings before dismissing a student on account of inadequate clinical ability, because formal adjudication was unlikely to generate greater truth and because formality might undermine academic relations and the educative value of the review process itself. See 435 U.S. 78, 90 (1978). Similarly in the detention context, it might be argued that formal combatant adjudications undermine the effectiveness of interrogation processes, thereby hurting security interests and perhaps even eroding truth-seeking.

189. Again, the Supreme Court’s due process analysis, while not directly relevant, illustrates some aspects of such an inquiry. While assistance of counsel is generally believed to enhance truth-finding, in some circumstances the Court has found it does not contribute significantly to decisionmaking accuracy. See, e.g., *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 (1985) (“[I]t is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment.”); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 32–33 (1981) (holding that Constitution does not require appointment of counsel for indigent parents in every parental status termination proceeding in part because “the presence of counsel for [plaintiff] could not have made a determinative difference”).

190. See 50 U.S.C. § 1803 (2006).

often do not exercise sufficient care; at the very least, targeting law's lack of determinacy may permit more than it constrains. Second, even when those responsible militaries do exercise care, many adversaries flagrantly violate their reciprocal duty to keep civilians out of harm's way; indeed, *especially* when militaries are *most* responsible do some adversaries see tremendous strategic advantage in hiding themselves among civilians.¹⁹¹

These problems are real. And even beyond these general difficulties with targeting law, several unique features of detention might exacerbate them were the rules applied in that context. But the experience of targeting law also offers policy lessons for mitigating these difficulties—lessons that can help shape the development of detention law. In particular, it illuminates the value of transparency in strengthening the enforcement of rules and enhancing the strategic benefits of abiding by them.

1. *The Strategic and Political Context.* — The law of war demands that parties launching military attacks internalize some of the expected costs to innocent civilians in their decisionmaking.¹⁹² How much of those expected costs they must bear depends on the circumstances, hence the evolution of a reasonableness approach. But the law of war is only one constraint on military decisionmaking.

Some additional pressures push against civilian cost internalization, especially pressure to reduce risks to one's own troops. In an era of casualty sensitivity, military commanders and planners will be inclined to conduct military operations in ways that minimize dangers to their own troops, even if it means putting civilians in greater peril.¹⁹³ Waiting until a target's identity can be verified with near certainty would often expose an attacking party to unacceptable risks and delays, and would mean refraining from many attacks where such verification is simply impractical.¹⁹⁴ The law of war as well as professional ethics in Western militaries obligate attackers to internalize some of the likely injury to civilians, but in practice no party is likely to do so to the point that it erodes its own political support to prosecute the war.¹⁹⁵

That said, especially in the case of military operations by the United States and its allies, some strong political and military pressures often push in the same "humanizing" direction as the law of war. Domestic political pressure and international diplomatic pressure cause the American and other democratic states' militaries to exercise force care-

191. See Matthew C. Waxman, *International Law and the Politics of Urban Air Operations* 43–53 (2000) (arguing that when one party operates under tighter legal and political constraints, opposing party may exploit this asymmetry).

192. See *supra* notes 78–92 and accompanying text.

193. See Alan Vick et al., *Aerospace Operations in Urban Environments* 53–55 (2000) (discussing "high sensitivity" to "potential U.S. casualties" in U.S. military policy).

194. See Rogers, *supra* note 85, at 180.

195. See Reisman, *Lessons of Qana*, *supra* note 94, at 396 (arguing that democratic polity will insist on version of law that defers to humanitarian considerations in absence of direct threats).

fully, emphasizing the need to minimize injury inflicted on civilians.¹⁹⁶ Furthermore, in most armed conflicts the United States and its allies recognize winning the “hearts and minds” of local populations as a key to victory. This, too, causes military forces to internalize the costs of errors and civilian collateral damage.

Mistaken bombardment of civilians or large-scale collateral damage is also likely to be broadcast widely and immediately. Indeed, because injuries to civilians are politically costly to American and allied military operations, adversaries are likely to do everything they can to publicize mistakes.¹⁹⁷ And because errors are transparent to the public—at home and abroad—they can be measured and assessed by outside observers against the standards the law provides. All of this is not to say that American and allied forces always adequately avoid mistakes and collateral damage to satisfy critics. Often, though, they operate under tight rules of engagement designed to minimize the likelihood of incidental harm to civilians in order to satisfy internal ethical concerns and maintain support of home and coalition publics and sometimes even of communities local to a conflict.¹⁹⁸ In these ways, the reasonable care standard for targeting becomes somewhat self-enforcing. Political pressures and internal military ethics, reinforced by wide publicity of errors, inject likely harm to innocent civilians into responsible militaries’ decision calculi. That may not be so, however, for detention.

Above I suggested that the fact that the stakes of erroneous detention are lower than the stakes of erroneous targeting arguably points in favor of a relatively lower standard of certainty for detention decisions.¹⁹⁹ But maybe, somewhat counterintuitively, it is precisely these lower stakes that render a targeting-like reasonable care approach unsatisfactory in the detention context. Because erroneous uses of detention power are generally (though not always) likely to have less injurious impact than erroneous targeting power, users may feel less inhibited in exercising it freely, especially since mistakes can be undone. Knowing that an erroneous detention can be corrected down the road without loss of life, military or intelligence decisionmakers may be less careful—perhaps much

196. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 *Am. J. Int’l L.* 239, 276–77 (2000) (suggesting that “most advanced countries” have taken steps to minimize civilian casualties).

197. See Michael Ignatieff, *Virtual War* 52, 192 (2001) (discussing attempts by Slobodan Milosevic and Saddam Hussein to publicize damage inflicted by American attacks); Mark Fineman, *Hussein’s Moves Seen as Steps in Calculated Plan*, *L.A. Times*, Jan. 17, 1993, at A1 (quoting diplomat in Baghdad as saying, “For Saddam, the whole purpose of this crisis is political—not military—to bring the siege of Iraq to the forefront of world attention”).

198. See Thomas A. Keaney & Eliot A. Cohen, *Summary Report: Gulf War Air Power Survey* 22, 69 (2002) (examining example of Iraq); Benjamin S. Lambeth, *NATO’s Airwar for Kosovo* 49 (2001) (examining example of Kosovo).

199. See *supra* note 107 and accompanying text.

less—in ordering someone detained than in ordering someone bombed.²⁰⁰

Equally important, whereas targeting is a public exercise, which tends to reinforce pressures in favor of a high standard of certainty, detention decisions as exercised by the U.S. government in the conflict against al Qaida and related terrorists are quite opaque to public scrutiny.²⁰¹ Mistaken detention decisions may never come to light at all, and to the extent that detention decisions are undone it will often be unclear whether an error even occurred. The Bush Administration has usually not acknowledged that those released from Guantanamo were “erroneously” detained,²⁰² and indeed it has said that many of them, having been assessed as not posing a threat, were actually terrorists skilled at deception.²⁰³ In other words, the U.S. government has tended to be more open in acknowledging false negatives (terrorists erroneously released) than false positives (innocents erroneously detained).²⁰⁴

Subjecting detention decisions after some period of time to tighter scrutiny—such as with an escalating standard of proof and additional procedural protections as time elapses²⁰⁵—need not impugn the judgment of military commanders in the field who exercised their best judgment at the earlier time. A later determination that a detainee is not, in fact, an enemy fighter makes the initial determination perhaps erroneous but not necessarily improper, any more than the bombing of the al Firdos bunker in Baghdad²⁰⁶ was improper given available intelligence.

200. Political pressures are also likely to be diffuse in another dimension of the detention context: The individual who detains someone in the first place is unlikely to be responsible for reviewing the detention, nor may he even be aware of error.

201. Actually, both are opaque, but in different ways. In targeting, decisionmaking is usually opaque but the effects are public when attacks are actually carried out. In detention, decisionmaking is also opaque as are some of the effects (such as false positives), though more may be known about the procedures that are employed.

202. Sometimes U.S. officials have acknowledged that certain individuals should not have been brought to Guantanamo because they turned out to be only low-level fighters, but not because they were nonfighters. See Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, *Wall St. J.*, Jan. 26, 2005, at A1.

203. See *supra* note 172 and accompanying text.

204. Political pressures to avoid false negatives (passing up an opportunity to act against a suspected enemy fighter) are likely to operate differently in the two contexts. Whereas targeters pass up opportunities to bomb suspected military targets all the time because they lack sufficient confidence of identity, those who have captured suspected terrorists may be reluctant to release them only to find that they had let someone “slip through their fingers.” That is, the political pressure to avoid false negatives may be greater in some detention contexts than some targeting contexts. The case of Osama bin Laden is an exception that may prove the rule. Political controversy has swirled around whether both the Clinton Administration and the Bush Administration failed to bomb bin Laden when intelligence agents thought they might have him in their sights. See Robert Novak, *Clinton Blew It on Bin Laden: Ex-CIA Official*, *Chi. Sun Times*, Oct. 2, 2006, at 35. But imagine the intense political firestorm that would erupt if he were captured and then erroneously released based on lack of sufficient certainty of the suspect’s identity.

205. See *supra* Parts III.A.2, III.B.3.

206. See *supra* notes 90–91 and accompanying text.

But political pressure provides an incentive against publicly admitting “mistakes.” Such instinctive defensiveness is likely especially during times of war, when political and military leaders are most concerned with erosion of public confidence in ongoing operations.²⁰⁷ Because detention errors may remain hidden, a reasonableness approach to detention decisions lacks some of the natural enforcement we expect in the targeting context.

2. *The Logic of Transparency.* — The experience with targeting, however, suggests that openness and transparency of errors may, over time, actually help shape public expectations and build confidence in executive decisionmaking. The more transparent the review processes are, the more public trust the state may gain because public scrutiny of adjudications would be seen as adding external enforcement pressure to “get it right.”²⁰⁸ From a policy perspective the government might therefore want to provide more procedural protections for innocents than demanded by the law alone.²⁰⁹

If this is true, what about the moral and incentive arguments drawn from targeting law that providing an escalating standard of certainty along with more liberty-protective and transparent process as detention duration grows would *reward* terrorist tactics of deliberately blurring combatants and noncombatants by privileging them over soldiers who abide by the law and a duty to keep civilians out of harm’s way? Recall that the law of war divides responsibility for misidentification of targets and collateral damage between the attacker and a defender who commingles or blurs soldiers with civilians; otherwise the law would provide incentives to thrust civilians into the line of fire. A lesson from the targeting context is that militarily weaker parties often see far more advantage in placing civilians in harm’s way of military attack than in protecting them.²¹⁰ An analogue to terrorist practices of hiding among civilians is the widespread use, particularly by those facing technologically superior forces, of

207. This was the experience of the British government in World War II, when it locked away many citizens under the mistaken view that they formed a rebellious “Fifth Column.” See A.W. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* 99–100 (1994).

208. See Willett, *supra* note 165.

209. The Army and Marine Corps’ new Counterinsurgency Field Manual emphasizes these principles not only for legal and ethical reasons but also for military effectiveness. After noting, for example, that the “nature of [counter-insurgency] operations sometimes makes it difficult to separate potential detainees from innocent bystanders, since insurgents lack distinctive uniforms and deliberately mingle with the local populace,” the Manual goes on to warn that “[t]reating a civilian like an insurgent . . . is a sure recipe for failure.” Dep’t of the Army, FM 3-24 Counterinsurgency paras. 7-38, 7-40 (2006). It continues: “Multinational and U.S. forces brought in to support [restoring order] must remember that the populace will scrutinize their actions. People will watch to see if Soldiers and Marines stay consistent with this avowed purpose. Inconsistent actions furnish insurgents with valuable issues for manipulation in propaganda.” *Id.* para. 8-42.

210. See David B. Rivkin, Jr. & Lee A. Casey, “Lawfare” over Haditha, *Wall St. J.*, June 7, 2006, at A14 (explaining strategies of “irregular” forces).

“human shields”: civilians emplaced at military sites to put attacking forces in the dilemma of leaving those sites alone or hitting them along with the civilian shields.²¹¹ But under the refinements to a targeting-like approach I describe above,²¹² terrorist fighters—those whose modus operandi makes it more difficult for the United States to differentiate them from bystanders—would be entitled to more robust procedural protection and periodic opportunity to win their release than would regular, professional soldiers captured during wartime, who can be held as prisoners of war without charge or repetitious review until hostilities cease. In other words, a captured soldier of a state can be held until the end of a war without opportunity to contest his incarceration, but a captured terrorist who owes no formal allegiance to state responsibilities would be accorded special procedural rights and hearings. This formula seems upside down: Would not providing more robust protections against erroneous detentions to terrorists turn the incentive structure of the law of war on its head and invite belligerents to hide themselves among civilians?²¹³

Such theoretical reasoning underlying targeting law breaks down in the practical context of detaining suspected terrorist fighters, especially taking into account how detention policies and the laws that govern them will be viewed among the communities from which individuals are likely to be captured and detained. No matter what the law says about divided responsibility for errors and the levels of protection due different categories of detainees, al Qaida and similar terrorist networks are unlikely in the real world to bear great costs of erroneous detentions. Indeed, in some cases they may even thrive on them.

As an initial matter, the general tendency of militarily weaker parties to see advantage in inducing errors and collateral damage is likely to be aggravated in the context of fighting al Qaida and other terrorist networks.²¹⁴ Both the nature of terrorism and the nature of detention exacerbate this problem.

211. As Secretary of Defense Rumsfeld remarked: “It is the distinction between combatants and innocent civilians that terrorism, and practices like the use of human shields, so directly assaults.” Donald Rumsfeld, Sec’y of Def., Department of Defense News Briefing (Feb. 19, 2003), available at http://www.defenselink.mil/transcripts/2003/t02192003_t0219sd.html (on file with the *Columbia Law Review*). On the use of human shield tactics generally, see Daniel Byman & Matthew Waxman, *The Dynamics of Coercion* 137–50 (2002).

212. See *supra* text accompanying notes 117–118.

213. This argument is made by, for example, Lee Casey and David Rivkin. See Casey & Rivkin, *Geneva Conventions*, *supra* note 41, at 211. For a general discussion of this type of argument, see Jinks, *supra* note 126, at 1524–26. Part of the answer to this apparent inconsistency between the provision of procedural protections and the incentive structure of the laws of war lies in the fact that those detained as enemy professional soldiers are unlikely to be held erroneously—because of their distinctive uniforms—so procedural protections are unnecessary.

214. See Schöndorf, *supra* note 34, at 39–40 (explaining tactics used by “non-state actors” against militarily superior opponents).

Al Qaida and like-minded terrorist networks—which generally reject legal order anyway²¹⁵—are likely to view substantial strategic benefits (besides merely defending themselves) to blurring terrorist-civilian distinctions for several reasons. First, terrorist organizations seek to sow panic in the United States and its allies—panic that is exacerbated when overt distinctions between friend and foe become obscured.²¹⁶ Perhaps more importantly, resentment against Western powers like the United States fuels these terrorist movements and the extremism that supports them—resentment that grows with perceived heavy-handed application of military force in places where al Qaida operates.²¹⁷ In embedding themselves in local populations, thereby inviting military attacks upon those locales, terrorist networks may actually sustain themselves.

Furthermore, the United States and other states combating terrorist organizations often rely on cooperation from local populations to help identify terrorists among them.²¹⁸ Because local community members are often best able to discern the affiliations and intentions of those embedded in their communities, individual tips are critical to identifying genuine threats otherwise invisible among populations.²¹⁹ The more, then, that military forces and intelligence agencies alienate local communities, the more they exacerbate the informational deficits that interfere with their ability to distinguish friend from terrorist.

The political costs of detention errors or perceived errors are especially likely to fall exclusively in the laps of the United States and its allies, regardless of how the legal regime divides responsibility for them with terrorists. Historically, detention practices viewed as overbroad have proven ill-suited to winning the “hearts and minds” of local populations. The British government learned painfully that internment of suspected Northern Ireland terrorists was viewed among Northern Irish communities as a form of collective punishment that fueled violent nationalism.²²⁰

215. Eric Posner argues that terrorist organizations may make military strategic decisions rationally, and in doing so generally do not see gains from compliance with international law. See Eric A. Posner, *Terrorism and the Laws of War*, 5 *Chi. J. Int'l L.* 423, 433 (2005).

216. See Bruce Hoffman, *Inside Terrorism* 43–44 (2006) (analyzing differences between “terrorists” and other “types of criminals”).

217. See Karzai Asks US to Cede Afghan Control, *English.Aljazeera.net*, May 22, 2005, at <http://english.aljazeera.net/archive/2005/05/2008410115912870274.html> (on file with the *Columbia Law Review*) (“Many Afghans have criticised US troops for what are seen as heavy-handed tactics, such as breaking into people’s homes in the middle of the night.”).

218. See Renee De Nevers, *Modernizing the Geneva Conventions*, 29 *Wash. Q.* 99, 106 (2006) (“[L]ocal cooperation is vital to identifying terrorists . . .”).

219. For a discussion of this phenomenon in the United Kingdom, see Christopher Caldwell, *Counterterrorism in the U.K.: After Londonistan*, *N.Y. Times*, June 25, 2006 (Magazine), at 42.

220. See David Bonner, *Executive Measures, Terrorism and National Security* 87–96 (2007) (detailing British policies governing detention of Northern Irish terrorism suspects); Laura Donohue, *The Cost of Counterterrorism* 36–48 (2008) (“[I]nternment and its aftermath not only increased the violence but also enhanced sympathy for those

Detention perceived as overbroad can be counterproductive as a protective tool, especially against threats spawned by extremist, anti-state ideology.

The intimate physical nature of detention helps explain why detention, in particular, is likely to be viewed locally as overbroad heavy-handedness and why local communities are likely to pin blame for errors (real or perceived) solely on the detaining state, even if the terrorists' modus operandi increases the danger of such errors. In the case of bombardment, for example, from the perspective of a local population or an outside observer, it is probably easy in many cases to visualize and understand the causal link between the kinetic collateral civilian damage from imprecise bombardment and unlawful, civilian-endangering tactics like human shielding. After all, spatial and temporal distance separates a bomber and a target—a distance that already injects some expected error into targeting and puts endangered civilians closer to the terrorist fighters among them than, for example, the high-flying bombing aircraft that conducts a strike.²²¹ By contrast, because of the personal, face-to-face nature of detention it may be more natural to associate errors proximately—and exclusively—with the detaining state.

This is especially true as the duration of detention expands. Regardless of how responsibility for error is assigned between the state and enemy terrorists at the moment of capture, as time in detention elapses, observers will naturally ascribe a greater share of that responsibility to the detaining state. At the moment of capture, like the moment of bombardment, enemy fighting forces can spare civilians much risk by identifying themselves clearly as combatants or removing themselves from the vicinity of civilians. But once time elapses in detention, only the detaining state can undo errors. Terrorists' shadowy practices and the risks they

opposed to the state."); Tom Parker, Counterterrorism Policies in the United Kingdom, *in* *Protecting Liberty in an Age of Terror* 119, 125–28 (Philip B. Heymann & Juliette N. Kayem eds., 2005) ("Within Northern Ireland, internment further galvanized the nationalist community in its opposition to British rule, and violence immediately surged against the security forces.").

221. Consider a May 2006 incident in which Taliban fighters attacked coalition forces from unaffiliated civilian homes in Afghanistan, leading to coalition bombardment of the homes and nearby structures and the deaths of more than a dozen civilians. See BBC News, *Dozens Die in Afghan Air Strike*, May 22, 2006, at http://news.bbc.co.uk/2/hi/south_asia/5003478.stm (on file with the *Columbia Law Review*). The experience of Lebanese civilians who risked Israeli air bombardment in recent anti-Hezbollah operations is mixed on this point, with many harboring intense resentment at Israel for their injuries but others blaming Hezbollah forces for hiding among civilian populations. See Hassan M. Fattah, *At Funeral, a Sunni Village Condemns Hezbollah's Presence*, *N.Y. Times*, Aug. 25, 2006, at A10 (describing criticism of Hezbollah); Maher Chmaytelli & Gwen Ackerman, *Israel's Attacks Deepen Lebanese Split over Disarming Hezbollah*, *Bloomberg*, July 20, 2006, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=a3RxOepQIXgU&refer=home> (on file with the *Columbia Law Review*) (describing criticism of both Israel and Hezbollah); Chris Link, *Photos that Damn Hezbollah*, *Herald Sun* (Austl.), July 30, 2006, available at <http://www.news.com.au/heraldsun/story/0,,19955774-5007220,00.html> (on file with the *Columbia Law Review*) (describing criticism of Hezbollah).

create will fade from memory while physical lockup in the hands of the state remains a stark reminder of who exclusively holds the key to the release of supposed innocents. As much as it might make sense to divide responsibility for erroneous detentions between both the detaining state and the terrorist organization whose practices make errors likely, in practice it will be difficult to achieve distribution of political costs for errors accordingly.

Ambiguous or opaque detention decisionmaking and review procedures will likely aggravate perceptions that detentions are applied overbroadly or as collective punishment. The murkier the standard of proof being applied and the less open to public scrutiny the decisionmaking, the more already distrustful communities and observers will criticize detention policies as inaccurately applied. This, again, was a lesson the British government learned in its handling of Northern Irish internment in the early 1970s, and it generated reforms emphasizing transparency in adjudicating suspected terrorists' cases to mitigate public perceptions of arbitrariness.²²² That now appears to be the case in Iraq and Afghanistan, where a lack of clear standards and processes open to public scrutiny for detaining suspected security threats seems to fuel distrust in detention policies.²²³ Opaque, ambiguous detention decisionmaking contrasts starkly with American criminal proceedings, in which convictions won and rationalized against a clear and high standard of proof communicate publicly not only the guilt of the convicted but the rigor with which the state conducts its adjudicative duties.

From a policy perspective, then, more clearly articulated standards of proof combined with transparent processes may help mitigate the resentment that sustains violent extremist movements like al Qaida and other terrorist networks in the first place. While the substantive standard of certainty question and the issue of how to enforce it are analytically distinct, the political enforcement pressures and the military advantages and disadvantages that flow from them are relevant to the appropriateness

222. See Lord Diplock, Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland paras. 28–34 (1972).

223. See Dexter Filkins, Hundreds of Iraqi Detainees Get First Taste of Freedom, *N.Y. Times*, June 8, 2006, at A6 (describing release of approximately 100 Iraqi prisoners amid criticism that they were indiscriminately “scooped up in sweeps” for detention); Carlotta Gall, U.S.-Afghan Foray Reveals Friction on Antirebel Raids, *N.Y. Times*, July 3, 2006, at A9 (describing tensions between Afghan government and American military caused by joint raid on civilian home by American and Afghan forces); Solomon Moore & Suhail Ahmad, Iraq Frees Hundreds of Prisoners in Nod to Sunnis, *L.A. Times*, June 8, 2006, at A27 (describing Iraq's release of nearly 600 Iraqi prisoners who were suspected of being insurgents despite, in many cases, never having been formally charged or tried); Joshua Partlow, U.S. Detention of Sheik Angers Sunnis in Iraq, *Wash. Post*, June 25, 2006, at A18 (describing rise in anti-American sentiment following accidental detainment of senior Sunni Muslim leader); Alissa Rubin, U.S. Remakes Jails in Iraq, but Gains Are at Risk, *N.Y. Times*, June 2, 2008, at A1 (describing widespread skepticism of American-run detention system in Iraq despite United States's recent attempts to make it more closely resemble its civilian model).

and viability of the proposed substantive standard. In the criminal justice context, open trials and the requirement of proof beyond a high threshold serve to communicate publicly the rigor of the state's efforts to distinguish offenders from innocents. In the targeting context, identification and intelligence evaluation processes are not transparent but errors are, which strengthens internal and external pressure on military decisionmakers to exercise care. In the detention context, public confidence (domestically, internationally, and locally) in decisions about who is detained may well be enhanced through similar procedural or public scrutiny.

V. CONCLUSION

This Article shows that the law of war can and should be interpreted or supplemented to account for the exceptional aspects of an indefinite conflict against a transnational entity. A targeting-based analytical approach to the detention standard of certainty question provides a familiar methodology drawn from an analogous context for balancing similar interests. Although reasonable care and proportionality rules are easier to state than to apply with precision, they offer a way to evaluate, consistent with policy and moral principles undergirding the law of war, screening policies for detention of certain suspected terrorists.

Even if this approach ultimately seems unsatisfactory, analysis of the ways in which the law of war has operated to deal with identification problems should inform consideration of alternative legal and policy approaches. That is, whether one looks to improve the existing paradigms or to develop an entirely new one, investigation of the targeting analogy illuminates several important issues to guide the development of a more robust detention legal regime.

First, the temporal dimension distinguishes detention from many other forms of military force. As detentions move through time both the security and humanitarian interests vary. A detention regime that recalibrates its required standard of certainty, and the procedures that accompany it, as the duration of detention expands more appropriately balances security and humanitarian/liberty interests overall. Second, targeting principles require a comparative analysis of alternative means of achieving valid security objectives with minimal injury to innocents. While a law of war approach generally, and targeting specifically, is often associated with wide executive discretion, this principle provides a powerful argument that independent review, adversarial process, or enhanced protections for suspected terrorists—if they are believed to generate more accurate determinations—are quite consistent with, and may even be demanded by the logic of, the law of war paradigm. Finally, the targeting approach highlights the role of political pressures and the incentive structures that legal rules help create or sustain in what will be an ongoing dynamic between states and terrorist networks. Detention rules may encourage or discourage certain terrorist methods of operations as well

as shape perceptions of key constituencies in the broader struggle against terrorism and the violent ideologies that support it.

This Article is a modest first step toward developing a more robust law of war approach to counterterrorism. Even operating at its best, this approach is unlikely to persuade many who see terrorism as a crime, not as warfare. Ultimately, this debate over the need for an entirely new paradigm can be settled only through fuller comparison of which framework more effectively advances national security objectives while safeguarding liberty principles and other values. But the approach presented here helps fill an important legal gap in the law of war framework and therefore allows for much richer assessment.