The Law of War and Its Pathologies

George P. Fletcher
*Columbia Law School*, gpfrecht@gmail.com

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Criminal Law Commons, Military, War, and Peace Commons, and the National Security Law Commons

**Recommended Citation**

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2111

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.
THE LAW OF WAR AND ITS PATHOLOGIES

George P. Fletcher*

War is with us more than ever. This is true despite the efforts of the United Nations Charter to ban the concept of war from the vocabulary of its member states.¹ The preferred term is armed conflict. True, the Charter does refer to the Second World War, but apart from this concession to historically entrenched labels, the word appears only once—when the Charter refers to ridding the world of the scourge of war.² The Geneva Conventions, adopted a few years later, follow the same pattern.³ George Orwell could not be more amused. We change the vocabulary and think we have changed the world.

The Geneva Conventions and the Rome Statute even tried to out-Orwell Orwell.⁴ They coined the term “international humanitarian law” to refer to the new law of war.⁵ Nothing could be

---

² U.N. Charter.
³ U.N. Charter pmbl.
⁶ See generally Int'l Comm. of the Red Cross, Commentary on the
more deceptive than referring to the Rome Statute, which establishes severe punishments for crimes of genocide, war crimes, and crimes against humanity, as a humanitarian measure.\textsuperscript{6} There is nothing humanitarian about sending men and women to jail for committing egregious crimes. Retributive punishment and its conceptual neighbor vengeance are alive and well in all of our international institutions, but lawyers still think of themselves as humanitarian benefactors of the just and good.

Of course, the Geneva Conventions have a humanitarian purpose of protecting the sick, civilians, and prisoners of war (POWs) from the sometimes-indiscriminate dangers of military hostilities.\textsuperscript{7} But criminal law also has the general purpose of protecting innocent people from harmful criminal behavior. If institutions are properly called humanitarian by virtue of their good purposes, then we might as well call the entire system of criminal law, including the death penalty, domestic humanitarian law.

Language is losing its moorings and we have to ask why. We refer to invasion of Iraq as self-defense.\textsuperscript{8} POWs are now called "enemy combatants" and are subject to detention under national

---

Additional Protocols of June 8, 1977 to the Geneva Conventions of Aug. 12, 1949 XXVII (Yves Sandoz et al. eds., 1987) (commenting on the Conventions' establishment of the term "international humanitarian law applicable in armed conflict" to mean law that is established by treaties or custom and intended to solve humanitarian problems arising from international or non-international armed conflicts); see also Rome Statute, supra note 4, art. 36(3)(b)(ii) (referring to "international humanitarian law" as distinct from the "law of human rights"). Cf. Dietrich Schindler, Human Rights and Humanitarian Law: Interrelationship of the Laws, 31 Am. U. L. Rev. 935, 935 (1982) (noting that the International Committee of the Red Cross introduced the term in reference to the Geneva Conventions).

6. Rome Statute, supra note 4, arts. 6–8.
7. First Geneva Convention, supra note 3, art. 3.1 (addressing the wounded and the sick members of the armed forces in the field); Second Geneva Convention, supra note 3, art. 3.1 (addressing the wounded, sick, and shipwrecked members of the armed forces at sea); Third Geneva Convention, supra note 3, art. 3.1 (addressing prisoners of war); Fourth Geneva Convention, supra note 3, art. 3.1 (addressing civilians).
rather than international law.\textsuperscript{9} Who are we kidding and why the charade? Perhaps conflicts in the post-9/11 period are so conceptually difficult for us that we hide in mellow-sounding words to avoid the hard conceptual work that the times require.

I want to suggest three core conceptual problems that we do in fact systematically avoid, whatever the reason may be. I will make provocative suggestions in the hope that others will join the conversation and make progress where I have fallen short.

The first major problem is the distinction between war and crime and why it matters.\textsuperscript{10} The second is the problem of protecting civilian life in warfare. And the third is the merger of war and crime in the concepts of war crimes and criminal liability of "enemy combatants."

All three of these problems interweave in the analysis of targeted assassinations. The first question is whether the killing of suspected terrorists, say by the Israeli Defense Force in the West Bank or in Gaza, should be governed by the model of fighting crime or the model of conducting warfare. The second problem is the protection of innocent civilian bystanders and how a principle of protection would be affected by treating the act resulting in harm either as self-defense against criminal aggression or as military action against a hostile enemy. The third issue is the classification of the terrorists themselves. Are they to be treated as POWs exempt from criminal liability, as "enemy combatants" subject to criminal liability, or civilians protected against the ravages of war? The Israeli Supreme Court addressed all three of these interrelated problems in its long-awaited decision of December 14, 2006, regarding targeted assassinations.\textsuperscript{11}

At first blush there does not seem to be much of a

\begin{itemize}
\item \textsuperscript{9} Military Commissions Act of 2006, 10 U.S.C.A. § 948a (West 2007).
\item \textsuperscript{11} HCJ 769/02 Pub. Comm. Against Torture v. Gov’t of Israel [2006], http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (holding that targeted assassinations are legitimate under Article 51(3) of the First Geneva Protocol, accepted in Israel as customary international law).
\end{itemize}
relationship between the Israeli Supreme Court case and another critical decision of 2006, *Hamdan v. Rumsfeld*,\(^\text{12}\) which considered the jurisdiction of military tribunals under the law of war. The burden of my article is to show how these critical decisions stem from the same conceptual confusions about the implications of war and the use of military power.

I. WAR AND CRIME

At the moment of the first major attack on the continental United States in almost two centuries, the September 11, 2001 attacks, we were confused about the right terms and analogies to describe what had happened. Was it a crime calling for justice, or an attack calling for a declaration of war? Was it an aggravated case of the Oklahoma City bombing or a recurrence of Pearl Harbor? If the attacks were the crimes of individuals—Islamic fundamentalist versions of Timothy McVeigh—then we could think about arresting the culprits and bringing them to "justice." If the attacks began a war with international terrorists, wherever they were, then justice was irrelevant. The primary value would be self-defense. In order to defend ourselves, we should have been prepared to strike at the enemy by any means possible—including military invasions, targeted assassinations, and even the use of military tribunals as an instrument of warfare.

In 2001 the Bush administration was ambivalent about whether it wanted justice or war. The Pentagon initially labeled the military campaign Infinite Justice,\(^\text{13}\) but at the same time President Bush described the attack as an act of war.\(^\text{14}\)

Not much has changed since then. The President's October 2006 speech\(^\text{15}\) announcing his signature of the Military Commission

---

14. President George W. Bush, Remarks After Meeting with National Security Team (Sept. 12, 2001), available at http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html ("The deliberate and deadly attacks which were carried out yesterday . . . were acts of war.").
Act of 2006\(^6\) (MCA) indicates that he persists in thinking of our response to the September 11, 2001 attacks as both a fight against criminals whom we must bring to justice and a fight against warriors whom we must kill in military operations. The MCA unites the two concepts: it defines the punishment of crimes at the same time that it represents itself as a military measure against enemy forces.\(^7\)

We should be clear about the differences between the pursuit of justice and the execution of war. In matters of justice, we should be focused on the individual culprits. In matters of war, the individual culprits are beside the point. War is waged against a collective, typically a nation-state. No one cared about the individual Japanese pilots who returned safely from the attack on Pearl Harbor. They were not criminals but rather agents of an enemy power. They were not personally “guilty” of the attack, nor were their commanders, who acted in the name of the Japanese nation.

Justice in punishment leads to the common understanding of the Biblical maxim of an eye for an eye: if we lost 3,000 people, then they should too. But suppose that the entire infrastructure of the terrorist movement suddenly surrendered. Or suppose its members credibly pledged never to attack again. Would we have justification for harming a single soul? Yes, in the pursuit of justice. No, in waging war. This shows that the aims of war can be more merciful than the imperatives of seeking moral order.

Even if we desired justice, we are not in a position to pursue it. We are a party to the dispute, not a neutral judge above the fray. We cannot be both a combatant and the jury of our own rectitude. This is the reason that Immanuel Kant concluded that punitive wars were logically impossible.\(^8\) Punishment presupposes hierarchal


\(^{17}\) See also Fletcher, supra note 16, at 433–40 (discussing the dubious constitutional status of the commission).

authority: the state can punish its citizens, parents can punish their children, and God can punish humanity; in all of these cases, the punishing agent has authority to condemn the offender and impose sanctions by force. According to the traditional conception of the international order, however, all states and nations are equal in dignity, and therefore no nation is in a position to punish another nation.

The practical consequences of classifying a conflict as war rather than as crime are many. Those who fight according to the rules of the Hague Conventions\textsuperscript{19} are entitled to be treated as POWs. This means that (1) the scope of permissible interrogation is limited to the POW's identity, (2) his POW status gives him immunity from prosecution and punishment for having engaged in military hostilities, and (3) he is entitled to be exchanged and sent home at the end of hostilities.\textsuperscript{20} These privileges of belligerents stem from the basic idea that entering armed conflict—or, in the older idiom, engaging in warfare—converts those engaged in the military into subjects of an alternative legal order.

In the alternative legal order of war, the participants are entitled to do many things that are strictly prohibited under all criminal codes. They are allowed to hurt people—indeed, to kill them—and, less egregiously, to destroy property that is related to the war effort. The alternative legal order is based on the principle of reciprocity: those that may act to harm are, to that degree, subject to a reciprocal risk of harm.

The first principle of the law of war, then, is reciprocity.\textsuperscript{21} Although this is obvious to me, I have not found this foundational


\textsuperscript{20} Annex to Hague Convention II, supra note 19; Annex to Hague Convention IV, supra note 19.

\textsuperscript{21} See George P. Fletcher, We Must Choose: Justice or War?, Wash. Post, Oct. 6, 2001, at A29; George P. Fletcher, The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt, 111 Yale L. J. 1499, 1517 (2002) [hereinafter Fletcher, Storrs Lectures] ("The principle of taking prisoners with the corresponding right of combatants to surrender without being killed lies at the foundation of the alternative legal order called war.").
principle discussed in the literature of international law. For the most part, the principle is taken for granted by those who work in the field and write legal opinions about the implications of warfare. The primary argument American military leaders make for observing the laws of war is that we want our troops to be similarly treated when they are captured.\textsuperscript{22}

Despite this foundational principle, some cases of non-international conflict appear to be asymmetrical. One side consists of combatants fighting according to the laws and customs of war; the other side consists of irregulars, guerillas, unlawful combatants, and various categories of fighters who are not entitled to be treated as privileged combatants under the law of war. This is the third pathology of the law of war.

Initially, I want to get a grip on the distinction between war and crime and why the legal orders of war and crime have radically different implications. Crime is typically the aggression of one person against another. War is often begun as an act of aggression, as a violation of \textit{jus ad bellum} (the right of the nation to go to war), but once the war begins the two sides are treated as having the same rights and obligations. They are disfavored under \textit{jus in bello} (the duties of soldiers, individually and collectively, when they are fighting wars) as having been aggressors or privileged as victims of aggression.

The legal regime passes, then, through three stages. The law of individual aggression (the wrong of committing a crime) is transformed by collective action into a violation of \textit{jus ad bellum}. The subtle movement from the initiation of hostilities to the midst of hostilities represents the passage from the latter to \textit{jus in bello}.

The reciprocity that matters in warfare is not individual but collective. When one nation attacks another or intends to attack under an official declaration, the two nations are at war. The nation is also at war when hostilities begin without an official declaration of war.\textsuperscript{23}

The range of undeclared war now includes internal armed


\textsuperscript{23} The Prize Cases, 67 U.S. 635, 667–68 (1862).
conflict. The first great example of this internal conflict is the American Civil War, which Abraham Lincoln steadfastly refused to recognize as a conflict between separate nations. The normally-recognized beginning of the war is South Carolina's shelling of Fort Sumter in Charleston Harbor. Initially, there was no way of knowing who was at war with whom. It was not even clear how many states would try to secede from the Union and of these, how many would go to war. From the outset, Southerners termed the conflict the War between the States (eleven states ultimately joined the Confederacy). The North insisted that the war was an act of rebellion and that in principle the citizens of southern states were still bound by their duties of loyalty to the Union. But treating the Civil War as an act of rebellion also had serious legal consequences that the North rejected. It would have meant that the North could not impose a blockade that neutral powers were bound, under international law, to respect. And it would have meant, in principle, that all the soldiers who fought for the Confederacy and fired upon the enemy without being personally under attack were subject to prosecution for both treason and murder.

In the end, neither the Confederate soldiers nor their leaders were held criminally liable (they were pardoned by the president). Yet the South was subject to collective sanctions such as the cancellation of the Confederate war debt in the Fourteenth Amendment, a measure that had serious consequences for the Southern economy. The South lost the wealth it had invested in more than four million slaves and the bondholders who financed the war effort found themselves with worthless paper. Unsurprisingly, it took the South about a century to catch up economically with the

24. See George P. Fletcher, Our Secret Constitution: How Lincoln Redefined American Democracy 41–42 (2001) (explaining that Lincoln viewed the American people as "an organic national unit" such that "the eleven Southern states could not go their own way").

25. The Supreme Court rejected this implication. See The Prize Cases, 67 U.S. at 671–74.

26. See Fletcher, supra note 24, at 87–89 (discussing possible trial of Jefferson Davis for treason after the war).


29. See Branch v. Haas, 16 F. 53, 54 (C.C.M.D. Ala. 1883) (declining to enforce a contract for the sale and delivery of Confederate bonds because the contract was "connected, by its consideration, with an illegal transaction").
For Americans, the Civil War is the paradigmatic war that broke down traditional categories of international law. The Civil War is also critical in American thinking because it is the crucible that generated the Lieber Code in 1863. Drafted by Francis Lieber, a German immigrant and professor of law at Columbia, the Lieber Code was the first systematic code on the law of war. It is widely recognized as the first step in the evolution of the international community toward the Hague Conventions at the end of the century and the Geneva Conventions in 1949. Lieber regarded the Civil War as an act of rebellion but one to which the ordinary rules of treating prisoners properly and exchanging them applied.

For Europeans, the conflict that communicates the same lesson is the 1990s war in Bosnia-Herzegovina. Like the Civil War, it was an internal conflict that was nonetheless treated, in some respects, as subject to the rules of the Geneva Conventions. The purpose of the Geneva Conventions is to regulate international armed conflict between the signatories to the treaty, which includes virtually the entire international community. The Geneva

30. See Gavin Wright, Old South, New South: Revolutions in the Southern Economy Since the Civil War 240 (1986) (discussing the Civil War's negative effects on the South's economy).


Conventions carried forth the basic principle of international law that war took place between states. And yet the Geneva Conventions sowed the textual basis for a radical extension of the concept of war to include internal conflicts like the Civil War. A special rule called Common Article Three (common to all of the Geneva Conventions) applies to non-international or internal conflicts that take place on the territory of one of the signatories to the treaty. In a series of developments, culminating in the 1995 Tadic decision in the International Criminal Tribunal of Yugoslavia, European jurisprudence came to think of asymmetric internal wars as equivalent to symmetric international wars.

A second form of asymmetry arose in the law governing the use of deadly force. The general problem is the armed response of the state to deadly attacks short of obvious military attacks by organized armies. Good examples are the terrorist attacks that occurred on September 11, 2001 in the United States, on March 11, 2004 in Madrid, on July 7, 2005 in London, and hundreds of times in the last five years in Israel.

These are precisely the kinds of attacks that we have difficulty classifying as war or crime. If they are acts of war, then the defending force can respond under Article 51 of the U.N. Charter against all military targets and all military personnel of the opposing side. The obvious problem in the case of submilitary attacks is that we cannot so easily identify the military targets—neither the place nor the people—of the enemy. This is inherent in the nature of terrorist attacks.

The danger of applying the principle of reciprocity to terrorist attacks is illustrated in the case of Israel versus the Palestinians. Palestinian fighters become entitled to kill all Israeli combatants in uniform conforming to the laws of war. And in return, who are Israeli soldiers entitled to kill? Since no one in the Palestinian population is self-designated as a combatant, the class of possible combatants is far broader than the class of military personnel.

38. First Convention, supra note 3, art. 3; Second Convention, supra note 3, art. 3; Third Convention, supra note 3, art. 3; Fourth Convention, supra note 3, art. 3.
41. U.N. Charter art. 51.
either a null set or encompasses the entire adult population (and perhaps some active teenagers). The *reductio ad absurdum* of this way of thinking is that the Israeli army becomes empowered to kill the entire Palestinian population. The fact, then, that some suspected terrorists are designated as targets for assassination comes into focus as the lesser evil—a sparing of the entire population for the sake of killing the few regarded as dangerous.\footnote{See, e.g., Daniel Statman, *Targeted Killing*, 5 Theoretical Inquiries L. 179, 195 (2004).}

There are three plausible responses to the extreme view implied by the principle of reciprocity. One is to insist that all persons not identified as combatants are civilians and therefore protected against intentional attacks under the Fourth Geneva Convention and the definition of war crimes in the Rome Statute.\footnote{See Fourth Geneva Convention, *supra* note 3, art. 3(1); Rome Statute, *supra* note 4, art. 8(2)(b)(i)-(iv).} This would be a leap from the fire backwards into the frying pan and further—away from the heat altogether. It is coherent and consistent but not entirely plausible in a world of practical politics. The civilian population vulnerable to terrorist attacks must be allowed to do something to protect itself. It would retain the right of self-defense in the case of imminent attacks but the question is whether it can do something to defeat the threat of terrorism at its base—before the attacks reach the point of imminent danger.

The other two responses are forms of compromise between the concepts of crime and of war. The nature of the compromise is to modify either the concept of the civilian or the concept of the combatant. For now I turn to variations on the concept of civilians; modifications of the notion of combatancy will be discussed in the next section.

The protected status of civilians was relaxed, in part, in the First Protocol to the Geneva Convention, adopted in 1977.\footnote{Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, arts. 4–5, 1125 U.N.T.S. 3, 8–9 (entered into force Dec. 7, 1978) [hereinafter Protocol I].} The Protocol applies exclusively in cases covered by Article 2 of the Conventions, essentially international armed conflicts.\footnote{Id. art. 1(3).} Article 51(3) contains language critical to the problem of targeted assassinations: "Civilians shall enjoy the protection afforded by this Section [i.e.,
"general protection against dangers arising from military operations"] unless and for such time as they take a direct part in hostilities." 46

The Israeli Supreme Court, led by Justice Aaron Barak, resolved the problem of targeted assassinations of Palestinians by applying and interpreting this provision. Justice Barak claims—without much authority—that although Israel has not ratified the First Protocol, it binds Israel as customary international law. 47 But the issue is not whether Israel is bound; it is whether Israel can justify its policy by invoking Article 51(3) of the Protocol.

The term "direct part in hostilities" is obviously vague and there is little point to an interpretation of the phrase without a theoretical grounding for the exception to the general protection afforded to civilians. There are various starting points for a theory of this sort. One approach would be based on forfeiture. Those who take "direct part" do not deserve protection. Another could be based on self-protection. The forfeiture theory would be a variation of the same view as applied in the theory of self-defense. The argument is that attackers forfeit their rights by voluntarily exposing themselves to the risk of deadly force. But they do not choose or desire to expose themselves to such risks. They choose and desire to harm someone else. If they could avoid risk to themselves, they would. The forfeiture argument bears a ring, therefore, of artificiality. 48

The self-protection theory turns out to be a variation on self-defense. But self-defense depends on how much imminent risk is posed to the victim. If the civilian taking direct part in hostilities creates an imminent risk to either combatants or civilians, those exposed to the risk could rely on the doctrine of self-defense without invoking the law of war. 49 To make a difference, therefore, the law of

46. Id. art. 51(1).
48. Another problem is that the criterion of self-defense in domestic law is not a culpable attack but a wrongful attack, which may or may not be culpable. If the attack is not culpable, it is difficult to impute desire for the consequences to the attacker. See George P. Fletcher, Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory, 8 Israel L. Rev. 367 (1973).
49. See generally George P. Fletcher & Jens David Ohlin, Defending Humanity: When Force is Just and Why (forthcoming 2008) (manuscript at 129–
war must apply to cases below the threshold of imminent risk to others.

Perhaps the best theory would recognize, in effect, that civilians will be treated as combatants when they act like combatants. Justice Barak seems to recognize this guideline when he argues:

A civilian preparing to commit hostilities might be considered a person who is taking a direct part in hostilities, if he is openly bearing arms. When he lays down his weapon, or when he is not committing hostilities, he ceases to be a legitimate target for attack. Thus, a person who merely aids the planning of hostilities, or who sends others to commit hostilities, is not a legitimate target for attack. Such indirect aid to hostilities might expose the civilian to arrest and trial, but it cannot turn him into a legitimate target for attack.\(^5\)

The reference to bearing arms seems to affirm the proposition that a civilian will be treated as a combatant when he acts like one. The only problem with this view is that those who plan and direct the hostilities also behave like combatants. This is what generals do—they plan and direct hostilities. It is naive to consider only the tiny sliver of the armed forces that bears arms on the front line as true combatants. Under the theory of forfeiture, the generals are also implicated and exposed. But under the alternative view of self-protection, the generals are arguably not threatening imminent harm. Under the domestic law of self-defense, organizers behind the scenes, such as mafia bosses, are not subject to the use of deadly force. Yet in terms of controlling and terminating military hostilities, it makes much more sense to strike at the generals than at the privates bearing arms.

Justice Barak strikes an obviously arbitrary bargain between the principle of war and the principle of crime. Those who bear arms from 9:00 to 5:00 are combatants subject to being killed on the spot. When they are asleep they are not subject to the same rules; they, and all their superiors, are at that time criminals subject only to arrest and prosecution.\(^5\)

\(^{30}\) on file with Columbia Human Rights Law Review) (discussing self-defense in war and the essential elements of making legitimate defense claims).

\(^{50}\) Pub. Comm. Against Torture, at para. 7.

\(^{51}\) Id. at para. 5.
To this compromise between competing worlds must be added the assumption that the Israeli-Palestinian conflict is an international armed conflict governed by the Geneva Conventions.\textsuperscript{52} Suppose a terrorist is on the way to bomb the subway in Paris. The police detect the bomb in his suitcase. Can they shoot him on the spot?

The Israeli Supreme Court hedges its position by saying that if you can arrest without killing, you must.\textsuperscript{53} As Justice Barak reasons in one line: "[S]uspects are not to be killed without due process, or without arrest or trial."\textsuperscript{54} But the law of war does not lend itself to a combination with the principles of individual justice.

Belligerents are not suspects, and when they are taken prisoner they are not arrested.\textsuperscript{55} They are not subject to trial for having participated in a hostile military force.\textsuperscript{56} These are two entirely different paradigms of legal thought. In the case of crime, suspects are arrested and put on trial. In the case of war, the enemy is either killed, or captured and held until the end of hostilities. The attempt to combine the two paradigms has led, in the United States, to the use of military tribunals to punish enemy combatants as though they were criminals,\textsuperscript{57} and in the case of Israel, to the legalization of targeted assassinations of suspected terrorists.

This, then, is the first pathology of the law of war. There is no

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{52} Whether it is or not, I do not think the same assumption can be applied to countries that have experienced terrorist attacks only in recent years, such as the United Kingdom, France or Egypt.
\item \textsuperscript{53} This draws on the compromise suggested by Kretzmer with regard to creating a realistic alternative for states like Israel to defend their residents against internal terrorists attacks without abandoning commitments to standards of human rights and humanitarian law. See Kretzmer, supra note 10, at 203.
\item \textsuperscript{54} HCJ 769/02 Pub. Comm. Against Torture v. Government of Israel, para. 4 [2006], http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.
\item \textsuperscript{55} See Lieber Code, supra note 31, art. 49 ("A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.").
\item \textsuperscript{56} Id. art. 56 ("A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.").
\item \textsuperscript{57} See Fletcher, supra note 16, at 455–59.
\end{itemize}
\end{footnotesize}
theory of the proper spheres of crime and of war. And yet, as we have seen, enormous legal consequences flow from the attempt to merge the diverse spheres of law. This strikes me as one of the deepest problems in the law of war and yet the discussion in the literature has yet to become theoretically sophisticated.  

II. THE PROBLEM OF PROPORTIONALITY

In international law it is assumed that the use of force must be necessary to attain a military objective and that any collateral damage to civilians must be proportional to the value of the military objective. In this respect, the law of war closely follows the law of self-defense, which imposes similar requirements on the legitimate use of force. 

The language of the Rome Statute uses the term "proportional" in the rule of self-defense in Article 31. But the vocabulary shifts slightly in the context of determining the legitimacy of military attacks that endanger civilians' lives. Endangerment of civilians is disproportionate and unlawful when the attack is launched with knowledge that the consequences will be "clearly excessive in relation to the concrete and direct overall military advantage anticipated."

Justice Barak uses both modes of discourse—disproportionate and excessive—in setting the limits to the use of targeted assassinations. He states: "The principle of proportionality is a central principle of the laws of war. It forbids striking even

58. The best I have seen is Kretzmer but he proposes a mixture of paradigms without delving seriously into the question of how much war and how much law enforcement would represent the ideal combination of the two spheres of law. See Kretzmer, supra note 10, at 174.

59. See George P. Fletcher, Crime of Self-Defense: Bernhard Goetz and the Law on Trial 41 (1988); see also Kretzmer, supra note 10 at 177-78 (noting that international human rights law prefers deterrence and prevention to be achieved through the use of criminal processes, and that the use of force is only legitimate in a narrow set of circumstances).

60. Rome Statute, supra note 4, art. 31(1) ("a person shall not be criminally responsible if at the time of that person's conduct: ... The person acts reasonably to defend himself or herself ... in a manner proportionate to the degree of danger to the person ... ").

61. Id. art. 8(2)(b)(iv) (using the same language cited by Justice Barak and found in Protocol I of the Geneva Conventions); Protocol I, supra note 44, art. 51(5)(B).
legitimate targets, if the attack is likely to lead to injury of innocent persons which is excessive, considering the military benefit stemming from the act. 62

Despite the assumption that legality presupposes proportionality, some nuanced distinctions are called for to understand the intuitions underlying the law of war. The first major distinction is between the defense of the nation as a whole and the seeking of a particular military objective. If the purpose of defensive force is to thwart an attack that threatens the nation as a whole, I am not sure that the principle of proportionality actually limits the use of defensive force. The Kantian model of vindicating autonomy 63 applies with full vigor to cases of nations fighting for their survival. 64 If there is no option but to use nuclear weapons to defeat an enemy invasion, then even this extreme measure might be justified. 65 But if the use of force is a post-attack effort to prevent subsequent attacks, the question of proportionality does arise. For instance, if a single Egyptian bomber reaches Tel Aviv and inflicts a hundred civilian deaths, Israel would undoubtedly respond. But launching a nuclear strike against Cairo would be a disproportionate response. The issue of proportionality becomes acute in these cases because the normal requirement of necessity does little work.

But Justice Barak is not concerned with the case of national survival; he is concerned with the case of securing of particular objectives, in which the international documents prohibit the use of force that is “excessive, considering the military benefit stemming from the act.” 66

The principle of proportionality is not itself a pathology of the law of war. The problem arises from the many different senses in which the concept is used. There are in fact four distinct sorts of proportionality. I go through each to raise international lawyers’ awareness of the shift from stricter to looser standards.

63. Kant, supra note 18, §§ 43–49.
64. See Fletcher, supra note 48, at 379–80.
65. Cf. Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Jul. 8) (suggesting that the use of nuclear weapons might be lawful when the survival of a nation would be at stake).
The strictest standard arises in cases of self-defense. It is possible to think of self-defense without recognizing any limitation based on the interests of the aggressor. Indeed that is a respectable position in Kantian legal theory.\textsuperscript{67} When the interests of the victim do become relevant, they impose a limit on the use of deadly force for the sake of protecting minor interests. The classic case in German law is whether it should be permissible to kill an apple thief when there is no other way of preventing the theft.\textsuperscript{68}

If "disproportionate force" limits the right of self-defense it is because taking human life represents excessive harm relative to the advantage of securing petty interests in property. This limited exception to self-defense is represented making the point 90 on a scale of 1 to 100.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Disproportionate.png}
\caption{Disproportionate self-defense.}
\end{figure}

In cases of justifiable necessity we may also speak of disproportionate force, but the meaning is entirely different. In the language of the Model Penal Code, the person using force may act only if the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.\textsuperscript{69} Here the pursuit of the greater good provides the primary rationale for the action. Thus if the disproportionate force in self-defense is represented by the figure 10, the disproportionate force in cases of necessity would be signaled by the ratio of 51 to 49.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{67} See Fletcher, supra note 48, at 379.
\item \textsuperscript{68} Reichsgericht [RG] [Supreme Court 1880–1945] Sept 20, 1920, 55 Enstscheidungen des Reichsgerichts in Strafsachen [RGSt] 82 (F.R.G.).
\item \textsuperscript{69} Model Penal Code § 3.02(1)(a) (2001).
\end{itemize}
\end{footnotesize}
These two standards are often confused in the law of war, and in particular, in the cases contemplated by Justice Barak. When we assess the liability of commanders who send in bombers to attack military targets and cause collateral damage to nearby civilians, the governing principle is the doctrine of double effect borrowed from Catholic theology. The doctrine holds that if the primary purpose of the action is legitimate (say the pursuit of a military target), then collateral damage is acceptable provided that the damage is not disproportionate to the aim pursued. The underlying moral principle is that the action should be regarded as privileged because of the legitimacy of the dominant purpose. Disproportional side effects provide a veto as they do in cases of self-defense. The kind of proportionality at stake here, therefore, is not of the sort that applies in cases of necessity as a justification where the ends and the means are of equal moral value. The case of "excessive side effects" in the law of war is closer to the one-side graph for self-defense than the equipoise suggested by the principle of lesser evils in the criminal law.

As if this situation was not sufficiently complicated, German private law also distinguishes between defensive and aggressive necessity against property interests. Defensive necessity arises when the defender must face a threat bearing down on him by a non-human actor. The classic example would be shooting a rabid dog in order to protect children in the area. The principles of self-defense apply against human actors who engage in aggression, but not against dogs, which are considered property and are not subject to the norms of the legal system. An interesting feature of passive

---

necessity as applied in the case of shooting the attacking dog\textsuperscript{71} is that, as in cases of self-defense, the defender is not required to pay compensation to the owner of the dog (or the victim in cases of self-defense).\textsuperscript{72}

Conversely, in cases of aggressive necessity the aggressor is intruding upon the property of another in order to save a higher interest. This is typified by a famous American tort case: a shipowner moors his ship to a dock owned by another in order to avoid the devastating impact of an impending storm.\textsuperscript{73} The storm crashes the ship into the dock, causing minor damage. In this case, both under German and American law, the shipowner is justified in mooring his ship, but he must compensate the affected party for the loss.\textsuperscript{74} This standard of necessity differs from that of passive necessity. In both cases the principle of proportionality imposes a limit. In the case of defensive necessity, the standard lies between the case of necessity as a justification in criminal law and the case of self-defense. It should be represented as point 70 on the graph.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{disproportionate_necessity.png}
\caption{Disproportionate passive necessity.}
\end{figure}

\begin{itemize}
\item \textsuperscript{71} Reichsgericht [RG] [Supreme Court 1880–1945] June 17, 1901, 34 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 295 (297) (F.R.G.).
\item \textsuperscript{72} Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug, 18, 1896, Reichsgesetzblatt [RGBI] 234, § 228. There is an exception for cases in which the defender brings about the attack, say, by letting the dog out of confinement. \textit{Id.} at sentence 2.
\item \textsuperscript{73} Vincent v. Lake Erie Trans. Co., 124 N.W. 221 (Minn. 1910).
\item \textsuperscript{74} \textit{See id.} at 222.
\end{itemize}
In the case of aggressive necessity, the standard of proportionality is more demanding. It cuts off the permissibility of the action at a stage even earlier than the 50/50 line. It should be represented as point 30 on the graph. That is, if you intrude upon another person's property and damage it, you need to have a very good reason. In cost/benefit terms, the standard for passive necessity (shooting the attacking dog) is that the costs cannot be too great relative to the benefits. But in the cases of aggressive necessity, in which the actor intrudes upon the property of another and causes harm, the benefit must actually be much greater than the costs. For instance, the benefit must be saving life relative to the cost of doing damage to property interests. This makes sense because an intrusion against someone else's property rights is always questionable and subject to tight restraints.

These differences reflect two value commitments. First, we should maintain a high respect for private property, even though we have less respect for property if it is a source of risk to others (i.e. the rabies-stricken dog). If the aggressor selects the victim and deliberately invades the property of another (as in choosing to dock without permission in order to protect the ship), the invasion against the rights of another is more palpable. Second, passive victims of threats have greater rights than those whose bodies become the instruments of harm. If a fetus growing inside the mother's womb threatens her life, the principle of defensive necessity would apply to

---

75. *See id.*
justify abortion of the fetus provided, of course, that the death of the fetus is regarded as being within the realm of proportionality.\textsuperscript{76} In this scenario, it is of critical relevance that the fetus moving in the mother's domain is described as a threat. If the fetus were in its own domain, apart from the mother, it would be much more difficult to justify killing the fetus in order to generate a benefit, even a life-saving one, for another person.\textsuperscript{77}

If a thing is tainted because it generates a risk to others, it is generally of lesser value in the balancing process, and this lesser value is reflected by the fact that it is possible to apply defensive necessity (as opposed to necessity as the lesser of two evils or aggressive necessity). That being the case, a serious problem remains: why, as a matter of principle, should an object's being the source of a risk matter in a modern rational system of criminal law? The literature in this area has not yet generated a convincing answer.

While the distinction between aggressive and passive necessity is not recognized in Anglo-American criminal law or international criminal law, it remains a valid option that needs to be considered in defining the concept of proportionality in the law of war.

In order of declining severity, the four standards are: (1) self-defense, (2) passive necessity, (3) lesser evils, and (4) aggressive necessity. In my view, the standard of proportionality that matters in the law of war falls someplace between self-defense and passive necessity. But this is very imprecise. The entire matter requires deeper theoretical consideration. In the meantime we are exposed to the constant manipulation by critics and proponents who use the concept of proportionality as they see fit. The pathology is the ambiguity, and the failure to think about it.

\textsuperscript{76} See Reichsgericht [RG] [Supreme Court 1880-1945] Mar. 11, 1927, 61 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 242 (254–256) (F.R.G.) (reasoning that, because the rights of a fetus must be balanced against the rights of a mother, abortion is not unlawful so long as it is the only means of saving the mother from a current threat of death or serious bodily harm.).

\textsuperscript{77} For a difficult and wrenching case, see the problem of the conjoined twins in Re A (Children) (Conjoined Twins: Surgical Separation), [2000] 3 F.C.R. 577 (C.A.). The court decided in favor of separating the twins in order to save the one who had the substantially better chance of survival.
III. WAR CRIMES

One of the mysteries in the relationship of war and crime is the way in which war crimes break the collective spell of military action. We can make sense of the claim that in the course of hostilities the individual soldier merges with the collective military unit. But is it possible, then, that the individual reemerges from the collective and becomes individually liable for a war crime? If he kills a soldier, he is part of the collective; if he intentionally kills a civilian, he is on his own—but not entirely on his own. The Rome Statute recognizes jurisdiction over war crimes "in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes." The force of this qualification, in particular, is not clear. Crimes are not usually defined like this. It would be like defining murder as the killing of a human being and in particular, the killing of someone who is weak and innocent. There may be some factors that influence prosecutorial discretion, but they do not form part of the definition of the offense. In this case, however, the collective dimension of "a part of a plan or policy" appears central to the definition of the crime. It is parallel to the collective definition specified in the definition of crimes against humanity: the specified acts must be "part of a widespread or systematic attack directed against [a] civilian population."

The collective and individual dimensions of war crimes, then, interweave in the following ways. Military hostilities are collective by definition: nations and similarly constituted groups go to war, not individuals. Some subgroups engage in a collective crime based on a shared plan or policy or widespread commission of the offenses. The latter collective effort provides the basis for individual responsibility under the Rome Statute.

79. Rome Statute, supra note 4, art. 8(1).
80. Id. art. 7(1). There is also an implicit requirement in the history of genocide that the crime be committed by one nation against another. See Fletcher, Storrs Lectures, supra note 21, at 1514.
81. This does not account for the precise conceptual relationship between the collective action and individual responsibility. For example, must the actor know of the collective plan or policy? This is not clear. In contrast, the Rome Statute provides that in committing a crime against humanity the actor must
The concept of war crimes still bears the mystery, then, of interrelating the conceptual dimension of both warfare and military criminality and the individual nature of criminal liability and punishment. To get a grip on this subtle concept—one I believe is totally ignored in the literature of international criminal law—we should review the emergence of war crimes as a concept in American constitutional history.

In the history of the concept in American law, we encounter precisely the danger highlighted by the merger of crime and war in Justice Barak’s analysis of targeted assassinations. A hybrid between war and crime emerges and this hybrid enables military commissions to impose punishment on those who would otherwise be treated as soldiers exempt from criminal liability.

To understand how this happened, we need to focus for a moment on the first two cases in American history that employ the concept of war crimes. They are both cases of ongoing relevance in the current debate about the legitimacy of military commissions. The first is the colorful case of *Ex Parte Quirin*, in which eight German saboteurs landed off Long Island and Florida in June 1942, buried their uniforms and their explosives on the beach, and then headed inland to reconnoiter their potential targets. They did not get far before two got cold feet and called the FBI to turn themselves in. All eight were arrested within days, and President Roosevelt immediately issued an executive order establishing a military tribunal.

The subsequent proceedings have had an enormous impact on the law related to military tribunals. The first critical step was that the Supreme Court agreed to hear claims of habeas corpus while the military commission proceeding was pending. After the Supreme Court’s per curiam order, the military commission quickly issued its verdict. Six of the defendants were electrocuted within days. It was objectionable for Chief Justice Stone to take another four months to write an opinion for the Court—imagine a version of

know of the systematic or widespread attack directed against a civilian population. Rome Statute, *supra* note 4, art. 7.

83. *Id.*
84. *Id.* at 19.
Bush v. Gore\textsuperscript{86} in which the Court says, George W. Bush wins the presidential election and in a few months we will tell you why. Nonetheless, on its own terms, the opinion expresses many important concerns about the law of war. The four prominent issues in Quirin are: (1) Why are the eight defendants not entitled to immunity as POWs?; (2) What crime did they commit by entering the United States surreptitiously?; (3) Why are they not entitled to a jury trial?; and (4) Why are the procedural deviations between military commissions and courts martial acceptable under federal law?

All four of these issues are of critical relevance and continue to influence litigation about military commissions, and did so recently in the June 2006 case Hamdan v. Rumsfeld.\textsuperscript{87} For my purpose, the biggest problem in Quirin is explaining why the German soldiers are not entitled to POW immunity. They are not even entitled (as they would be in cases of doubt about their status under the Geneva Conventions) to be presumed to be POWs until a competent tribunal determines otherwise. The solution to this problem, according to Chief Justice Stone's opinion, lies in the invention of the category of unlawful combatant. These are the critical lines:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.\textsuperscript{88}

Here we encounter the first breach in the principle of POW immunity. The German soldiers have no immunity if they are unlawful combatants. And how do they become unlawful combatants? Well, by not qualifying as combatants under the definition in Article One of the Annex to the Hague Conventions.\textsuperscript{89} The four conditions laid out in the Annex to the Hague Conventions and then repeated in the Geneva Conventions are these:

\begin{itemize}
\item \textsuperscript{86} Bush v. Gore, 531 U.S. 98 (2000).
\item \textsuperscript{87} Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
\item \textsuperscript{88} Ex Parte Quirin, 317 U.S. 1, 30–31 (1942).
\item \textsuperscript{89} Annex to Hague Convention IV, supra note 19, art. 1.
\end{itemize}
The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
To be commanded by a person responsible for his subordinates;
To have a fixed distinctive emblem recognizable at a distance;
To carry arms openly; and
To conduct their operations in accordance with the laws and customs of war.\(^9\)

The heading for the provision is the "Qualifications of Belligerents."\(^9\) Everyone in the regular army should be of this qualification upon capture, but the Court interpreted these four conditions for all troops, not just those in the militia and volunteer corps.\(^9\) This is the reason that the saboteurs did not qualify as belligerents. In this limited sense they were unlawful combatants. There is no suggestion in the Hague Conventions that failing to qualify as a belligerent would imply criminal liability.

In one of the greatest legal fallacies I have ever encountered, the \textit{Quirin} court makes the giant leap from the \textit{status} of failing to qualify as a lawful combatant to the \textit{crime} of being an unlawful combatant. This is like reasoning from someone's driving a Chevrolet without a license to the liability of General Motors for a violation of the criminal law. Essentially, the \textit{Quirin} defendants were engaged in practicing war without a license. They had bad intentions but they had done only one thing that could qualify as a crime in federal court: engaging in a conspiracy to commit espionage and sabotage. There was little doubt on this point; in fact, the military charged them with conspiracy to commit these offenses along with the alleged violation of the law of war.\(^9\)

Amazingly, the \textit{Quirin} court ignored the charge of conspiracy and affirmed the conviction solely on the possibility of violating the law of war.\(^9\) That the \textit{Quirin} court ignored the charge of conspiracy became a critical factor in the Supreme Court's decision in \textit{Hamdan}, in which the Court held that conspiracy charges are not subject to

\begin{footnotes}
\footnote{90. \textit{Id.}; Third Geneva Convention, \textit{supra} note 3, art. 4(2).}
\footnote{91. Annex to Hague Convention IV, \textit{supra} note 19, ch. 1.}
\footnote{92. \textit{Ex Parte Quirin}, 317 U.S. at 31.}
\footnote{93. \textit{Id.} at 23.}
\footnote{94. \textit{Id.} at 48.}
\end{footnotes}
prosecution in military tribunals.\textsuperscript{95} Be that as it may, and I am grateful that \textit{Hamdan} came out as it did, there are at least three good reasons for distancing ourselves from the concept of unlawful belligerency as introduced in \textit{Quirin}.

First, \textit{Quirin} confuses the failure to qualify for a status with the commission of a harmful act. Second, the Department of Defense realized that something was illogical about the concept of unlawful combatancy as a crime. When the Department defined the offenses that might be charged in military tribunals in what it called Military Commission Instruction No. 2, it specifically omitted the offense of merely being an unlawful combatant (or in their preferable language, the crime of being an unprivileged belligerent).\textsuperscript{96} Instruction No. 2 defines an offense of murder\textsuperscript{97} and destruction of property by an unprivileged belligerent.\textsuperscript{98} The Military Commissions Act omits even these offenses.\textsuperscript{99} Unlawful belligerency is not a jurisdictional prerequisite of the military tribunals.\textsuperscript{100}

The third reason for rejecting the logic of \textit{Quirin} is that the offense is not the kind of crime that would be properly recognized under international criminal law applicable to all nations. The illegal entry into the United States bothered President Roosevelt (understandably, for symbolic reasons), but it certainly would not offend the sensibilities of other countries or the international community as a whole.\textsuperscript{101} One would not expect a rational German court to convict the eight saboteurs. On the contrary, their compatriots would be proud of them. The offense was a parochial offense in much the way espionage and treason are: those who spy or commit treason against the United States naturally subject themselves to liability in American court but they are not guilty of an international crime.

\textsuperscript{95} Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2785 (2006).
\textsuperscript{97} Id. at 6(B)(3).
\textsuperscript{98} Id. at 6(B)(4).
\textsuperscript{100} Military Comm'n Instruction No. 2, supra note 96, at 6(B).
In contrast to Quirin, consider the second major case on war crimes in the Supreme Court, the prosecution of Japanese General Yamashita in a military tribunal for failing to properly supervise his rampaging troops in the Philippines.\(^{102}\) He was recognized to be a POW but nonetheless subject to prosecution. He was convicted of an essentially new crime based on the same provision of the Hague Convention that defined the elements for qualifying as a belligerent. The third element is that the belligerent must be commanded by a person responsible for his subordinates. The Court took the word “responsible” as a cue that criminal responsibility would be appropriate for a commander who negligently failed to control his subordinates.\(^{103}\) This, of course, is a major stretch—a clear violation of the principle *nulla poena sine lege*, the rule of prior legislative warning. If a similar stretch occurred in a domestic criminal prosecution we would scream bloody due process. And yet, *Yamashita* has become a precedent that has shaped international criminal liability. It is the foundation for the concept of command responsibility in the ad hoc tribunals and Article 28 of the Rome Statute.\(^{104}\) *Yamashita* deserves to be called the first American case to establish a universal principle of international criminal wrongdoing.\(^{105}\)

But the idea of cracking POW immunity originates in *Quirin*.\(^{106}\) *Quirin* played a positive critical role in *Hamdan*,\(^{107}\) but Chief Justice Stone's opinion also introduced another concept that has contributed to the unraveling of the protections for POWs originally promised by the Hague and Geneva Conventions: the concept of enemy combatant. The context is the same as the

\(^{102}\) In Re Yamashita, 327 U.S. 1 (1946).

\(^{103}\) This report of the decision is a bit generous. In fact, the Court does not use the word negligence but merely refers to an unlawful failure to prevent atrocities. *See id.* 327 U.S. at 14–16 (noting that the Hague Conventions place “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”).


\(^{105}\) *See Fletcher, supra* note 101, 650–51; Fletcher, *The Storrs Lectures, supra* note 21, at 1516 n.77.

\(^{106}\) Ex Parte Quirin, 317 U.S. 1 (1942).

previously cited language about unlawful combatants. Chief Justice Stone thought of enemy combatants as fighters who did not warrant POW status and who could be punished for their hostile and harmful actions. In *Yamashita*, a majority opinion also written by Chief Justice Stone, the term is used at least ten times and seemingly interchangeably with the term “prisoner of war.”

As the language of war has evolved, however, the concept of enemy combatant has become a major pathology of the law of war. By 2004, when litigation over the detainees in Guantánamo Bay finally reached the Supreme Court in *Hamdi v. Rumsfeld*, the assumption of the Court was that the government could detain enemy combatants until the end of hostilities—even if that meant the duration of their lives. The only real debate was whether the President could designate somebody as an enemy combatant or whether a decision of a neutral tribunal was necessary to classify someone as subject to detention without a criminal conviction. In the authoritative plurality opinion by Justice O'Connor, there is no discussion whether Hamdi was entitled to POW status. The only relevant category was one not even mentioned in the Hague or Geneva Conventions, the American invention called enemy combatancy.

Originally, at least, in the *Quirin* opinion, the Court took seriously the question whether a detainee was entitled to treatment as a POW. Now the detainees are fortunate to get a hearing by a supposedly neutral Combat Status Review Tribunal to decide whether they were fighting with the Taliban in Afghanistan as opposed to just being an aide worker caught on the spot. The new Military Commissions Act of 2006 treats POW status as irrelevant. It distinguishes, as did the Court in *Hamdan*, between lawful and unlawful enemy combatants. The latter are to be tried in military commissions. The former do not receive immunity as POWs but

rather are subject, illogically, to prosecution in courts martial for a range of offenses, including many that are not violations of the law of war.\textsuperscript{114}

The worst thing about this unraveling of POW immunity is that now enemy combatants have the worst of both worlds. They are subject to being held indefinitely like POWs, but unlike POWs they are subject to being prosecuted for engaging in hostilities against the United States.

The experience of Salim Ahmad Hamdan is illustrative. He was Osama bin Laden's driver for five years before he was picked up in Afghanistan.\textsuperscript{115} There is no evidence, so far as I know, that he was bearing arms for the Taliban.\textsuperscript{116} But he was a true believer in the goals of al Qaeda, and although he presumably did no more than drive bin Laden from place to place, a Combatant Status Review Tribunal labeled him an enemy combatant.\textsuperscript{117} After two years of detention in Guantánamo Bay, the Government decided to prosecute him in a military commission. They charged him with having joined a conspiracy to engage in terrorist acts against civilians, namely the September 11, 2001, attacks.\textsuperscript{118} After a surprising victory in the district court\textsuperscript{119} and then a reversal in the D.C. circuit\textsuperscript{120} he quite astoundingly garnered five votes in the Supreme Court.

There is some basis in Justice Breyer's concurring opinion for thinking that the problem with military commissions is that the President acted on his own. Under this interpretation, the problem is

\textsuperscript{114} Id. § 948(c). There is no reason, in my opinion, to assume that this provision is constitutional.
\textsuperscript{115} Hamdan v. Rumsfeld, 415 F.3d 33, 35 (D.C. Cir. 2005).
\textsuperscript{117} Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2761 (2006).
\textsuperscript{118} Id. at 2759.
\textsuperscript{120} Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).
remedied because Congress has enacted the Military Commissions Act and reinstituted charges of conspiracy in the jurisdiction of military tribunals.\footnote{121} Whether it truly is remedied will depend on how Hamdan is read in the next round of litigation. My preferred reading is that the four-vote plurality under Justice Stevens (with possible adherence by Justices Kennedy and Roberts) interpreted the law of war to be of constitutional status.

The argument for the constitutional interpretation of Hamdan goes like this: in the tradition from Milligan\footnote{122} to Quirin, the defendant plausibly objected to trial in a military commission on Sixth Amendment grounds.\footnote{123} Since the proceedings were criminal in nature, he was entitled to a jury trial. But the response was that the law of military commissions antedated the Constitution and therefore took precedence over the guarantee of a jury trial. If that is so, then the law of war as applied in the tribunals is incorporated into the constitutional structure. It cannot be redefined by a simple law of Congress.

Somehow I fear this argument will not succeed. The law of war is too pathological to do us this service of protecting civil liberties against a Congress bent on favoring the power of the president and the military. The pathologies began with the breakdown of the distinction between war and crime and they continue with erosion of the fundamental immunity granted to belligerents under the Hague and Geneva Conventions.

\footnote{121}{Military Commissions Act of 2006, 10 U.S.C.A. § 950(v)(28) (West 2007); see also Fletcher, supra note 16.}
\footnote{122}{Ex parte Milligan, 71 U.S. 2 (1866).}
\footnote{123}{U.S. Const. amend. VI.}