
ROUTLEDGE CRITICAL TERRORISM STUDIES
Lessons and Legacies of the War on Terror
From moral panic to permanent war
Edited by
Gershon Shafir, Everard Meade, and
William J. Aceves
ROUTLEDGE

Lessons and Legacies of the War on Terror

This book examines the lessons and legacies of the U.S.-led "Global War on Terror," utilizing the framework of a "political moral panic."

A decade after 9/11, it is increasingly difficult to deny that terror has prevailed – not as a specific enemy, but as a way of life. Transport, trade, and communications are repeatedly threatened and disrupted worldwide. While the pace and intensity of terror attacks have abated, many of the temporary security measures and sacrifices of liberty adopted in their immediate aftermath have become more or less permanent.

This book examines the social, cultural, and political drivers of the war on terror through the framework of a "political moral panic": the exploration of threats to particular individuals or institutions that come to be viewed as threats to a way of life, social norms and values, civilization, and even morality itself. Drawing upon a wide range of domestic and international case studies, this volume reinforces the need for reason, empathy, and a dogged defence of principle in the face of terror.

This book will be of much interest to students of terrorism studies, human rights, U.S. foreign policy, American politics, and Security Studies and I.R. in general.

Gershon Shafir is Professor of Sociology, Director of the Institute for International, Comparative, and Area Studies, and founding Director of the Human Rights Minor at the University of California, San Diego. He is the author of several books, including *Being Israeli: The Dynamics of Multiple Citizenship*, co-authored with Yoav Peled, which won the Middle Eastern Studies Association's Albert Hourani Award for best book on the Middle East in 2002.

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Citizenship, co-authored with Yoav Peled, which won the Middle Eastern Studies Association's Albert Hourani Award for best book on the Middle East in 2002. He co-edited with Alison Brysk *National Insecurity and Human Rights: Democracies Debate Counterterrorism* (UC Press, 2007), as well as *People Out of Place: Globalization, Human Rights, and the Citizenship Gap* (Routledge, 2004).

Preface

We would like to thank UCSD's Institute for International, Comparative, and Area Studies (IICAS) for hosting the conference on which this volume is based. Gershon Shafir and Cynthia E. Schairer would like to express their appreciation to the UCSD Department of Sociology for supporting their research with the Summer Graduate Research Assistantship for Faculty-Student Collaboration.

1 Introduction

Constructing national and global insecurity

Alison Brysk, Everard Meade, and Gershon Shafir

A decade after the September 11th attack on the United States, it is increasingly difficult to deny that terror has prevailed – not as a specific enemy, but as a way of life. Transport, trade, and communications have been threatened and disrupted worldwide; basic international norms for the conduct of war and law enforcement have been trampled; thousands of civilians have been killed in international and civil wars; massive terror attacks have rocked London, Madrid, and Mumbai; and dozens of smaller and larger bombings have wrought devastation in the Middle East and North Africa. Segments of Islamic communities have radicalized in the Middle East and Europe in a vicious cycle with rising anti-Islamic xenophobia, hate crimes, and violations of religious freedom in the West. As Benjamin Franklin predicted, "They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."

While the pace and intensity of terror attacks have abated, many of the temporary security measures and sacrifices of liberty adopted in their immediate aftermath have become more or less permanent. This volume explores the war on terror, not as a fleeting over-reaction, but as the foundation of a new anti-democratic global order that transcends partisan politics and national borders.

As Shafir and Brysk demonstrated in their comparative volume *National Insecurity and Human Rights: Democracies Debate Counterterrorism* (Berkeley, University of California Press, 2006), the UNITED STATES and its allies responded to the terrorist threat by constructing "national insecurity," a mirror image of the apocalyptic worldview of religious terror. The resulting policies diluted democracy at home and abroad, and damaged the West's comparative advantage of legitimacy, tolerance, and flexibility, empowering autocratic security elites. This volume explores how and why many of these policies have become permanent fixtures of the exercise of power, irrespective of the administration or party in power, and analyzes the interrelated implications of a permanent war on terror at home and abroad.

The contributors examine the social, cultural, and political drivers of the war on terror through the framework of a "political moral panic." Moral panics are responses to perceived existential threats – threats to particular individuals or institutions that come to be viewed as threats to a way of life, social norms and values, civilization, and even morality itself. A powerful illustration of this

version of threat is found in the 2006 National Security Strategy for Combating Terrorism: "The terrorist attacks of September 11, 2001, were acts of war against the United States, peaceful people throughout the world, and the very principles of liberty and human dignity." The terms of the war on terror exaggerated the strategic threat, defined "the enemy" in ever-expanding concentric circles, and encouraged the use of disproportionate force in response. More important, the moral panic over terrorism facilitated the revival and entrenchment of a broad range of repressive policies from the past with relatively little debate or dissent.

The initial preoccupation with "why they hate us" quickly turned into how much they hate us, and the seemingly limitless ways in which they could harm us (with little unpacking of "us" or "them"). The Bush–Cheney Administration amplified this panic at every turn. By singling out a threat in isolation, giving it a name and a simple narrative, and then deploying it in a concerted public relations campaign, the terms of the war on terror became self-reinforcing and self-reproducing. Otherwise skeptical journalists, commentators, congressmen, and others accepted a limited set of questions about the nature of the threat and how to respond to it, and thus fell into a rhetorical trap – "it's complicated and there's a lot we don't know" faced off against "it's simple and we know everything we need to know" in encounter after encounter. In the pressure to respond, to offer answers and solutions in the face of uncertainty, the latter, simpler answer triumphed time and time again.

Rather than big-brother media manipulation, or "manufactured consent," the Bush–Cheney Administration used its privileged knowledge of the threat to exacerbate existing fears, rather than to mitigate them. While their view wasn't omniscient by any means, and there was plenty of cause for short-term overreaction, they were well positioned to offer a more rational risk assessment, or at least to counter the most extravagant and apocalyptic myths. They not only declined to do so, but they manipulated the mystery of what they supposedly did know but couldn't reveal for dramatic political effect – think of Condoleezza Rice's warning of the "smoking gun" appearing as "mushroom cloud."

Meanwhile, definitions of the enemy expanded, and the range of proposed responses contracted. The reorganization of a wide swath of government agencies under the heading of "homeland security," and the formal establishment of the "deterrence of terrorism" as the top priority of all federal law enforcement reinforced this collapsing at every turn. Metaphorical invocations of war – repeated assertions that the attacks were "acts of war," that the country needed to get "on a war footing," or that unprecedented domestic surveillance was justified because "we are at war" – prepared the cultural and institutional terrain for real war, and the thorough militarization of counter-terrorism.

While the breadth and speed with which the global war on terror developed initially caught many critics off guard, it has faced deep and abiding opposition. Millions around the world protested the invasion of Iraq; the revelation of the torture and humiliation of prisoners at Abu Ghraib produced a media firestorm, congressional hearings, and criminal prosecutions; and the fate of the prisoners at Guantánamo Bay, Cuba became a central issue in the 2008 presidential

election and the subject of a voluminous and rich jurisprudence on civil rights and the law of armed conflict. But, most of the underlying policies have weathered the storm, and most of them have continued under the Obama Administration. More important, the legal and institutional changes wrought during the post 9/11 emergency have become more or less permanent, affecting millions of ordinary people without the most ancillary connection to terrorism.

The war on terror has spilled over into a more general crackdown against non-citizens. The new policies include the revival of the use of detention as a punitive deterrent to undocumented immigration, the classification of case files and other information about immigrants, and the criminalization of minor immigration-related offenses, such as driving without a license, or presenting false documents. Unprecedented rates of arrest, detention, and deportation have separated families, despite overall declines in immigration. The securitization of immigration on top of prior attempts at the formal criminalization of non-citizens as national policy, in turn, casts a long cultural shadow, fueling everything from state laws targeting Mexican workers, to local controversies over the construction of mosques and Islamic cultural centers.

A variety of moral entrepreneurs, many in the highest echelons of the state, have perpetuated this moral panic, and mobilized it to their own ends. Using the perceived threat of "terrorist infiltration" as a point of entry, a lawyer in Kansas developed the idea of "self-deportation"– making it so difficult for undocumented immigrants to function in society that they "deport" themselves – and deployed it in a series of restrictive local immigration laws, which have passed in Arizona, Alabama, and several other states. It's a similar story with local campaigns to ban Sha'ria law in Tennessee, Alabama, and Oklahoma. Most of them were dreamed up and written elsewhere and the local controversies they have spawned have nothing to do with a real threat of Sha'ria law or Muslim practices dominating their communities – they are simply a way of telling Muslims minorities, potential immigrants, or political progressives who may sympathize with them that they are not welcome.

The goal of this volume is not to pass judgment on popular beliefs or to unilaterally condemn a set of policy decisions at face value. Rather, the contributors explore how ideas and policies that were publicly disavowed in living memory because they sustained hateful or intolerant practices, or because of the serious and systematic abuses they spawned, have been revived without any real acknowledgement of why they were abandoned in the first place.

Indeed, one of the most insidious aspects of political moral panics is the way in which they obscure the genealogies of repressive policies. Many of the migrants and refugees caught up in the current crackdown against undocumented immigration, for example, fled the terror and genocide produced by U.S.-backed counterinsurgency regimes in Central America in the 1980s. Similar kinds of blowback characterize U.S. policy towards Iran and Sub-Saharan Africa, to say nothing of Iraq or Afghanistan. Asaf Siniver and other security analysts have noted the total lack of "introspection," or inquiry into "self-responsibility" for the "root causes" of terrorism among the governments waging the war on terror.

At a more pedestrian level, those who raised causal connections in the immediate aftermath of 9/11 often faced a stiff backlash. Witness the pillory of Susan Sontag for suggesting a degree of realpolitik in Al Qaeda's strategy or mentioning the courage of the hijackers in a *New Yorker* editorial, or the hysterical response to novelist and military historian Caleb Carr's rather modest assertion that terrorism is a tactic and not an ideology.

The 9/11 Commission Report (2004) repeatedly urges those fighting the war on terror to learn the lessons of the Cold War, warning against short-term alliances with repressive regimes, etc., but it posits no causal relationship between the two, and, in fact presents the history of U.S. responses to terrorism in complete isolation. In its attempt to avoid partisanship or ideology, the report avoids causation altogether, and portrays terrorism almost as a force of nature. A threat without a cause is a threat that can't be reasoned with, sized up, or fleshed out. It is all possibility, "self-renewing menace potential," as Brian Massumi describes it. This uncertain, amorphous quality, when combined with an exemplary act of violence, and many superficial markers of cultural difference, makes for the perfect panic. Though panics are popular phenomena, political moral panics are engineered for political needs by political leaders, who play upon and encourage existing fear and rage, even if genuine public panic remains weak, as indicated by the relatively modest rise in hate crimes against Muslims in the United States after 9/11. As Kathryn Olmsted shows, panics over perceived conspiracies against an "American way of life" during World War I, the Cold War, and the current war on terror have provided unique opportunities for the rapid (and largely permanent) expansion of government power.

In order to explore much more precisely how the ideas and institutions of the global war on terror have turned into a permanent feature of the exercise of power, the contributors to this volume pursue three related goals: (1) a broad theoretical framework which examines the deeper drivers of the global war on terror (GWOT or WOT) as a political moral panic; (2) an integrated approach to the domestic and international dimensions of the war on terror; and (3) an exploration of continuities across the Bush and Obama administrations that highlight the enduring aspects of the war on terror.

The volume begins with a broad theoretical introduction. Shafir and Schairer conceptualize moral panic not as a "theme" but rather as a comprehensive analytical framework. They examine each of the customary features of Stanley Cohen's original theory of moral panics, reevaluate, and reconceptualize them in detail. They extend the reach of moral panic theory from the study of social deviance that is amplified by mass media to the analysis of politics that revolve around moral and symbolic battles, connect it with political institutions and dynamics, and identify the circumstances in which it is likely to emerge and persist. From the perspective of moral panic they explore why with the end of the panic's "life cycle" so many of the policies that constituted the war on terror have not been dismantled, even after the term itself has been dropped. They propose an alternative response to grave threats, combining a careful assessment of the exaggeration of threats through "risk analysis"; the promise of liberal

education for combating the overbroad definition of adversaries; and the tools of constitutional law and the rule of law to properly constrain disproportionate responses.

Rescuing the submerged histories, giving a voice to those who have borne the brunt of abusive counterterrorism policies is critical to preventing the revival of such policies in the next panic. Aceves examines the enormous potential that civil lawsuits provide for retelling these histories in front of impartial arbiters, with empirical evidence, and in the survivors' own words. While the constitutionality of "enhanced interrogation techniques," the indeterminate detention of "enemy combatants," and many other aspects of the war on terror have been explored in a vast legal literature, civil remedies for the same kinds of abuses have received very little attention. As Aceves points out, in addition to the procedural robustness and legitimacy of the civil justice system in the UNITED STATES, there is good recent precedent for using civil lawsuits to give the victims of torture (at home and abroad) a day in court and a formal validation of their claims, even if there's no way of collecting monetary damages. Civil suits also offer an orderly path to a broader global pattern of post-atrocity reparations. Moreover, the system is "victim-centered … it allows the victims to control the proceedings, from the filing of the initial lawsuit, through the presentation of evidence, and to the execution of judgment." His recounting of several cases where the victims of torture and arbitrary detention as part of the war on terror have sought civil remedies under the "Bivens doctrine" – whereby they file suit against particular U.S. officials for violations of their constitutional rights – shows how U.S. officials in the Bush–Cheney and then the Obama Administration have invoked "state-secrets" privilege to prevent discovery and to withhold information necessary to sustain these claims, and how the federal appeals courts have allowed these obstructionist tactics to stand. In keeping with the broader thrust of this volume, Aceves shows that blaming the president or a cabal of national security officials for these decisions is off point. The moral panic and the extreme risk aversion it nourishes are sustained by the quiet cascading of many seemingly small decisions by law enforcement, government lawyers, and ultimately judges at every level, who have allowed the erosion of basic constitutional principles.

This kind of bureaucratic risk aversion, aided and abetted by extreme secrecy and a lack of transparency, has facilitated the evisceration of the rights of asylum seekers in the United States. Meade explores the rise of a sweeping new notion of deterrence in U.S. immigration policy after 9/11, including the adjudication of asylum claims. Tasked with deterring terrorism above all other priorities, immigration enforcement agencies and personnel fell back on a variety of punitive and prejudicial practices, and undermined the fragile progress made by the Refugee Act (1980) in creating a system in which individual asylum seekers could seek refuge from persecution in the United States based on their individual merits. In an alarming number of cases, the very same evidence that sustains a credible asylum claim has been used to detain, and exclude asylum seekers from legal status in the United States, as fraudsters and threats to national security.

When members of the general public (or even federal judges) get a glimpse of the experience of asylum seekers, they are confronted by overlapping spectacles – a spectacle of criminality reinforced by their arrest and detention in remote facilities, the forensic examination of their documents, and the repeated invocation of "terrorism," however peripheral the putative association; and a spectacle of desperation reinforced by hunger strikes, "rescues" at sea or in the desert, and other situations in which "refugees appear as groups of desperate people begging for asylum, rather than individuals demanding their rights."

Gottschalk's exploration of the revival of a barely-latent Islamophobia in the Park51 mosque controversy in lower Manhattan relies upon a similar notion of spectacle and the leveraging of a national moral panic over a local controversy. By systematically comparing this episode to the build-up to the assault on the Branch Davidian compound in Waco, Texas in 1993, he shows how the language, politics, and relationships between media coverage and law enforcement produced a similar result – in both cases the very existence of a religious group came to be widely perceived as a threat to "the American way of life." However, thanks to the norms of American Protestant secularism, whereas the demonization of the Branch Davidians didn't extend to all Christians and they were isolated as a "cult," the Islamic terrorists conjured up by the Park51 controversy cast suspicion on all Muslims. Once again, a political moral panic has empowered broader cultural forces, and revived practices rooted in previous panics.

Closer to the fighting on the ground, private security firms who tout their expertise, flexibility, and discretion have proliferated, earning billions of dollars in federal contracts and top security clearance, with very little oversight. Large military operations, diplomatic security details, and training courses have always involved private contractors, but the use of private intelligence officers, soldiers-for-hire, and shell corporations to finance and equip clandestine operations was largely abandoned after the Iran-Contra debacle and the revelation of various and sundry alliances forged in fighting the war on drugs. Counterinsurgency doctrine, largely abandoned in the aftermath of bloody and politically disastrous campaigns of torture and murder in Africa, Southeast Asia, and Central America, has re-emerged as the magic bullet in the war against the Taliban and Al Qaeda. Similarly, the strategic assassination of presumed terrorists and the political leaders of insurgent groups, banned after congressional oversight committees revealed the often indiscriminate killing of more than twenty thousand individuals from several different countries during the Phoenix Program in Southeast Asia, was revived by President Bush, and has been dramatically expanded by President Obama, aided by unmanned aerial vehicles.

The Prestholdt and Pedersen pieces illustrate how the domestic and international dimensions of the war on terror are part of a coherent whole, by showing how the moral panic over terrorism at home has played out in East Africa and El Salvador, respectively. Prestholdt explores how an obscure Al Qaeda operative was reinvented as a "master terrorist" by a group of moral entrepreneurs that included both U.S. counterterrorism officials and African policymakers eager to

take advantage of U.S. aid. Through the rhetorical prisms of "war" and "specters," they exaggerated the threat that he posed and imagined him as part of a larger phenomenon, lumping together dissidents of very different political persuasions into an exaggerated, amorphous threat. The appearance of this exaggerated threat, in turn, helped to redefine East Africa from a victim of terror attacks (the 1998 embassy bombings) to a "breeding ground" and a "safe haven" for terrorists, and thus served as a pretext for massive new U.S. military investment in the Horn of Africa. What began as a law enforcement operation to assist democratic allies in the region, turned into U.S. support for a series of proxy regimes in East Africa which have rolled back a generation of democratic reforms in the name of counterterrorism.

Pedersen examines how the political moral panic over terrorism helped to transform the "El Salvador option" for counterinsurgency or "population-centered warfare," from a piece of late-Cold-War arcana, sullied by systematic human rights violations, into a sterling example of building democracy through military intervention. Drawing on his own fieldwork, Pedersen shows how the counterinsurgency campaign in El Salvador imagined generic insurgents everywhere and configured all opposition to the regime as opposition to the cause of democracy in the Cold War, leading to tacit support for death squads and an action–reaction escalation of the civil war. In the end, the policy was quietly abandoned and any empirical analysis of its long-term legacy would be hard pressed to call it a "success" – murder, gang violence, social fragmentation, and mass exodus the United States seem to have been the primary results. But, through a series of serendipitous events and personal connections, U.S. military planners revived the "El Salvador option," including the death squads (renamed "covert actions squads"), as a roadmap for "success" in Iraq and Afghanistan, and the impetus for massive U.S. investment in counterinsurgency warfare. Rather than naïveté or ignorance, Pedersen shows that this revival was part and parcel of a whole new science of political risk analysis that redefined "success" in ways that obscured inconvenient historical data and justified preparation for seemingly remote possibilities. In the end, similar to the case in East Africa, a political moral panic revived policies rooted in previous panics, and obfuscated the reasons why they had been abandoned.

If the political moral panic over terrorism imposes a kind of amnesia, allowing us to accept disavowed policies and practices without confronting the reasons for their disavowal, then one of the lessons we should take from it is to explore a critical history of the present. The critical histories that make up this volume aim to recover lessons and legacies of the war on terror that have slipped below the surface of American politics. When he took office, President Obama announced that it was "time for reflection, not retribution" – but, in fact, neither of these has taken place. Violators have enjoyed impunity, controversial counterterrorism programs have been expanded, the government has become less transparent, and wartime emergency measures have become permanent institutions that affect millions of ordinary people. Rather than paralyzing us with despair, the examples in this volume reinforce the need for reason, empathy, and a

dogged defense of principle in the face of terror. They should give us confidence that the logic of diplomacy, negotiating in good faith, and the rational, proportional use of force that presumes an enemy not totally unlike any other enemy (or ourselves) can work, that we only face an existential threat if we allow a moral panic to change who we are.

2 The war on terror as political moral panic*

Gershon Shafir and Cynthia E. Schairer

"Nine-Eleven changed everything for us" was an oft-repeated statement by former President Bush and Vice President Cheney.[1] The subject of this study is the manifold and far-reaching response of the Bush–Cheney Administration to the al Qaeda terrorist attacks of September 11, 2001 – articulated under the novel doctrine of a "global war on terror" (GWOT) and its continuities and its discontinuities with the Obama Administration's own reactions. It is our contention that the GWOT is best understood as a political moral panic (see also Shafir *et al*. 2007: 184–186). In this chapter we offer a theory of political moral panics, elucidate the social dynamics by which the moral panic of the global war on terror has been created and sustained, and highlight its repercussions and alternatives.

1 Theoretical background

A Characteristics of moral panics

Stanley Cohen coined the concept of moral panic in order to account for the animosity toward the hooliganism of the "Mods" and "Rockers" in British resort towns in the 1960s and the immoderation of English working-class youth culture in general. His focus was on the social construction of deviance in public and media discourse which, at times, creates analogous panics around threats posed by school bullies, illicit drug abusers, child molesters, welfare mothers and immigrants (Cohen 1992: viii–xxi). In conceptualizing such a situation as a "moral panic," Cohen sought to highlight processes by which a threat to random innocent individuals assumes a moral dimension by becoming widely interpreted as a threat to the social order itself.

Since the majority of threats, regardless of their severity, do not lead to panics and most panics, regardless of the extent of their spread, develop a moral dimension, it is clear that moral panics, as Cohen asserts, are socially constructed. For example, the threat of predictably recurrent massacres of students, coworkers, and other bystanders with firearms widely available in the United States has led neither to panic nor to forceful legislative strategies of gun control and ownership regulation. Conversely, during runs on bank deposits or stock markets, coincidental attempts by individuals to safeguard their own assets by getting a

jump on other fearful depositors or investors create the very financial crisis all wish to avoid. In such cases, however, it is not the panic that assumes a moral coloring; on the contrary, a moral dimension enters such panics only when efforts to bring them to an end generate potential "moral hazards." The focus in studies of specific moral panics, therefore, should be on the moral entrepreneurs who transform threats into moral panics and the interests that benefit from such panics.

Cohen's theory is compelling, but we find it necessary to revise it in two ways to address an internal ambiguity (which we do in this section) and to flesh out its potential as a framework for analyzing the GWOT (the subject of Section B). Though Cohen clearly suggests that moral panics are socially, that is normatively, constructed, he also insists that most claims associated with moral panics can be evaluated objectively with respect to other threats or to basic demographic information. Both older and newer constructivist approaches gladly consent that once a situation is defined as objective or real, that definition will take on a life of its own and have real consequences (Thomas and Znaniecki 1984). We equally recognize that some threats pose greater risks than others – and therefore there is room for the combination of moral panic theory and risk analysis (as we shall see below). Cohen's aspiration to use an objective scale of threats conceals his recognition that since responses to threats are socially constructed they will both reflect and shape social and political interests. We suggest that conceptualizing a moral panic has to include an allusion to the process of how it is constructed. In fact, Cohen himself does so from time to time.

Cohen's original book does not offer a systematic theory as much as a number of insightful observations on the characteristics of moral panics. In a continuing debate with several waves of supporters and critics, Cohen has since identified several features of moral panics, though only suggestively or with excruciating terseness (see Unger 2001: 272). Of these features, we consider four to be the most significant. Reading Cohen's original formulation, his revisions, and the criticisms of his approach, we offer a conceptualization that highlights the social and political process by which moral panics are created.

i The *exaggeration of the threat* posed by a person or group is one of the key features of a moral panic in Cohen's definition. We also wish to ask, how can one follow the exaggeration of the threat, not as part of a comparison with other unrelated threats, but as part and parcel of the creation of the moral panic itself? We locate the exaggeration of the threat in the ever *escalating moralization of the threat* by which threats are cast not solely as endangering individuals and property but, progressively, as an attack on societal values, conventions, and the taken-for-granted social consensus over what is normative and what is deviant, but also on morality itself, the social order and ultimately of civilization itself (Cohen 1992: xxii, xxv–xxvi, 1, 7, 38, 57–58). Threats to individuals and property may be real and serious, as they certainly are in the case of terrorism, but the ongoing moralization of the threat, which replaces strategic considerations with intimations of existential jeopardy, is nearly always an exaggeration.

ii An *overbroad definition* of the social group – the "folk devils" – from which the threat emanates is Cohen's second feature of a moral panic. He emphasizes that the violators commonly hail from already stereotyped visible groups but emphasizes that state control policies keep adding on to and punishing the penumbra of those who share some of the social characteristics of the perpetrators themselves but have not been involved in wrong-doing (Cohen 1992: xxii, 39–43). Again, rather than declaring the targeting of a threatening population to be overbroad *ab ovo*, we wish to point to a process of *sequential accretion* or expansion of the enemy that leads to its overbroad characterization by which the panic is created.

iii A *disproportionate response* to the exaggerated threat, typically in the form of a massive mobilization and misuse of resources, is a third feature identified by Cohen as characterizing a moral panic. He numbers a sense of permanent emergency; police repression and a show of force to intimidate or gain respect; the bending and changing of laws and social control mechanisms in ways that run counter to established practice and principle; restrictions of individual rights; and social polarization as parts of such a response (Cohen 1992: 66–72, 140–145). While it is difficult to determine if a response is proportionate to an unknown risk, the *monopolization* of the public discourse by a single dominant doctrine of response through attacks on pluralist approaches, and through the reduction or elimination of barriers, institutional, legal, and moral to limiting a response leads to the discrediting of normal political life itself and thus to the overreaction to the threat.

iv Finally, Cohen holds that a moral panic has a clear *life cycle*. It appears, runs its course, and disappears or, more likely, submerges (Cohen 1992: 1). Whereas we suggested that the conceptualization of the first three characteristics of a moral panic require a focus on the process whereby these features are produced, we propose that in portraying their timeline we need to take a long-term view of the moral panic process. Therefore, in contrast to Cohen, we suggest that, more than a passing fashion or a mode of media coverage, full-blown moral panics can inspire legally enshrined *institutional changes* that become permanent long after the panic has subsided. Consequently, for a moral panic to truly subside the deep institutional and cultural changes that are the legacy of moral panics must be reckoned with.

Cohen implies that the exaggeration of a threat, overbroad definition of the enemy, and disproportionate response are produced through the social dynamic of *circular amplification*. Repeated and ever more alarmist warnings and responses by political and moral entrepreneurs lead to a feedback cycle. In an *external amplification spiral*, the disproportionate repression of the folk devils will enhance mobilization to their cause and allow them to replenish their ranks and continue their acts of deviance. In this spiral, the agents of reaction and deviance become parasitic on each other by continually feeding on and magnifying each other. Significantly, even in the absence of additional attacks or emergencies, moral panics commonly are amplified through an *internal amplification*

spiral of dramatization and exploitation by moral and political entrepreneurs for their own reasons (Cohen 1992: 8, 13, 118; Wilkins 1964). The internal spiral of the moral panic in this sense is self-enabling.

B Political moral panics

Cohen's theory of moral panics provides an inspiring conceptualization of potent social dynamics and serves as a promising foundation for our examination of the GWOT. But, while his focus on vulnerable and powerless populations opens the door to topics and institutions with political overtones, he does not venture there. Since our goal is to extend the reach of moral panic theory from the study of deviance to the analysis of politics that revolve around moral and symbolic battles of good and evil, we propose the concept of *political moral panic* that has particularly powerful ramifications and, consequently, requires its own theoretical exposition. We will now introduce the distinct political issues embedded in the "what," "how," and "why" of moral panics.

i What are political moral panics?

All moral panics, including the political variety, share the four features outlined in Cohen's work and revised by us. Political moral panics are distinct in involving the state and in being catalyzed by political and moral entrepreneurs who seek to attain goals that are out of reach of politics as usual. When customary interest group or party politics appear ineffective, such entrepreneurs translate their political interests into symbolic terms as a struggle of good and evil and cast the threat as jeopardizing civilization or morality itself.

Two clarifications concerning subsidiary characteristics of political moral panics are in order. First, because they arise through political mechanisms, political moral panics are likely to be the least spontaneous of panics and do not necessarily involve rioting or mass hysteria. In the case of the GWOT, many Muslims reported feeling public mistrust, discrimination, and harassment after 9/11 (Cainkar 2009), but the government's actions contributed to these feelings far more than incidents of mob violence. While there was a modest rise in hate crimes aimed at Muslims, programs undertaken by the Department of Justice, FBI, INS, and other law enforcement agencies to hunt down terrorists among aliens and migrants had a much larger impact. These efforts included the rounding up and indefinite detention of over 700 Arab aliens in the months after 9/11 and the required registration, as well as increased scrutiny, of more than 85,000 migrants from Arab countries in the following years (DOJ 2003: 2, 15, 22; Tumlin 2004; *NYT* November 22, 2003; *NYT* April 4, 2003). In contrast, annual surveys of hate crimes indicated that in the aftermath of 9/11 hate crimes against people of Middle Eastern descent, Muslims, and South Asian Sikhs (often mistaken for Muslims) rose from 28 in 2000 to 481 during 2001 then fell to 155 in 2002 and slowly declined until they climbed back to 160 in 2010.[2] In fact, "hysteria about Muslims in American life" has gripped parts of the country only some nine years after 9/11 and was catalyzed to a large

extent by a gradually formed network of Islamophobic moral entrepreneurs keen on benefitting from the 2010 elections.[3]

Second, political moral panics provide opportunity and justification for sidestepping traditional political channels and therefore feature an atmosphere of permissive lawlessness. Some may object that some of the policies carried out in the name of the GWOT were secret and therefore cannot be considered part of a panic. However, while the details of these policies may not have been publicly known, vague signals and rumors of their existence were enough to demonstrate the latitude the government was permitting itself.

In Section Two we will elaborate on what political moral panics are by examining the circular amplification of (A) the concept of the "global war on terror" as the main, and exaggerated, framing device of the panic; (B) the gradual inflation of the "enemy," (C) the disproportionate expansion of the response; and (D) the panic's life cycle, in order to demonstrate that the war on terror has a close fit with Cohen's own concept of moral panic. But unlike Cohen who studied the media and "the operations and beliefs of particular control agencies such as the police or the courts" (Cohen 1992: 6), we will examine the speeches and actions of President Bush and Vice President Cheney, and their Administration, in particular the Justice Department, as the central political and moral entrepreneurs of the GWOT, and of follow-up decisions by the Obama Administration.

ii How do political moral panics happen?

The amplification of a political moral panic is channeled through and reflects both the institutional and political makeup of the national field of politics. In the United States, amplification is played out through challenges to the "separation of powers" between the branches of government. Through a constitutional system of "checks and balances" the legislative, executive, and judicial branches guard their boundaries jealously against each other to counter the possibility of excessive power accumulation by any one of them (Hamilton *et al.* 1961: 355–359; Neustadt, 1990: 29). What is distinct to political moral panics is that the amplification of the response progresses by breaching these institutional boundaries. The lowering or erasing of the "walls," including well-established "bright lines," between governmental branches and institutions destroys the independence of their agonistic interests and allows moral panics to spread from one branch to the next unchallenged.

We suggest that political moral panics are amplified either by the *invasion and conquest* of one branch by another or by the *fortification* of one branch against the checks and balances of the other. The clearest examples of such breaches involve the creation and exploitation of legal *grey zones* that fall between existing institutional jurisdictions. In this amplification process, unique threats become all-consuming, cause and effect analyses are suspended, and a dominant principle of response gains upper hand through the ascendance of a single branch unmoored from alternative approaches and unmoderated by competing institutional branches.

The "wall" separating the executive and legislative branches is, in practice, lower than the walls between them and the judicial branch. Representatives of the former two are beholden to public opinion, while the latter's independence translates to a more pronounced separation of power. In addition, the field of law, as Bourdieu (1987) has pointed out, is a self-referential profession and tradition that operates with its own formal logic that further shield it from electoral politics and public opinion. The field of law, whether Federal Courts, the Supreme Court, or even the Office of Legal Council (OLC) has the potential to raise the highest barriers to stem the amplification of panic.

In Section Three, we analyze how political moral panic was amplified in the interstices of the branches of the U.S. government. We examine three challenges to the rule of law: (A) the coining of the category of unlawful enemy combatants, their detention, and the formation of military tribunals to try them; (B) the warrantless wiretapping of U.S. citizens' overseas communications; and (C) attempts to redefine the meaning of torture and harsh interrogation techniques.

iii Why do political moral panics emerge periodically?

Though Cohen implied that moral panics are reflections of socio-economic changes that polarize social classes, we wish to suggest a more precise historical and sociological context for the emergence of political moral panics. Our contention is that such panics are a customary conduit of *counterrevolutions*, namely ideologically articulated attempts to roll back legally enshrined changes that have brought about greater liberty, democratic representation, and more inclusive legal rights for previously vulnerable groups. Counterrevolutionary attempts unfold as moral panics when, at opportune moments of crisis, the political and moral entrepreneurs of the *ancien régime* construe their objectives not in political terms but rather as a moral struggle undertaken to protect civilization itself.

The term counterrevolution was born in the crucible of the French Revolution (Tise 1998: 323), but is most commonly associated with Marxist analyses that highlight the asymmetry between delivering new rights and access to resources and revoking recently acquired ones. In this paper we will use the formulation of Arno Mayer, a historian of modern Europe, who distinguishes counterrevolutions from two additional types of responses to social transformations accomplished through mass mobilization or revolutionary processes. Whereas "reactionary political actors propose to lead a retreat back into a world both lost and regretted" (Mayer 1971: 49) and conservatives articulate a traditional, defensive, and pragmatic but deferential outlook (Mayer 1971: 50, 51, 61), counterrevolutionary actors are innovators who nurture a fresh ideology to undergird a novel revolutionary conservative regime. While reactionaries and conservatives also seek a retreat from liberty and reason, only counterrevolutionaries do so with revolutionary zeal. In his work on "restoration," another post-revolutionary response, historian Robert Kann specified that it "must come about within the life-span of a political generation" (Kann 1968: 403).[4] This condition also seems to obtain for counterrevolutionaries.

We also would like to point out that the characterization of certain revolutions as counterrevolutionary is a sociological and not a partisan undertaking. Many left-leaning revolutions in history went through two stages, moderate followed by radical. The radical phase, which rejects the earlier moderate phase, will *eo ipso* contain a counterrevolutionary dimension. To disassociate themselves from their moderate revolutionary precursors, radical revolutionaries frequently resort to amplification typical of moral panics in that they proclaim their goal to be nothing less than the defense of the revolution itself. To accomplish their goals, radical revolutionaries have been willing to use the kinds of extreme methods that have given rise to the expression "the revolution devours its own children." Radical phases of revolutions, such as the Jacobin Terror, Great Stalinist Terror, and the Cultural Revolution, all rolled back freedoms, violated rights, and repossessed land and other resources attained in the earlier phases of the French, Russian, and Chinese Revolutions respectively. In doing so, they channeled moral panics in the pursuit at once of radical and counterrevolutionary goals. The focus of this chapter, however, is a more typical ideologically-driven counterrevolution that amplified fears to reverse rights acquired within living memory.

In describing their characteristics, Mayer concluded that counterrevolutionary leaders specialize in mobilizing their constituents "by inflaming and manipulating their resentment of those above them, their fear of those below them, and their estrangement from the real world about them" (Mayer 1971: 61). Furthermore, in Mayer's words, "one of the chief earmarks of a counterrevolutionary ideology is that it exalts passion to the near-paralysis of man's reasoning faculties and potentials. More particularly, it extols those individual passions that can feed collective paranoia and aggressiveness" (Mayer 1971: 63). These features, so ably rendered by Mayer, are indeed the moral panics that act as the conduits of counterrevolutions.

Section Four focuses on why political moral panics occur, through an exploration of the attempted incorporation of prior agendas into the core of the war on terror. We discuss three counterrevolutionary agendas that originally had little to do with combating terror: (A) the establishment of the United States as an imperial power in the Middle East, (B) the strengthening of the executive office through the "unitary executive power" doctrine, and (C) the securitization of anti-immigrant policy.

Section Five will ask how moral panics might be avoided. We will suggest that a combination of risk analysis, historically-conscious liberal education, and constitutional separation powers are required to break away from the exaggeration of threat, the overbroad definition of enemies, and the disproportionate response to threats, respectively. This can reduce the enduring effects of moral panics beyond their duration and maybe even mitigate them.

In our Conclusion, we seek to highlight the range of phenomena that the theory of moral panic can fruitfully explain.

2 The panic-driven global war on terror

What makes the GWOT a political moral panic? In this section, we will demonstrate that the war on terror displays all four distinct features of Cohen's theoretical framework and, consequently, can be accurately and fruitfully theorized as a moral panic. The pronouncements made by the Bush–Cheney Administration in the months after the 9/11 attacks demonstrate a clear and progressive inflation of the definition of the threat, the enemy, and the proper response to them. These were the result of treating terrorism as a threat unlike any other, from the absence of rigorous cause and effect analysis of terrorism, and from allowing a single doctrine to crowd out other possible responses. We will follow these through an examination of President Bush's major post-9/11 speeches, in particular his annual State of the Union addresses.

A Exaggeration of the threat

The characterization of terrorism as a singular threat to the very order of U.S. society represents a clear moralization and, therefore, exaggeration of that threat. This theme appeared again and again in the President's speeches. On September 20, 2001, during his first post-9/11 address to a joint session of Congress, President Bush replied to the question "Why do they hate us?" by rendering the putative answer in the broadest terms: "these terrorists kill not merely to end lives, but to disrupt and end a way of life." In his view the terrorists attacked the United States because "they hate our freedoms," in particular U.S. democracy. But in President Bush's view even more then American freedom was at stake and, consequently, the response had to be understood as "the world's fight,… civilization's fight." On the fifth anniversary of 9/11, as many times before, President Bush reiterated that the war on terrorism was nothing less than "a struggle for civilization" and must be fought to the end.[5]

B Overbroad definition of the enemy

On September 11, just a few hours after the attacks, while at Barksdale Air Force Base in Louisiana, President Bush stated in a focused and measured fashion, "make no mistake, the United States will hunt down and punish those responsible for these cowardly attacks" (Lemann 2002: 1). On September 20, 2001 he answered the question "Who attacked our country?" by pointing to al Qaeda, but immediately began expanding the list of enemies. "Our war begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." Later in the speech he added to the enemy list nations that aid or provide safe heaven to terrorists. President Bush further broadened the conflict and ruled out the possibility of neutrality by asserting that "every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists."[6]

In his January 20, 2002, State of the Union address, President Bush segued into a yet more wide-ranging ambition, and declared his intention "to prevent

regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction." Three radically different regimes – North Korea, Iran, and Iraq – were singled out and lumped together as constituting an "axis of evil" that threatens the peace of the world. On the slippery slope of subjunctive conditionals, President Bush linked these enemies: "by seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred."[7] This chain elided many logical leaps: seeking WMD did not mean that a regime had them, nor that it was willing to hand them to terrorists who, in fact, were likely to have a different agenda from the regime's own.

In the 2003 address, the conditional clause was employed to draw attention to Saddam Hussein who "could" provide one of his hidden weapons to al Qaeda, kindling even greater fear. "Imagine," President Bush said, "those 19 hijackers with other weapons and other plans – this time armed by Saddam Hussein."[8] By the time of the 2007 address, he listed both Sunni and Shi'a extremists as adversaries and, accordingly, the enemy was re-conceptualized even more broadly. Now the United States was engaged in "the fight against extremism."[9] By 2008, he stated that "since 9/11, we have taken the fight to these terrorists and extremists," now firmly linking these two enemies – one ill-defined, the other undefined.[10]

The full extent of the nebulous cause-and-effect reasoning used to define the enemy is best illustrated in the 2006 *National Strategy for Combating Terrorism* policy paper:

> In addition to [the] principal enemy, a host of other groups and individuals also use terror and violence against innocent civilians to pursue their political objectives. Though their motives and goals may be different, and often include secular and more narrow territorial aims, they threaten our interests and those of our partners as they attempt to overthrow civil order and replace freedom with conflict and intolerance. Their terrorist tactics ensure that they are enemies of humanity regardless of their goals and no matter where they operate.
>
> (5)

This sweeping characterization of the enemies of the war on terror includes groups that carried out local acts of terror but had not attacked the United States, as well as "extremists," a category that includes adversaries that may have never employed terrorist tactics and, in certain cases, have been hostile to al Qaeda's itself (Gerges 2005). Furthermore, the extension of the war into Iraq has intensified an external amplification cycle between the United States and al Qaeda and served as a major recruitment tool for terrorism in Iraq, Western Europe, and elsewhere (Benjamin and Simon 2005).

C Disproportionate response

The simple act of naming the official response to terrorism a war set the stage for a disproportionate response, as the metaphor of war monopolized national discourse. Though he promised to employ diplomacy, intelligence, law enforcement, and "every necessary weapon of war," President Bush placed these instruments in the context of a war aimed at the "disruption and defeat of the global terror network." Since 9/11, a variety of terms were used to label the U.S. response, ranging from "war against terrorist groups of global reach," "war on terrorism," to "battle against international terrorism," but the one that has caught on is "war on terror."

The designation of the U.S. response to the 9/11 attacks as war even when the classic conditions of warfare do not obtain had a profound amplifying potential. The war on terror is akin to other *metaphorical wars* declared by earlier presidents. In 1964, Lyndon Johnson was the first President to make such a pronouncement by declaring war on poverty, and President Nixon followed suit by waging war on drugs in 1971, both non-tangible and non-state enemies. The gravest danger of metaphorical wars is that they may be transformed into actual war. Nowhere has this been more evident than in the way the United States was drawn into the invasion of Iraq (see Section Four, below).

D The life cycle of the GWOT

The catchphrase "war on terror" was burnt into American consciousness on September 20, 2001 and came to define the Bush–Cheney Administration. When Presidential candidate Senator John Kerry argued in October 2004 that the term war on terror was inappropriate since the threat of terrorism, though real, has been exaggerated, he was forced to back down (Are We Trapped 2006: 6). Ironically, as he prepared to leave the Pentagon in 2006, Donald Rumsfeld openly questioned both terms of the expression. He suggested that the term war "creates a level of expectation of victory and an ending within the 30 or 60 minutes of a soap opera. And it isn't going to happen that way." He also added: "Furthermore, it's not a war on terror." Rather it is "a struggle or a conflict, not against terrorism but against a relatively small number, but terribly dangerous and lethal, violent extremists." Consequently, "I guess I don't think I would have called it the war on terror."[11] President Bush, however, refused to consider alternate ways of describing the U.S. policy and stuck by the term until the end of his second term.

The term "war on terror" began fading away only after President Obama assumed office (*NYT*, March 23, 2009). He described the U.S. policy with more long-winded and less sweeping words, for example as the "enduring struggle against terrorism and extremism." As the term falls out of favor, the definition of the enemies is also shrinking to include only specific extremist groups, in particular "ones that are viewed as threats not just to America or the West, but also within the countries [in which] they operate."[12] Thus the

"global" dimension of the threat is also in the process of vanishing. The June 2011 *National Strategy for Combating Terrorism* aims narrowly at "disrupting, dismantling, and eventually defeating al-Qaeda and its adherents" and promises to "have placed our counterterrorism campaign in a context that does not dominate the lives of the American people nor overshadow our approach to a broad range of or interests" (1). But, as we shall see, a change in terminology and even the scaling down of the enemy's definition and the size of the response cannot fully undo the institutional, legal, and political legacies of the GWOT.

3 Separation of powers and the rule of law

How was the GWOT amplified into a political moral panic? As a political moral panic, the amplification of the GWOT is the result of specific political strategies carried out within and in response to the tradition of separation of powers in U.S. government. These strategies include the creation and exploitation of grey zones and the invasion of other branches or fortification against checks and balances (see also Bay 2005). Thus, political moral panic may be used as a justification to consolidate power as well as circumvent public debate and independent oversight. In addition, the *monopolization* of the political agenda by demanding loyalty to the concept and pursuit of "war on terror" served as a particularly effective tool for discrediting normal politics. Once adopted by President Bush, GWOT was used not only by his Administration but also adopted by the Democratic opposition as well as the press thereafter. Though Democratic Presidential candidate John Kerry suggested in 2004 that "we have to go back to the place … where terrorists were not the focus of our lives but … a nuisance … [that is] not threatening the fabric of [our] life" (*NYT* Magazine, October 10, 2004), his campaign had to clarify that he remained committed to the war against terror (Lustick 2006: 115–117). The President and his Administration were singularly effective in persuading the population that the country is notionally at war. In fact, when President Bush was criticized it was usually over the handling of the war, not over waging it.

Legal scholars have often pointed out that many of the policies carried out under the umbrella of the war on terror were secret (e.g., Savage 2007: 91–97; Olshansky 2007: 11), thus potentially casting doubt on the appropriateness of studying them as components of a moral panic. But from a sociological perspective rumors and partial information are sufficient to project an atmosphere of permissive lawlessness and thus generate moral panics. The Bush–Cheney Administration's willingness to operate outside the rule of law in the pursuit of the war on terror was an open secret. Vice President Cheney famously stated in an interview with Tim Russert on September 16, 2001 that:

> we also have to work, though, sort of the dark side, if you will. We have to spend time in the shadows … so it's going to be vital for us to use any means at our disposal.… It is a mean, nasty, dangerous dirty business out

> there, and we have to operate in that arena. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission.
>
> ("The Vice President" 2001)

In September 2002, Cofer Black, the CIA's counterterrorism chief, testified to a joint session of the House and Senate intelligence committees that "there was a before 9/11, and there was an after 9/11. After 9/11 the gloves come off."[13] The nod and wink to illegality both confirmed and perpetuated the public's fear of terrorism, thus feeding the dynamic of the moral panic. Full knowledge of the Administration's actions, in contrast, might well have led to public displeasure and protest against the officials in power.

The formation and exploitation of legal grey zones in semi-secretive fashion are particularly unmistakable in three policies of the Bush–Cheney Administration's response to terrorism that we discuss in this section. In our first example, the creation of the novel category of "unlawful enemy combatant" and the military tribunals to try them worked to impinge on the jurisdiction of the judiciary and fortify the executive from congressional and judicial oversight. Likewise, the National Security Agency (NSA) wiretapping program began by questioning the distinction between domestic and foreign correspondence and then claimed sweeping privileges for executive espionage, lowering the wall put in place by Congress to separate these activities. Finally, the Administration's reevaluation of practices recognized as torture indicated that the executive branch will not be bound by international or domestic law.

A Unlawful enemy combatants

The re-categorization of suspected terrorists from criminals to "unlawful enemy combatants" is perhaps the most dramatic example of how the Bush–Cheney Administration created a grey zone to rationalize an invasion of the judicial branches and fortify the executive against checks and balances. Under the Third Geneva Convention, combatants have the legal right to participate in hostilities and enjoy the treaty's protection as POWs. Under the Fourth Convention, civilians, such as al Qaeda terrorists, do not have those rights and consequently can be tried as criminals in civilian court (Olshansky 2007: 49–51). The Bush–Cheney Administration created a new type of detainee, the unlawful enemy combatant, who is neither criminal nor prisoner of war, and, consequently, is entitled neither to the protections granted to POWs by international humanitarian law, nor to the protections granted to criminals by domestic law. The category itself – usually referred to in shorthand as "enemy combatants"– was left undefined in the Military Order, "Detention, Treatment, and Trial of Certain Noncitizens in the War against Terrorism."[14] Over time it has expanded to include al Qaeda members, Taliban fighters, terrorist suspects captured anywhere in the world and, notwithstanding the order's title, U.S. citizens Yaser Esam Hamdi and Jose Padilla (Olshansky 2007: 48).

The prosecution of the new category of enemies also required a novel and untried system of judicial institutions. Unlawful enemy combatants, as laid down in the November 2001 military order issued by President Bush, were to be tried by specially constituted military commissions (Amann 2004: 269; Olshansky 2007: 47–48). Though only a few of the commission's rules were set by this order, these were particularly draconian. They allowed the court to keep evidence secret from the defendant as well to admit evidence obtained through coercive interrogation. Neither did they provide for the right of appeal nor for the cross-examination of hostile witnesses (Savage 2007: 139, 275; Falk 2007: 30–31).

Finally, the geographical location of the commissions themselves in the makeshift prison camp set up at the U.S. Naval Base in Guantanamo Bay, Cuba, where the Bush–Cheney Administration argued that American courts had no jurisdiction over the commissions (Savage 2007: 145), would have served as the perfect "grey zone" or legal limbo for terrorist suspects. In sum, through the superimposition of a new legal designation of terrorist suspects, a novel system of military commissions, and their location outside the presumed authority of the U.S. judicial system, the executive branch created a system of detention and trial wholly under executive control and attempted to fortify this system from the intrusions of the independent judicial branch that might otherwise claim jurisdiction over these suspects.

In June 2006, the Supreme Court ruled by majority vote in the *Hamdan* v. *Rumsfeld* case that "the President violated the separation of powers by setting up the commissions without congressional authorization and in a manner inconsistent with Articles 3 and 4 of the Third Geneva Convention of the Treatment of Prisoners of War" (Falk 2007: 33). Even so, Congress closed ranks with the Bush–Cheney Administration and soon passed the Military Commission Act bringing the system into compliance with the Hamdan ruling but leaving most of its original provisions intact. In spite of the skepticism of the courts, Congress both enshrined the Administration's theory of vast war powers and legalized a grey zone for terrorist suspects created in a new law that has no sunset clause (Falk 2007: 30–31, 33–34; Savage 2007: 319–320). In June 2008, however, the Supreme Court decided that the "combatant status review tribunals" provided inadequate protection and reinstated the right of alien unlawful combatants held in Guantanamo to seek *habeas corpus* rulings on their detention (*NYT*, June 13, 2008).

It is in regard to the detention and prosecution of terror suspects that the most significant continuities between the Bush–Cheney and the Obama Administrations become apparent. In the early days of his presidency Barack Obama signed an executive order to close Guantanamo within a year (*NYT*, January 23, 2009), but this policy has not been pursued with much vigor, gradually eroded and was ultimately abandoned. The main source of opposition to closing the infamous prison, freeing those not suspected of terrorist ties, and trying the others detainees in civilian courts in the U.S. was Congress. It adopted a series of resolutions between May 2009 and December 2010, which run the gamut from refusing

funds for closing the facility, through objecting to the freeing or transfer of detainees in the U.S. to barring the Justice Department from bringing them to the U.S. even for prosecution (Finn and Kornblut 2011; Hajjar, September 10, 2011). On its part, the NY Police Department raised various obstacles to trying Khalid Sheikh Mohammed, the mastermind of 9/11 in a Manhattan federal courtroom (Finn and Kornblut 2011). In March 2009, in a submission to the Supreme Court, the Obama Administration sought to maintain the legality of holding terror suspects indefinitely, even as it rejected the logic of sweeping executive power (*NYT*, March 14, 2009), and in March 7, 2011 President Obama signed an executive order for a review processes that would allow it to hold detainees indefinitely and without trial (Hajjar, September 10, 2011).

Another practice, the targeted killing by drone-fired missiles in Pakistan, Somalia, and Yemen, has now emerged as a related issue in regard to terror suspects. It was the killing in October 2011, of Anwar al Awlaki, a U.S. citizen affiliated with al Qaeda in Yemen, that generated a lively debate over the meaning of due process related to the assassination. The Justice Department's Office of Legal Council has issued a secret memorandum justifying the action on the basis of the threat al Awlaki posed and the high risk of trying to apprehend him in Yemen. Whatever the constitutional merits of the OLC's opinion, what stands out is that the decision to kill a U.S. citizen was made without recourse to either Congress or the judicial branch, namely entirely within the executive branch (*NYT*, October 12, 2011; Salon, March 6, 2012). Thus, the Obama Administration's approach to fighting terror appears as a direct continuation of the Bush-Chaney Administration's emphasis on the unitary role of the executive branch.

B Wiretapping

The decision to wiretap international electronic correspondence without approval of the Foreign Intelligence Surveillance Court (FISC) after 9/11 was another policy of the war on terror designed to shield the executive branch from the oversight of an independent court. This policy was a direct challenge to one of the significant reforms put in place after President Nixon's misuse of the power of the CIA, FBI, and NSA. In 1978, in the aftermath of the Watergate scandal and Nixon's resignation, Congress passed the Foreign Intelligence Surveillance Act (FISA). On the recommendation of the Church Commission, the act established the Foreign Intelligence Surveillance Court (FISC) and required the executive branch to request warrants for domestic wiretapping prior to or, in case of emergency, within twenty-four hours after commencing a wiretap. The NSA, on its part, was allowed only to spy on the communication of foreigners abroad (Olshansky 2007: 265, 283).

However, shortly after 9/11, the NSA carried out surveillance of American's international phone calls and e-mails without FISC warrants and without authorizing legislation. The Bush–Cheney Administration achieved these ends by circumventing the FISC, instead depending on Department of Justice's Office of

Legal Council, to offer a legal theory undergirding the legality of these new policies (Mayer 2008: 67–71).

This strategy met resistance within the executive branch, but ultimately succeeded in reducing oversight over executive wiretapping. When the second head of the Office of Legal Council (OLC) under the Bush–Cheney Administration, Jack Goldsmith concluded that the program was in violation of the FISA law, Attorney General John Ashcroft decided not to recertify the program's legality. On the evening of March 10, 2004, the day before the program's renewal date, the conflict came to a head.[15] While Ashcroft was in intensive care recuperating from a gall bladder operation, President Bush sent Alberto Gonzales, his legal counsel, and Andrew Card, his chief of staff, to pressure Ashcroft in his "weakened condition" to reverse the decision. The top echelon of the Department of Justice and the FBI Director, following the lead of the OLC, rushed to Ashcroft's bedside to counter the Bush emissaries and Ashcroft, on his part, refused to change his mind. Later, in a midnight meeting at the White House, the Justice Department officials reiterated their legal opinion that in its present form the wiretapping program was not legal and threatened to resign en masse. President Bush nonetheless signed the order and the program continued operating though held now to be illegal while the Justice Department made "a series of undisclosed changes" to it (Savage 2007: 184–188).

In January 2007, the newly elected Democratic majority in Congress planned to open an investigation but the new Attorney General Alberto Gonzales informed Congress that the issue had become moot. One of the judges of the FISC issued an "innovative" order which authorized the NSA to continue its surveillance with the approval of the court (Savage 2007: 201–207). Finally, in July 2008, Congress overhauled FISA by authorizing "a major expansion of the government's surveillance powers" which "included almost all the major elements the White House wanted." Though Congress reclaimed its authority to set limits on permissible wiretapping and reaffirmed the role of the FISC in approving in advance wiretapping procedures, it also greatly expanded the range of those limits. Under the new legislation, NSA is now allowed to seek broad, rather than individual, warrants to authorize wiretapping communications passing through American telecommunication switches whose targets are "reasonably believed" to be outside the United States (*NYT*, April 16, June 20, July 10, 2009). A month later, FISC announced its ruling that the Fourth Amendment's protection does not apply to intercepted international phone calls and emails of American citizens suspected of being spies or terrorists (*NYT*, January 16, 2009). It was also disclosed recently by the Obama Administration that NSA engaged in "significant and systematic," though possibly "unintentional," collection of American citizens' domestic phone calls and emails. However, under the new law it can do so for no longer than a week before receiving FISC authorization. This "overcollection" may or may not have been resolved (*NYT*, April 16, 2009). The long-standing legacy of the Bush–Cheney Administration and, to a lesser extent, the Obama Administration's policies on wiretapping are summed up by John Yoo who concluded that, in regard to electronic surveillance, the post 9/11 era has

seen "a big change." One legal expert commented that "the Fourth Amendment has been seriously diluted," given "the amount of surveillance that's been unleashed with less and less judicial review and less and less individualized suspicion" (*NYT*, September 11, 2011).

C Torture: "heavy" and "light"

The Bush–Cheney Administration's efforts to rubber-stamp the use of aggressive interrogation techniques follows the same pattern of creating grey zones that, in tandem with the climate of panic, helped to rationalize policies that would otherwise be considered beyond the law. In this case, the Administration placed harsh interrogation practices in a grey zone and claimed they were not torture. In a different but related move, memos produced through the OLC sought to claim novel circumstances under which these techniques might be justified.

The United States ratified the international Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1994. In response to "advances" in interrogation in the 1960s and 1970s, such as the replacement of physical pressure with techniques that do not leave bodily marks, the Convention prohibits both "torture heavy" and "torture light." Unlike most other legal instruments, CAT does not allow derogation and, consequently, the prohibition of torture is absolute, marking off this practice with a bright line.

On August 1, 2002, after the CIA became convinced that one of the arrested terror suspects, Abu Zubaydah, held back information during his interrogation, it requested a review of this policy. Jay Bybee, the Bush–Cheney Administration's first Assistant Attorney General in charge of the Office of Legal Council, issued an opinion which came to be known as the "torture memo." The memo, drawn up by John Yoo, an expert on presidential war powers employed in the OLC who in effect reported to the White House Counsel Alberto Gonzales (Goldsmith 2007: 22–25), dramatically lowered the threshold of torture. The memo permitted practices shy of physical injury that cause "death, organ failure, or … loss of significant bodily function," and also reiterated that the domesticated CAT violated the constitutional authority of the President as Commander in Chief to set interrogation standards (Greenberg and Dratel 2005: 172; Savage 2007: 155–6; Goldsmith 2007: 144: Shafir 2007). Two separate memos addressed to the CIA, made public only on April 16, 2009, approved a list of ten "conditioning," "corrective," and "coercive techniques" of interrogation, including waterboarding, and a subsequent memo approved their combined use.[16]

Military interrogators at Guantanamo received a similar list of allowable coercive interrogation techniques from Secretary of Defense Rumsfeld (Savage 2007: 177–179). These were later "exported" by Major General Geoffrey Miller, the commander of the Guantanamo prison, to Abu Ghraib in Iraq, in effect expanding the category of those who could be harshly interrogated to include individuals captured in a country with which the United States was at war and thus clearly under the aegis of the Geneva Conventions' protection (Savage 2007: 190). The release of the Abu Ghraib photos in April 2004 made this

practice dramatically public. All the while, after years of press coverage suggesting that suspected terrorist were being subject to harsh punishment, President Bush assured the world that "the United States does not torture. It's against our laws, and it's against our values" (Danner 2009).

On June 15, 2004, a few weeks after the publication of the Abu Ghraib photos, Goldsmith withdrew the memos, an unprecedented action, since it was taken within a single administration. His reasoning was not that the authorized interrogating techniques violated the Convention against Torture but that the legal justification violated the separation of powers by discarding many federal laws as well as Supreme Court decisions (Goldsmith 2007: 144–149).

Attempts to scale back the practice and authority behind harsh interrogations remained ineffective until the end of Bush–Cheney Administration. The still secret memo that listed the permissible harsh interrogation techniques was redrafted: it left out the reference to unlimited Presidential authority but declared, in a breathtaking footnote, that all the interrogation techniques used by the military and the CIA had remained legal.[17] In 2005, Senator McCain proposed a law prohibiting military and CIA interrogators from exceeding the Army Field Manual's guidelines which were written in accordance with the Geneva Conventions. Though the White House claimed to accept it when it passed with a lopsided bipartisan vote (Savage 2007: 220–226), President Bush issued a "signing statement" to the effect that in implementing the law, the executive branch will be cognizant of the limitations on judicial power and act to protect the American people from further terrorist attacks.[18] In fact, an International Committee of the Red Cross (ICRC) report that was leaked in March 2009 on the interrogation of fourteen "high-value" detainees after their transfer to the Guantanamo Camp in 2006, concluded that their treatment "constituted torture."[19]

Less than a week into his term, President Obama reversed the policies of his predecessor and "ordered the CIA to cease the torture and mistreatment of terrorist suspects."[20] On April 16, 2009, he released the OLC's memos that authorized the CIA to employ coercive interrogation tactics against terror suspects during the Bush–Cheney Administration, but also announced that "his administration would not prosecute CIA operatives for carrying out controversial interrogations of terrorist suspects" (*NYT*, April 16, 2009 and February 20, 2010).

Though President Obama did away with the practice of torture "heavy," such as waterboarding, by adopting the Army's Field Manual across U.S. agencies, including the CIA, elements of the remaining interrogation policy still amount to torture "light." Changes to the manual (in Appendix M), ironically adopted in 2006 after the Abu Ghraib scandal, potentially allow indefinite solitary confinement, stress positions, the manipulation of temperature in confinement cells, and 20-hour long daily interrogations with the aim of achieving debility, disorientation, and dread (*NYT*, January 21, 2010; Hajjar, September 9 and 10, 2011).

As we have seen in this section, during the Obama Administration wiretapping of U.S. citizens communications has continued though now in a form legalized by Congress and authorized by the FISC, heavy torture has been forbidden though the door was left open to cruel, inhumane, and degrading forms of

treatment which are commonly viewed as torture "light," and there has been considerable backtracking "in substantial if nuanced ways" in regard to detaining and trying terror suspects (*NYT*, May 16, 200). Even so, suggestions of full continuity, namely a "Bush-Obama Presidency,"[21] are grossly off the mark. Indeed, the major obstacle to trying several terror suspects in civilian courts was that they were heavily tortured during the Bush–Cheney Administration and consequently their legal cases have become tainted (see, for example, Hajjar, September 8, 2011). Cohen's expectation that moral panics have a life cycle, namely that they rise and then disappear or go into abeyance, has certainly not been born out in the case of the GWOT. Many of the overreactions have, in fact, been either legalized or adopted in a more muted form by Congress or a new administration that sought to distance itself from them. Political moral panics appear to survive the circumstances of their birth.

4 The GWOT as counterrevolution

Why did the response to the 9/11 attacks erupt into a political moral panic? Moral panics are frequently the conduits of counterrevolutions. In this section we will examine the artful incorporation of three prior agendas into the war on terror with the intention of reversing far-reaching domestic and international legal transformations that have taken place since the end of World War II. The first of these legal revolutions began with the creation of the United Nations as a body that fashioned strict criteria for declaring and waging war. The principles of the new multilateral order were laid down in now famous legal instruments such as the Charter of the U.N., the 1949 Geneva Conventions, the 1984 *Convention Against Torture and Other Cruel, Inhuman* or *Degrading Treatment or Punishment (CAT)*, etc. The second revolution, narrower in scope, was the post-Watergate congressional legislation which limited the powers of the executive branch. The third was the civil and minority rights revolution of the 1960s and 1970s,[22] including the *de jure* and de facto liberalization of immigration. These legal instruments and regimes had a common denominator: they were either international, domestic, or domesticated rights-based legislation which placed limits on the autonomy of the executive branch.

Distinct groups led the struggles against each of these legal revolutions, though at times their members overlapped. The first of the three counterrevolutionary agendas consisted of the incorporation of the neo-conservatives' blueprint for regaining American war-making powers in the wake of the fall of the USSR and using it to remove Saddam Hussein by segueing from the war against al Qaeda into the invasion of Iraq. The second agenda sought a return to an "Imperial Presidency" on the novel constitutional grounds that objected to the checks and balances of the legislative and judicial branches on the President's "unitary executive power" as Commander in Chief. Finally, the third agenda, originating in Congress, was the securitization of immigration from Mexico; proponents of this agenda ultimately succeeded in defying President Bush himself.

A War in Iraq

The initial focus of the war against al Qaeda and the Taliban in Afghanistan rapidly shifted as the GWOT converged with the prior agenda of regime change in Iraq. The foreign policy and military leadership of the United States under President Bush was divided between, on the one hand, the State Department, the uniformed military, and the majority of the intelligence community, who held fast to settled multilateral principles of U.S. foreign policy, and, on the other hand, a small group of neo-conservatives formed around the "Project for the New American Century" within the civilian ranks of the Pentagon sponsored by Vice President Cheney and Defense Secretary Rumsfeld. This latter group wished to establish a world-wide U.S. hegemony in a quasi-imperial fashion at the end of the Cold War (see, for example, Norton 2004; "Are We Trapped…" 2006: 48–70; Gerson 1996). They called for making an example of the Middle East's main troublemaker, Saddam Hussein. The main legal barrier standing in the way of the plan was the UN's Charter which recognized the right of defensive war under Article 51, but not the legitimacy of foreign invasions with the intention of replacing a country's leadership with one more favorable to the invader.

Notwithstanding the neo-conservatives' brave talk their influence on the U.S. public was very limited. The United States could not have attacked Iraq either before or even right after 9/11 and this was clearly recognized by Vice President Cheney who stated that, "at this stage … the focus is over here on al-Qaeda" ("The Vice President Appears…" 2001; see also Suskind 2006: 26). Segueing from metaphorical to actual war required a deliberate effort on the part of the Bush Administration to incorporate a regime change in Iraq into the metaphorical war on terror.

In the President's January 20, 2002 State of the Union speech, Iraq was accused not only of seeking weapons of mass destruction but also of being willing to provide these arms to terrorists.[23] The Bush–Cheney Administration mounted a two-part operation to link the metaphorical war on terror with the planned invasion of Iraq. First, a newly created Office of Special Plans in the Pentagon under Douglas Feith relied on raw intelligence to establish Iraq's nuclear threat and ties with al Qaeda as "mature and symbiotic," even though a subsequent investigation by the Inspector General of the Department of Defense found that "these claims were not supported by the available intelligence."[24] Second, the White House Iraq Group, chaired by Karl Rove, was formed in August 2002 to coordinate the media campaign, plan speeches, and produce white papers about the nuclear threat posed by Iraq. The crude and far from self-evident segue from the war on terror to the war in Iraq highlights the pliability of moral panics for uses by prior political interests. The GWOT not only lowered the barrier for using "faulty" intelligence to go to war but, even more significantly, set the stage for "policy pressures [which] encouraged analysts to take their assumptions about Iraq to logical extremes" and "deliver certain conclusions" (Rovner 2011; see also Pillar 2011) and thus the fabrication of false intelligence in the first place.

In the United Kingdom, the United States' main ally in the Iraq War, independent reporting by the BBC had uncovered that the intelligence was "cooked." Sir John Scarlett, the head of the Joint Intelligent Committee in charge of preparing a dossier that detailed the case for the war, pointed out "the benefit of obscuring the fact that in terms of WMD Iraq is not that exceptional" (*Observer*, June 25, 2011). Best known, perhaps, is the leaked secret British memo in which Richard Dearlove, the head of MI6, detailed Prime Minister Blair on his talks in Washington nine months before the invasion:

> There was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy.[25]

As part of the attempt to leap seamlessly from the war in Afghanistan to the invasion of Iraq, National Security Advisor Rice stated that "there will always be some uncertainty about how quickly [Hussein] can acquire nuclear weapons, but we don't want the smoking gun to be a mushroom cloud" (CNN, September 8, 2002). President Bush himself stated in September 2002 that "You can't distinguish between al Qaeda and Saddam when you talk about the war on terror … They're both equally as bad, and equally as evil, and equally as destructive" (*Washington Post*, September 26, 2002). Randy Beers, a counternarcotics and counterterrorism expert, summed up the results of this publicity campaign: "There is no threat to us now from Iraq but 70 percent of the American people think Iraq attacked the Pentagon and the World Trade Center. You wanna know why? Because that's what the Administration wants them to think … they are using the war on terror politically" (Clarke 2004: 241–242). A Senate investigation concluded that President Bush, Vice President Cheney and their aides "repeatedly overstat[ed] the Iraqi threat in the emotional aftermath of the September 11 attacks" (*NYT*, June 6, 2008), and fell short of explaining how the "evidence" was generated in the first place.

B Unitary executive power

The March 2005 "National Defense Strategy of the U.S." contended that "our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international *fora*, judicial processes, and terrorism,"[26] in effect putting international and domestic courts and judges on par with terrorists (quoted in Goldsmith 2007: 53). What was the source of this deep animosity? According to Jack Goldsmith, the Administration aimed to undo "the judicial civil liberties revolutions of the 1960s and the 1970s," which made the United States more "solicitous of political and civil rights" (Goldsmith 2007: 49). Some of these legal restrictions, established in the War Powers Act and the 1978 Foreign Intelligence Surveillance Act, were the result of the "rebellions and disclosures of the 1960s and 1970s [that] had led the American people, the

press, and criminal investigators to lose faith and trust in executive branch officers." In particular, the 1987 Convention Against Torture, ratified by Congress in 1994, became a *bête noire*, which even Goldsmith describes as "the criminalization of warfare" (Goldsmith 2007: 65–66) as if somehow torture and warfare could be thought of as one and the same thing. The unraveling of human rights protection, particularly international humanitarian law, was a central aim of the Bush–Cheney Administration's legal counterrevolution.

Among the many counterrevolutionary agendas that have been rolled into the GWOT, the most far-reaching was the Bush–Cheney Administration's desire to expand, consolidate, and protect presidential power. Numerous observers argued that President Bush engaged in an aggressive program to expand presidential power for its own sake (Goldsmith 2007: 89). One author goes so far as to dub this program "The Return of the Imperial Presidency" (Savage 2007). But the expansion of the field of executive power involved much more than a simple power grab; it was the result of a sustained effort to use the war on terror to replace judicial and congressional oversight with a new doctrine of unfettered Presidential power.

Observers trace the origins of this counterrevolutionary agenda to the late 1980s (Goldsmith 2007: 85; Schwarz and Huq 2007: 156; Suskind 2006: 17). In 1987, the Majority Report of the Congressional Committee that investigated the Reagan Administration's Iran–Contra Affair concluded that the channeling to the Nicaraguan Contras of the payment for secret arms sales to Iran resulted from "secrecy, deception, disdain for the law" and from "disrespect for Congress's efforts to perform its Constitutional oversight role in foreign policy."[27] Then-Congressman Cheney and his Legal Counsel David Addington wrote a Minority Report that accused the Majority Report of aggrandizing the Congress's foreign policy powers (Goldsmith 2007: 87; Schwarz and Huq 2007: 159–160). So, "long before 9/11" Addington and Cheney "had set out to reverse what they saw as Congress's illegitimate decades-long intrusions on 'unitary' executive power" (Goldsmith 2007: 85; Savage 2007: 202). Just as Kann's generational analysis of "restoration" would predict, Cheney and Addington's living memory of the era before the legal terrain was transformed paired with Bush's absence from national politics until his election as President, allowed Cheney and Addington to infuse the new Administration with their own single-minded focus. They defined the Bush–Cheney Administration's GWOT in clear ideological terms as a counterrevolution.

The very term "unitary executive" originates from the Reagan presidency but was at the time used to justify a narrowly conceived opposition to attempted congressional control of administrative agencies (Schwarz and Huq 2007: 158). The Bush Administration used the term in a "newer and more aggressive incarnation" (Goldsmith 2007: 85). This novel doctrine of "unitary executive power" was based on the attempt to redraw the boundaries between the three branches of the U.S. government. It held that under the Constitution the government consists of "three *wholly separate* powers: the lawmaking power, a judicial power, and an executive power" (Schwarz and Huq 2007: 156, italics added) and, consequently,

"Congress could not exercise *any* control, direct or indirect," over the powers of the executive branch "over all matters touching on national security." In other words, the President as Commander in Chief had plenary powers that cannot be limited by Congress (Goldsmith 2007: 85; Schwarz and Huq 2007: 158). This approach, as explained by Schwarz and Huq, amounted to a "counterrevolution against checks and balances," or what famed conservative columnist George F. Will, described as a "monarchical doctrine" (Savage 2007: 204; Schwarz and Huq 2007: 156–8, 174–175).

C Securitization of immigration

Since the 1960s there has been a steady expansion of rights-based protections for migrants of all types in Western industrial democracies, including the United States The extension of various levels of membership rights to foreigners and members of ethnic groups through interest group politics, legislation, and court rulings led to what Wayne Cornelius, Philip Marten, and James Hollifield (1994) call a "liberal republicanism." Christian Joppke (1998) and others pointed out that these protections made for an ambivalent immigration control and led to the acceptance of even unwanted immigrants. These formal legal and informal enforcement changes were part and parcel of the same civil rights revolution that served as the target of the Bush–Cheney counterrevolutionary challenge to the rule of law.

The post-9/11 panic enabled the subordination of immigration and immigration policy to counterterrorist policy. The abolition of the Immigration and Naturalization Service (INS) and the transfer of most of its authority to the newly established Department of Homeland Security (DHS) is the institutional expression of this invasion. As Karen C. Tumlin pointed out, this restructuring, which "communicates the view that immigrants, including refugees and asylum seekers, are potential terror threats," constitutes "a fundamental shift in how the United States receives newcomers" (Tumlin 2004: 1177–1179).

The Department of Justice, FBI, INS, and other law enforcement agencies undertook three major drives – the Pentagon/Twin Towers Bombings investigation or PENTTBOMB, the voluntary interview, and the National Security Entry–Exit Registration system or NSEERS registration programs – to hunt down terrorists among aliens and migrants, broadening the policy's reach to ever larger concentric circles (DOJ, 2003). A similar policy was applied to asylum seekers entitled to refugee status, starting with a moratorium on admission and greater scrutiny of asylum seekers (Operation Liberty Shield) and the broadening of the category of "material support for terrorism." The material support clause, in fact, was drawn so broadly that it lacks a *de minimis* threshold, namely a minor or trivial claim unworthy of legal attention.[28]

But there was one group of immigrants President Bush sought to exclude from the securitization process and welcome into the United States economy. Early in his first term President Bush pledged to work together with President Fox of Mexico to "open legal channels for Mexicans to seek work in the U.S."

(*NYT*, May 14, 2006). On January 7, 2004 he proposed immigration reform based on a temporary worker program to "match willing foreign workers with willing American employers, when no Americans can be found to fill the jobs." Undocumented workers already in the United States and new ones were to receive renewable visas for three years and temporary worker cards that would allow them to visit their home countries and re-enter the United States Some would even be allowed to apply for U.S. citizenship. Simultaneously, the President promised, though in less detailed fashion, to improve border security through more border patrol agents and better tracking technology. He drew a clear connection, though one that ran counter to the rest of his restrictive immigration policies, between illegal entry across the border and national security by arguing that "illegal entry across our borders makes more difficult the urgent task of securing the homeland."[29] In June 2005, Senators John McCain and Edward M. Kennedy proposed the bipartisan bill *The Secure America and Orderly Immigration Act*, which incorporated some of the President's proposals.

But a Congress already familiar with the securitization of immigration by the Administration was not inclined to make the exception President Bush sought. Both the McCain-Kennedy Bill and President Bush's plan encountered massive resistance in the Republican Party and large sections of the American public (*NYT*, May 21, 2006). During debates in the House of Representatives, Republican Representatives "highlighted the threat of terrorist infiltration to justify their tough plan for border enforcement" (*NYT*, July 8, 2006). The Chairman of the House Subcommittee on International Terrorism and Nonproliferation, Representative Ed R. Royce, held immigration hearings around the country in which the same link was made, and David V. Aguilar, the Chief of the Border Patrol, testified that "the nexus between our post-September 11 mission and our traditional role is clear. Terrorist and violent criminals may exploit smuggling routes used by immigrants to enter the United States illegally and do us harm" (*NYT*, June 4, 2006). Immigration reform was abandoned, and in its place Congress passed legislation to erect 700 miles of fencing on the border with Mexico (*NYT*, September 21, 2006).

The Bush–Cheney Administration fostered the securitization of immigration through its amplification of moral panic. The defeat of its immigration reform and the loss of immigration policy's independent agenda demonstrate the power of a snowballing moral panic to bury under its avalanche even those who had set it in motion. Since the Bush proposal, no serious attempts have been suggested or made to tackle the issue of immigration.

5 Breaking the cycle

Having outlined the general characteristics of political moral panics and analyzed the GWOT as such a panic, we now wish to ask how to prevent political moral panic. Scholars have suggested the importance of risk analysis, liberal education, or legal institutions in preventing the symptoms of moral panic. We will argue that since each of these recommendations addresses only one of the

characteristics of panics outlined by Cohen the three should be viewed as complimentary and be used in tandem to discourage the rise and amplification of political moral panic.

A Risk analysis and the exaggeration of threat

Risk analysis discourages panic by quantitatively comparing the threat in question with others, thus short-circuiting the tendency to view the threat in isolation and elevating it above all other risks that obtain in modern life. In this view, each threat is accompanied by a certain level of probability. By comparing the probabilities of given individual event or set of events, their risk can be ranked and the proper amount of resources commensurate with their place in the index determined. The rationality of this approach is based on the comparison of the probabilities of distinct risks, allowing policy makers to consider the whole universe of risks and resources simultaneously. Thus, this approach requires that any risk be considered as one of many facing society.

Two political scientists sought to provide metrics for measuring the terrorist threat after 9/11. John Mueller provides a traditional risk assessment by comparing the likelihood of being hurt in a terrorist attack with risks posed by everyday dangers, such as automobile accidents or drowning in bathtubs. His conclusion is that terrorism is "a rather limited problem," that, comparatively speaking, it "generally does not do much damage," and that the odds that any individual will become a victim are microscopic. According to his calculation, the number of Americans killed by acts of international terror since such statistics began to be collected in the late 1960s to-date (including 9/11) is roughly the same as those "killed over the same period by lightning, accident-causing deer, or severe allergic reactions to peanuts" (Mueller 2004: 42. See also Mueller 2005 and 2006). September 11, 2001, consequently, "continues to stand out as an extreme event," and an escalation from the use of low-tech weapons to WMD, which are hard to manufacture, acquire or deploy, are far from evident or likely.

Ian Lustick's (2006) political risk analysis is focused on the threat of international terrorism alone and reaches a similar conclusion through another method of risk-analysis. Lustick argues that we can measure the level of threat by examining the effectiveness of the responses of the U.S. government to the 9/11 attacks. He concludes that in spite of "the massive expenditure of time, money, and personnel," and

> the virtual nonexistence of constraints on the conduct of investigations and the gathering of evidence, and the disposition of authorities to err on the side of arresting and charging the innocent so as to maximize the probability of discovering the guilty … [there was] a near total absence of evidence of al-Qaeda sleeper cells or of sophisticated groups of Muslim extremists planning or preparing for attacks of massive destruction inside the border of the U.S.
>
> (Lustick 2006: 35, 46–47)

Lustick thus turns the efforts of the U.S. government against itself to show that its policies were misguided and reaction wasteful and exaggerated.

The actuarial approach followed by Mueller and Lustick seeks to bring threats into perspective by examining them in relation to other threats or to the effectiveness of the response. Further, it does not aim for zero risk but "accept[s] the task of risk management" ("Are We Trapped…" 2006: 2). Mueller and Lustick each protest that, while widely used in other arenas, risk analysis has not been used in the GWOT.

B Liberal education and overbroad definition of enemies

The simplest remedy for an ever-broadening definition of the enemy is, of course, liberal education, as it encourages a careful causal analysis of relations with rivals. Because the GWOT is frequently compared to the Cold War, a model repeatedly appealed to for approaching a dangerous and implacable enemy has been an early document of that era: "The Long Telegram" from George F. Kennan, U.S. Chargé d'Affairs in Moscow, to the Secretary of State from February 22, 1946 (see for example, Lustick 2006; and Carafano and Rosenzweig 2005). The central thesis of Kennan's telegram was that the United States needed to engage in a sober assessment of the USSR as well as the United States' own strengths.

Kennan, who never used the word "enemy" to denote the USSR or the term "war" as the method of struggle against it, suggested that:

> We must see that our public is educated to realities of Russian situation. I cannot over-emphasize importance of this … I am convinced that there would be far less hysterical anti-Sovietism in our country today if realities of this situation were better understood by our people. There is nothing as dangerous or as terrifying as the unknown.
>
> (Carafano and Rosenzweig 2005: 220)

This analysis, he recommends, is to be done with the same "courage, detachment, objectivity, and … determination not to be emotionally provoked or unseated" that doctors use to study an "unruly and unreasonable individual" (Carafano and Rosenzweig 2005: 220). Unfortunately, the brief debate subsequent to the 9/11 terrorist attacks about "why do they hate us?" was rapidly short-circuited by the belligerence of the war on terror.

The anti-intellectualism of the Bush–Cheney Administration casts expertise and scholarly attempts of analysis as weakness rather than a method of calibrating the response to provocation. Consequently, the small portion of salafi jihadis who attacked the United States on 9/11 ended up being lumped together with the broader circles of jihadis opposed to their own governments, political Islamicists, salafi Muslims, pious Muslims, and Muslims in general. Nor have the internal disagreements and conflicts between these groups been adequately considered. Greater attention to scholarly analysis of the Middle East, including

the many voices with which it speaks, would provide better causal explanations of the motivations of our enemies and the consequences of our actions.

In a painstaking and thoughtful philosophical reflection, Alan Wolfe examines the gamut of phenomenon he classifies as "political evil" and explores the range of responses to it. When practitioners of such evil motivated by a passion or purpose are organized into a movement of state, they are capable of unleashing vast violence. Wolfe concludes that not missionaries or soldiers but politicians are better equipped to respond to such threats, since they are trained in a savvy assessment of facts and unsavory responses to them. His conclusion is that "when confronted with political evil, we are better off responding to the 'political' rather than to the 'evil' " (Wolfe 2011).

In addition to the recommendations of the Kennan telegram, and Wolfe's approval of political realism in all circumstances, we suggest the systematic study of the history of prior political moral panics as another important application of liberal education. It is by studying past moral panics and our responses to them that we learn not to repeat their mistakes. Anticipating panicked responses and the manipulation of fear during times of threats and crises can serve as a powerful antidote to panic. Study of both the enemy and previous moral panics apply the great tools of liberal education – context and perspective – to provide a causal analysis of potential enemies.

C Constitutional law and disproportionate response

Through its instantiation in constitutional law, the separation of powers prevents disproportional responses to crises by discouraging single doctrines from overwhelming policy decisions. This is achieved by building and maintaining autonomous and complementary branches and institutions of political power. It is customary to point broadly to the value of a strong legal tradition of civil liberties in limiting the centralization and abuse of power as well as the importance of resilient institutions in facing complex uncertainties (e.g., Douglas 1985; Douglas and Wildavsky 1983). Thus the separation of powers doctrine in the United States, when operating according to the constitutional checks and balances, would prevent the dominance of a single doctrine and serve as a dam to political moral panic.

In practice, the mutual checking and balancing among the branches of the U.S. government and the corresponding balancing of civil rights and national security has never been simple. Even so, Jack Goldsmith argues that the Bush–Cheney Administration's assertion of executive authority and what we called the invasion of the legislative and judicial branches was more far-reaching than the sweeping presidential power assertions by Presidents Lincoln and FDR. Goldsmith points out that President Lincoln violated the Constitution during the Civil War, for example by raising an army, borrowing money, suspending the writ of habeas corpus and jailing southern sympathizers without due process, but he did so openly. Lincoln invoked emergency powers to exercise powers reserved for Congress but only until Congress could meet; he then "informed Congress about

all these acts, publicly defended them as necessary to meet the crisis, and asked Congress to approve them" (Goldsmith 2007: 82–3, 85; Rehnquist 1998). During World War II, Roosevelt used extraordinary emergency powers to ignore a price control law unless Congress acted – in fact compelling Congress to act (Goldsmith 2007: 84–85). Goldsmith holds that it is an "underlying commitment to expanding presidential power [that] distinguishes the Bush Administration from the Lincoln and Roosevelt Administrations," and that Bush's distinction was in having "an aggressive program to expand presidential power for its own sake" (Goldsmith 2007: 89).

The legal remedies that may be used to thwart moral panics are not exhausted by a reassertion of checks and balances. The institutionalization of new international norms is an additional avenue for preventing disproportionate responses. President Bush viewed the GWOT, in this very fashion, as the fight against terrorism itself. "The enemy," in his approach, "is not a single political regime, person, religion, or ideology. The enemy is terrorism – premeditated, politically motivated violence perpetrated against innocents" (*National Security Strategy* 2002: 5). In 2003, President Bush presented this goal in the *National Strategy for Combating Terrorism* in the following fashion:

> We must use the full influence of the United States to delegitimize terrorism and make clear that all acts of terrorism will be viewed in the same light as slavery, piracy, or genocide: behavior that no respectable government can condone or support and all must oppose.

The "new international norm" to be established would allow for no tolerance for terrorism (*National Strategy for Combating Terrorism* 2003: 23–24). This goal has come in for a particularly large dose of criticism. Critics argued that terrorism is not a proper noun behind which there is a flesh and blood enemy, but rather a method or technique of waging war (Record 2003: 25). Zbiegnev Brzezinski argued that declaring a war on terror made as much sense as declaring war on Blitzkrieg ("Are We Trapped…" 2003: 10). Jason Burke went as far as arguing that "the term 'war on terrorism' is … effectively nonsensical" (Burke 2003: 22).

In this instance we wish to disagree with the critics of the war on terror. While it may be inappropriate to wage a "war" on a practice such as terrorism, it is perfectly possible, and indeed desirable, to seek to abolish such practices in other ways. President Bush listed successful examples of international norm change, and we could add the institutionalization of positive norms such as the abolition of torture since the Enlightenment, the spread of international humanitarian law in the past century and half, and the institutionalization of human rights in the wake of World War II. Since these norms are now enshrined in countless international treaties and in common law, their violation is difficult to legitimate.

Instituting new norms, however, requires the acceptance of legal traditions and constraints as "bright lines." Indeed, practically every definition of terrorism

is based on foundations laid by outlawing the harming of non-combatants at time of war by the Geneva Conventions; the very law that terrorists defy. To seek to innovate, therefore, requires engaging with old norms and the legal traditions out of which new norms have to be fashioned. President Bush himself recognized the connection between delegitimizing terrorism and the law when he stated that: "those who employ terrorism … strive to subvert the rule of law and effect change through violence and fear" (*National Strategy for Combating Terrorism* 2003: 1). His administration has, however, repeatedly and determinedly violated the rule of law domestically and was hardly in position to seek such change internationally. The desire for norm change is incompatible with a global war strategy that defies the rule of law and would have to serve as an alternative to it.

The fortification of the executive branch behind the new legal doctrine of "unitary executive power" allowed it to evade the checks and balances between the three branches of the U.S. government and pursue a single-minded doctrine of war against terror. As Goldsmith points out, the Bush–Cheney Administration did not view its concentration of powers and ensuing ability to create legal, institutional, and geographical grey zones as a temporary measure but as a permanent order. In contrast, both separation of powers and effective pursuit of new legal norms require multilateral efforts and compromise between competing interests and agendas.

6 Conclusion

After 9/11, moral and political entrepreneurs fostered a climate of moral panic to implement their counterrevolutionary agendas. The Bush–Cheney Administration's efforts to roll back civil liberty advances and war-making and war-waging regulations and to lift the restrictions placed on executive power since the 1970s clearly demonstrate both the features and dynamics of political moral panic. The Administration pursued its goals by depicting al Qaeda terrorism as distinct from and more menacing than all other risks faced by Americans by defining the enemy ever more broadly in absence of any serious cause–effect analysis of terrorism, and by responding disproportionately through the singular prism of war, both metaphorical and actual. And, as late as a decade after 9/11, Fawaz Gerges, the author of some of most insightful studies on jihadism, concluded that "overreaction is still the hallmark of the US War on Terror" (Gerges, 2011).

The legalization of new categories of enemies, wiretapping of American citizens, and carrying out harsh interrogation techniques against terror suspects as part of the GWOT has challenged dearly held constitutional protections. While the details of these policies were kept secret, an atmosphere of lawlessness was encouraged and acknowledged, communicating to the American public that the rule of law no longer applied in the "brave new world" of panic. These counterrevolutionary legal transformations were made possible because checks and balances between the branches of government were undermined by creating and exploiting grey zones that allowed the executive to take over judicial functions and ignore congressional legislation. In addition, Congress actively supported

the executive and exercised limited oversight. The GWOT, in short, was a full-blown political moral panic.

Cohen's theory of moral panic arose out of the narrowly focused study of deviance and collective behavior (Thompson 1998: 139; Goode and Ben Yehuda 1994: 3), but the events examined in this chapter cover topics well beyond these subfields of sociology and merit the attention of political and historical sociologists as well as sociologists of law and social movements. Warnings about the dangers of panics abound in our everyday language, from popular cultural expressions such as "the sky is falling" to expressions alluding to past panics such as "witch hunts." We suggest that a proper appreciation of the political and institutional dimensions of the GWOT demonstrates the significance of political moral panics in history. In this Conclusion we will compare the GWOT with other political moral panics in history to suggest the broader applications of our theory as well as highlight some of the distinctive characteristics of the GWOT. We will conclude by pointing out that far from having limited life cycles, the legal and institutional legacies of political moral panics endure long after the panics have petered out.

A Political moral panics in history

Some of the most infamous governmental actions in history can be profitably viewed as political moral panics and analyzed with the tools proffered in this chapter. It can certainly encompass the Alien and Sedition Act of 1798 adopted in the wake of the French Revolution, the "Red Scare" after the Russian Revolution, as well as the internment of Japanese-Americans in California after Pearl Harbor (Caute 1978: 18–20).

McCarthyism in particular, which emerged following the rise of the USSR and its acquisition of nuclear weaponry, left deep scars on the American psyche through its relentless and wide-ranging amplification of the anti-Communist panic. Though initially directed against the State Department accused of harboring known Communists, Congressman McCarthy's brutal and intimidating investigations also targeted artists, writers and actors, academics, homosexuals, union activists, and the military. At first accusing Democrats, in particular Secretary of State Dean Acheson and Secretary of Defense George Marshall, for "the unimpeded growth of the Communist conspiracy within the U.S." (Johnson 2005: 348, 247, 374), he later began insinuating that even Republicans, including President Eisenhower, were either abetting or failed to eradicate the "treasonous" acts of the Truman administration (Lipset and Raab 1973: 131; Johnson 2005: 348). McCarthy portrayed the rivalry between the United States and the U.S.S.R. in cosmic terms, claiming this to be: "the era of the Armageddon – that final all-out battle between the light and darkness foretold in the Bible" (Theoharis 1973: 76; Lipset and Raab 1973: 129; Johnson 2005: 285). At the same time, a central counterrevolutionary goal of McCarthyism was to reduce the influence of the domestic labor movement that grew during the Great Depression and the New Deal (Latham 1966: 423; Caute 1978: 349–359). This panic, like

the others mentioned above, was perpetuated through sweeping actions and policies made possible by the designation of the threat as existential, and by the subsequent breaching of boundaries between the legal, political, judicial, and police functions.

Linking McCarthyism with such comparable historical incidents in U.S. history led the famed historian Richard Hofstadter to develop a distinctly American version of moral panic theory. He famously described the phenomenon as the "paranoid style in American politics" which is "overheated, over-suspicious, overaggressive, grandiose, and apocalyptic in expression," and becomes "systematized in grandiose theories of conspiracy" aimed "against a nation, culture, a way of life whose fate affects not himself alone but millions of others" (Hofstadter 1965: 4).

Political moral panics run the full gamut of brutality. The theory may also be used to analyze the ultimate moral panic of the twentieth century – fascism and its most malign version, Nazism. Nourished by frustrated nationalist sentiment, Nazism emerged in the wake of Germany's defeat after World War I, seized power during the economic depressions that followed and consequently was destructive on an unprecedented scale. Under the conditions of moral panic, Nazis were able to espouse an unstable admixture of ideas that could never have been amalgamated by sober social analysis and relied on a familiar unifying and mobilizing of power. Indeed, Nazism displays all three of Cohen's features of moral panics: it claimed that the German people were threatened with extinction, defined erstwhile political enemies and minorities in racial and ideological terms, and launched the most extreme "countermeasures": world war and genocide (Laqueur 1996; Paxton 2004).

Nazism was not just the purveyor of moral panic but of its full-scale political and institutional version. In the two decades after World War II, Nazism, like Soviet communism, was viewed as totalitarianism, but since the 1980s scholarly interpretations have been reversed, viewing Nazism, unlike Stalinism, as a multicentered regime. According to the Arendt (1958) and Friedrich and Brzezinski (1961) totalitarian theories, Hitler fortified executive power using the "Führer principle," and not only invaded but also displaced legislative authority and subjugated judicial authority, employing the most extreme versions of the institutional dynamics of such panic. In contrast, Martin Broszat (1981: 308) and Hans Mommsen (1991) argued that Nazism's radicalism was due not to a successful centralization of all power but rather to the creation of competing institutions and the consequent chaotic nature of the polycratic Nazi regime. It was the lack of a clear institutional structure in Nazi Germany that led to a fanatical competition between its old and new elites (e.g. the army, civil service, SS, industrialists) and that accounts for its radicalization. Broszat seems to suggest that any institutional order would have acted as a dam to radical inhumanity. Though the scholarly understanding of Nazism has shifted 180 degrees, both explanations conclude that it was the absence of effective institutional barriers between various government bodies that allowed the implementation of Nazi ideology through terror.

Even these few examples indicate that the scope of moral panics spreads far beyond Cohen's concern with deviance and that there is a wide range of institutional variation between political moral panics. Nazism illustrates the utter destruction made possible by the complete dissolution of institutional checks and balances. McCarthyism demonstrates that not only the executive but also legislative branch may play a potent role in feeding the fire of political moral panic.

B Enduring effects of moral panics

William Faulkner famously wrote that "the past is never dead. It's not even past." Moral panics have equally lingering effects. Though Cohen anticipates the cyclical nature of moral panics that peak and then decline or submerge (Cohen 1992: 1), he does not consider the possibility that moral panics might have long-term effects that endure after they have subsided. But political moral panics, in particular, do not fade away when elements of a disproportionate response become codified in law.

Not all the grey zones established and powers concentrated by the executive under the GWOT were rescinded either by Congress or by the new Obama Administration. Interrogation through torture – a grey zone that is so disturbing to our post-Enlightenment conscience – was abolished by President Obama *in toto*. The same cannot be said for the other two grey zones. The Supreme Court granted the ancient right of habeas corpus appeals to unlawful enemy combatants in Guantanamo but left intact many other provisions of the Military Commissions Act. The Obama Administration, in fact, "retain[ed] important elements of the Bush-era for trying terrorism suspects" in military commissions (*NYT*, May 16, 2009). It claimed in federal court that the Supreme Court decision did not apply to prisoners held in the Bagram detention facility in Afghanistan, since the country is a theater of war. President Obama also proposed indefinite preventive detention, though under legal and Congressional oversight, of terrorism suspects who, due to prior coercive interrogation, could not be convicted in civilian courts (*Washington Post*, May 22, 2009). He transferred to a military tribunal of Khalil Sheikh Mohammed, the planner of the 9/11 attacks, and four accomplices, the arraignment for whom was held at Guantanamo Bay in May 2012. And in December 2011, President Obama signed the 2012 National Defense Authorization Act under which the government is authorized to detain, without charge or trial, "suspected members of Al Qaeda and its allies – or those who 'substantially supported' them" for suspects apprehended on U.S. soil until the end of hostilities. Though the President clarified in his signing statement that he will not apply this selective suspension of due process and habeas corpus to U.S. citizens, he has drawn harsh criticism and observers called the Act itself unconstitutional (*NYT*, December 14, 2011; Counterpunch, January 18, 2012).

The July 2008 law, which overhauled the FISA, reclaimed on behalf of Congress the sole authority to determine the limits of wiretapping but greatly expanded the NSA's range of permissible targets, including communications

passing through American telecommunication switches (*NYT*, June 20 and July 10, 2009). In fact, two members of the Senate Intelligence Committee complained in March 2012 that the government has secretly expanded its interpretation of the surveillance powers under the Patriot Act in a way that would "stun" the public and, furthermore, that the operation based on this interpretation is less crucial to national security than the executive branch claims it to be (*NYT*, March 16, 2012). It came to light in early 2012 that the New York Police Department has been conducting surveillance of entire Muslim neighborhoods, including shops, restaurants, and mosques, using funds provided by the White House for the High Intensity Drug Trafficking Area program, which was authorized under the Bush–Cheney Administration to engage in counterterrorist surveillance as well (*Chicago Sun-Times*, February 27, 2012). Finally, the provision of retroactive immunity to phone companies that engaged in wiretapping at the direction of the executive branch, the promise not to prosecute CIA interrogators who used coercive techniques, and the reluctance to prosecute OLC lawyers who provided legal opinions that are "legally flawed [and] tendentious" (Goldsmith 2007: 151), suggest that the rule of law has not been fully restored. Few things predict future abuse as much as past impunity.

Crises frequently require the redrawing of boundaries between branches of government, but only when extended executive power is combined with the creation of more extensive legal and judicial oversight will the balance of power between branches of government be retained. Thus, while risk analysis and education can help attenuate political moral panics, constitutional checks and balances are especially important in mitigating the long-lasting legacies of these events. Ultimately, prevention is the only way to avoid the lingering effects of political moral panics and can only be achieved by addressing all features of moral panics.

In conclusion, a reasoned and effective counterterrorism policy requires a combination of effective risk assessment, education, and a separation of constitutional powers combined with meaningful checks and balances. When "life as we know it" is said to hang in the balance, and we disregard assessment, education, and institutional integrity as too cautious or time consuming, little remains to dampen the amplification spirals that turn threats into panics. In political moral panics, unchecked fear can drive long-lasting changes to the government that would be unthinkable otherwise. As the analysis of moral panics demonstrates, what we mostly have to fear is fear itself.

Notes

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1 For example, see President Bush and Prime Minister Allawi Press Conference, The Rose Garden, September 23, 2004, www.presidentialrhetoric.com/speeches/09.23.04.html; "Remarks by the Vice President," McChord Air Force Base, Tacoma, Washington, December 22, 2003, http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031223–1.html; and Daniel Henninger, "'9/11 Changed

Everything': Twentieth-Century Rules Will Not Win a 21st-Century War," *Wall Street Journal*, April 7, 2006, www.opinionjournal.com/columnists/dhenninger/?id=110008194.

2 For hate crime statistics see FBI, Uniform Crime Report, www.fbi.gov/about-us/cjis/ucr/ucr. A list of such acts committed in 2001 can be found at Anti-Defamation League, "ADL Responds to Violence and Harassment against Arab Americans and Muslim Americans," 2001, www.adl.org/terrorism_america/adl_responds.asp.

3 Max Blumenthal, "The Great Fear," December 19, 2010, *TomDispatch.com*, www.tomdispatch.com/post/175334/tomgram:_max_blumenthal,_the_great_fear_.

4 Similar to, but distinct from, Mayer's concept of conservative movements, "restoration" seeks to maintain legal continuity with the *ancien régime*, making these movements more programmatic than pragmatic conservatism.

5 MSNBC, "Bush rallies nation to 'struggle for civilization': 5 years after 9/11 attacks, President braces nation for 'difficult road ahead'" September 12, 2006, www.msnbc.msn.com/id/14788377/.

6 http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/.

7 www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2002. The same conditional "could" was used also in the 2003 and 2004 State of the Union addresses.

8 www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2003.

9 www.americanrhetoric.com/speeches/stateoftheunion2007.htm.

10 www.americanrhetoric.com/speeches/stateoftheunion2008.htm.

11 http://archives.chicagotribune.com/2006/dec/12/news/chi-0612120277dec12.

12 "Under Obama, 'war on terror' phrase fading," Associated Press, February 1, 2009, www.msnbc.msn.com/id/28959574/wid/17153391/.

13 Intelligence Resource Program, 2002 Congressional Hearings, www.fas.org/irp/congress/2002_hr/092602black.html.

14 http://fas.org/irp/offdocs/eo/mo-111301.htm.

15 Daniel Klaidman and Evan Thomas, "Palace Revolt," *Newsweek*, February , 2006; Transcript, Hearing of the Senate Judiciary Committee, "Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? – Part IV," May 15, 2007, cited in Savage 2007, pp. 184–188.

16 http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques#p=1.

17 Daniel Levin to James Comey, memorandum re: "Interrogation Standards under 18 USC 2340–2340A," December 30, 2004, www.usdoj.gov/olc/18usc23402340a2.htm (see also Savage 2007, p. 196).

18 www.fcnl.org/issues/item.php?item_id=1784&issue_id=70.

19 www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031502724.html.

20 www.independent.co.uk/news/world/americas/obama-orders-cia-to-stop-torturing-terror-suspects-1513428.html.

21 See, for example, David Bromwich, "Symptoms of the Bush–Obama Presidency," August 18, 2011, *Huffington Post*, www.huffingtonpost.com/david-bromwich/symptoms-of-the-bushobama_b_930260.html.

22 Given the preceding mass mobilization and the wide reach of the new legislation, many scholars chose to view the ensuing transformation as a revolution. See Skrentny (2002) and Sargent (2004).

23 www.c-span.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2002.

24 Inspector General of the U.S. Department of Defense, "Review of Pre-Iraqi War Activities of the Office of the Under Secretary of Defense for Policy," February 9, 2007, pp. ii, 34.

25 David Manning, "The Secret Downing Street Memo: From Matthew Rycroft, July 23, 2002, S 195/02," *Sunday Times*, May 1, 2005, www.timesonline.co.uk/article/0,,2087–1593607,00.html; see also Patrick Wintour, "Blair manipulated intelligence to justify war, says BBC film," *Guardian*, March 21, 2005, www.guardian.co.uk/media/2005/mar/21/bbc.politicsandiraq.
26 www.defenselink.mil/news/Mar2005/d20050318nds2.pdf.
27 "House Select Committee to Investigate Covert Arms Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition," Report of the Congressional Committee Investigating the Iran–Contra Affair, S. Rep, No. 216, H. Rep No. 433, 1000 Congress, 1st Session, 1987, pp. 11, 19.
28 Sridharan, Swetha, January 2008, "Material Support to Terrorism – Consequences for Refugees and Asylum Seekers in the United States," *Migration Information Source:* www.migrationinformation.org/Feature/display.cfm?id=671.
29 www.worldnetdaily.com/news/article.asp?ARTICLE_ID=36498.

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Part I

Responses at Ground Zero

3 Constitutional barriers and the perils of impunity*

William J. Aceves

Introduction

Most Americans view the U.S. Constitution as a protector of rights, and with good reason. For over two centuries, the Constitution has been used to protect fundamental civil and political rights in the United States.[1] The Fifth Amendment, for example, provides that no person "shall be deprived of life, liberty, or property without due process of law" (U.S. Const. amend. V). This constitutional provision identifies a set of fundamental rights – life, liberty, and property – and provides that these rights cannot be taken without due process, which includes notice, an opportunity to respond, and judicial review. Significantly, these rights are protected against government infringement. And, when the government infringes on these rights, the U.S. legal system offers a mechanism for redress. Civil claims filed by those injured as a result of government misconduct serve two purposes. They ensure that fundamental rights are adequately protected. And, they offer redress for injuries.

Civil litigation is an important mechanism for protecting rights and providing redress for personal injuries (Aceves 2007: 176–183). Through pleadings, discovery, and the trial process, litigation creates a record of the abuses perpetrated and the complicity of the defendants in these abuses. Indeed, litigation is a particularly valuable mechanism for monitoring government action and sanctioning government abuse of power. If permitted, it can provide a level of oversight for government misconduct that might not otherwise exist. It can also sanction government abuse of power and can compel the government to take action or to refrain from acting. And, unlike criminal proceedings, civil litigation is a victim-centered mechanism for redress (Stephens *et al.* 2008). It allows the victims to control the proceedings, from the filing of the initial lawsuit, through the presentation of evidence, and to the execution of judgment. In this manner, civil litigation transforms the parties – victims become plaintiffs, converting them from passive subjects of abuse to active participants in the search for justice (Schuman and Smith 2000; Lind *et al.* 1990: 953).

On some occasions, however, the Constitution can serve as a barrier to justice. Rather than facilitating civil claims by individuals harmed through government misconduct, the Constitution has been used to impede such lawsuits and

deny redress. These barriers to justice do not appear in the constitutional text. Rather, they are judicially created doctrines, and the federal courts have crafted these legal doctrines by reference to constitutional principles. These doctrines do not consider the significance of a plaintiff's injuries or the culpability of the government. Indeed, the merits of the underlying claim are irrelevant for purposes of a procedural dismissal.

The state secrets privilege, for example, compels courts to dismiss cases that may implicate national security (Donohue 2010: 77; Crook 2009: 57; Chesney 2007: 1249). The privilege was first referenced by the U.S. Supreme Court in *Totten* v. *United States*, 92 U.S. 105 (1875), an 1875 decision arising out of a secret agreement allegedly authorized by President Lincoln during the Civil War. In dismissing a lawsuit brought to enforce the agreement, the Supreme Court expressed concern that litigation could disclose information that might harm government interests. In these situations, the Court indicated that such lawsuits should be dismissed rather than risk the disclosure of confidential information. According to the Court, "[i]t may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated" (Totten 1875: 107).

In *United States* v. *Reynolds*, 345 U.S. 1 (1953), the Supreme Court indicated that courts must engage in a three-part analysis when considering the assertion of the state secrets privilege by the U.S. government. First, the court must determine whether the government has properly asserted the privilege and complied with the procedural requirements. Specifically, the privilege must be asserted by the U.S. government, and a formal claim of privilege must be presented by the head of the appropriate government department. The privilege may only be invoked after actual personal consideration by the appropriate department head. Second, the court must decide whether the information sought to be protected qualifies as a state secret. To make this determination, the court must conclude "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged" (Reynolds 1953: 10). In its analysis, the court must offer deference to the executive branch's findings. Third, the court must then determine how best to proceed with the case. If the court accepts the applicability of the state secrets privilege, it has two options. One option is for the court to preclude adjudication of any claims premised on state secrets (known as the *Totten* privilege) (Totten 1875: 105). The other option is narrower, and provides an evidentiary privilege that excludes privileged evidence from the case but need not result in dismissal of the claims (known as the *Reynolds* privilege).[2] (Reynolds 1953: 1). A court's decision to use the *Totten* or *Reynolds* privileges is fact-specific and will be made on a case-by-case basis.

The state secrets privilege has been used to dismiss lawsuits alleging a wide range of government misconduct.[3] Courts have indicated that the state secrets privilege is grounded in constitutional principles. They assert that it protects the

separation of powers and the role of the executive branch in national security matters (*United States* v. *Nixon*, 418 U.S. 683, 710 (1974)).

Another constitutional barrier to justice appears in the *Bivens* doctrine, which allows individuals to pursue civil claims for constitutional harms perpetrated by federal government officials. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court upheld a private action for damages against several federal officers who allegedly violated the plaintiff's constitutional rights. The Court recognized that federal officials, as government agents, wield significant power (Bivens 1971: 391–392). And, when this power is abused and harms constitutional rights, these officials should be subject to liability. Thus, the purpose of a *Bivens* action is to provide a remedy for victims and to deter federal officials from committing constitutional violations (Reinert 2010: 809; Pfander and Baltmanis 2009: 117). Indeed, damages are appropriate "even if no substantial deterrent effects on future official lawlessness might be thought to result" (*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 408 (Harlan, J., concurring)). In reviewing a *Bivens* claim, a federal court must engage in a multi-part analysis. First, it must determine whether an alternative remedial scheme is available to the plaintiff. In other words, can the plaintiff seek redress through other mechanisms? Second, the court must determine whether special factors counsel hesitation in creating a *Bivens* remedy. Examples of special factors include whether the case involves military affairs or national security concerns (Margulies 2010b: 195; Brown 2009: 841). If the court determines that such special factors exist, it will reject a *Bivens* claim.

The *Bivens* doctrine was created by federal courts to provide a mechanism for civil redress for constitutional violations in the absence of a statutory remedy. It plays an important role in checking the abuse of power by government officials.[4] (Bandes 1995: 292; Dellinger 1972: 1532). But, the special factors analysis imposes a significant restriction on *Bivens* actions.

This chapter examines how the state secrets privilege and the *Bivens* doctrine have affected claims arising out of the Global War on Terror.[5] It focuses on two cases filed by individuals who were victims of the extraordinary rendition program of the United States. The rendition program transferred suspected terrorists to overseas detention centers (Fisher 2008: 1405; Meyer 2008; Grey 2007). These individuals were detained without charge and were subjected to torture and other cruel, inhuman, or degrading treatment. Extraordinary rendition has been subject to withering criticism as a violation of international law. Abduction and detention raise claims of arbitrary detention. Conditions of confinement can constitute cruel, inhuman, or degrading treatment or even torture.

Several victims of the extraordinary rendition program have filed lawsuits against U.S. government officials who allegedly authorized their abductions and detentions. This chapter examines two such cases: *El-Masri* v. *United States* and *Arar* v. *Ashcroft*. In these cases, federal courts used the state secrets privilege and the *Bivens* doctrine to prevent victims of extraordinary rendition, arbitrary

detention, and torture from having "their day in court." In both cases, the lawsuits were dismissed, and the plaintiffs were not allowed to present their claims to a jury.

This chapter is divided into four parts. Following this introduction, it examines the case of Khaled El-Masri, a German citizen who was captured in Macedonia, transferred to Afghanistan through the extraordinary rendition program, detained at the infamous Salt Pit facility, and eventually released. El-Masri brought suit in the United States against several U.S. government officials, corporate defendants, and private individuals to seek redress for his rendition. After several years of litigation, El-Masri's lawsuit was dismissed under the state secrets privilege because the courts determined that the lawsuit could not proceed without implicating privileged state secrets. The next part reviews the case of Maher Arar, a dual citizen of Canada and Syria who was detained by the United States while traveling through New York, transferred to Jordan and then Syria through the extraordinary rendition program, tortured, and eventually released after being detained for over a year. Arar subsequently filed a federal lawsuit in the United States against several U.S. government officials who were complicit in his detention and subsequent rendition. His case was dismissed under the *Bivens* doctrine because the courts held that special factors counseled hesitation in the case. The final part of this chapter explains the problems that emanate from these decisions and offers suggestions for overcoming these constitutional barriers.[6]

While courts have dismissed civil actions seeking relief for extraordinary rendition, detainees have had some success in other cases. Indeed, the Supreme Court has ruled in favor of detainees in several high-profile cases. In *Rasul* v. *Bush*, 542 U.S. 466 (2004), the Supreme Court held that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals at Guantanamo. In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court determined that a U.S. citizen can challenge the factual basis for his detention as an enemy combatant before a neutral decisionmaker. In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court found that the military commissions lacked authorization to proceed absent explicit congressional support. And, in *Boumedienne* v. *Bush*, 553 U.S. 723 (2008), the Court held that Guantanamo detainees have the right to file habeas corpus petitions to challenge their detention. In contrast, the Supreme Court has refused to consider the dismissal of civil actions filed by rendition victims.

The case of Khaled El-Masri

In 2003, Khaled El-Masri, a German citizen of Lebanese descent, lived in Ulm, Germany with his wife and five young children. On December 31, 2003, El-Masri traveled from his home to Skopje, Macedonia for a short vacation. When El-Masri crossed the border into Macedonia, he was detained by Macedonian law enforcement officials. His passport was confiscated, and he was eventually detained without charge in Macedonia for three weeks. El-Masri was kept at

a hotel throughout his detention in Macedonia. He was questioned about his religious beliefs and his association with several individuals and Islamic organizations. He was not allowed to communicate with his family, and his requests to speak with a lawyer and German consular official were denied. After two weeks, El-Masri began a hunger strike to protest his detention and treatment. On approximately January 23, 2004, El-Masri was taken to an airport where he was beaten, stripped, and drugged. He was then placed in a waiting aircraft and flown to Afghanistan. Upon arrival, he was transferred to a CIA detention facility near Kabul known as the Salt Pit, where he was detained in a cell for the next four months. El-Masri was again interrogated repeatedly about his association with alleged terrorists, which he continued to deny. Despite repeated requests, he was prevented from contacting a lawyer or any member of his family. El-Masri commenced another hunger strike to protest his detention. By April 2004, CIA officers realized they had abducted and detained an innocent man (Horton 2010; Priest 2005; Brandt 2005). CIA Director George Tenet and Secretary of State Condoleezza Rice were notified that the CIA was detaining an innocent German citizen and yet El-Masri remained in detention for two more months. On May, 28 2004, El-Masri was taken from the Salt Pit and flown to Albania, where he was released. He was abandoned on a hill by his captors with no explanation and told to walk away. El-Masri was initially detained by Albanian authorities, who then sent him back to Germany. When he arrived home, El-Masri discovered that his family had returned to Lebanon.[7] El-Masri eventually reunited with his family.

On December 6, 2005, El-Masri filed a federal lawsuit in the federal district court for the Eastern District of Virginia seeking relief for his abduction and detention.[8] The lawsuit named former CIA Director George Tenet, ten unnamed employees of the CIA, three corporate defendants, and ten unnamed employees of the defendant corporations.[9] According to the complaint,

> Mr. El-Masri's abduction, detention, and interrogation without legal process were carried out pursuant to an unlawful policy and practice devised and implemented by defendant Tenet known as "extraordinary rendition:" the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws.[10]
>
> (Complaint, *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06–1667), at 1–2)

It raised three causes of action: (1) violation of the Fifth Amendment right to due process; (2) violation of the international norm against prolonged arbitrary detention; and (3) violation of the international norm against torture and cruel, inhuman or degrading treatment. El-Masri sought compensatory and punitive damages.

On March 8, 2006, the United States filed a Statement of Interest with the district court invoking the state secrets privilege.[11] While El-Masri did not sue the

United States, the U.S. government was entitled to enter the proceedings to protect U.S. interests (28 U.S.C. § 517). Attached to its filing, the U.S. government submitted a classified declaration from CIA Director Porter Goss which: (1) described the information that the United States wanted to protect; (2) explained how further court proceedings could risk disclosure of the information; and (3) explained why disclosure would harm national security. In his submission, Goss explained that the state secrets privilege was asserted because El-Masri's complaint raised clandestine intelligence matters.

> Confirming the existence of an alleged clandestine intelligence activity would reveal the very classified information sought to be protected from disclosure. The United States does not, however, have the luxury of denying unfounded allegations of clandestine intelligence activities without serious adverse consequence. The denial of CIA involvement may, by itself, provide the informed intelligence analyst useful information about the CIA's capabilities and the scope and thrust of CIA activities. Even where that is not the case, the United States cannot simply deny the existence of such activities where none exist. If that were the policy, the United States' failure to deny such activities in other circumstances would be tantamount to an admission of such clandestine activities in these other circumstances. Therefore, the United States and current and former CIA officers, such as Director Tenet, must take the consistent position of refusing to confirm or deny allegations relating to unacknowledged intelligence activities.
>
> With these considerations in mind, I hereby submit this declaration to formally assert a claim of state secrets privilege. I make this claim of state secrets privilege in my capacity as head of the CIA, after personal consideration of the matter. In view of the allegations of CIA involvement, parties in this case have a special incentive to probe the CIA's foreign intelligence interests, authorities, and methods generally, and seek information and evidence to establish or refute claims and defenses.
>
> (Formal Claim of State Secrets Privilege by Porter J. Goss, Director, Central Intelligence Agency, *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06–1667), at 4–5)

On May 12, 2006, the district court accepted the U.S. assertion of the state secrets privilege and dismissed the case (*El-Masri* v. *Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006)). The court found that litigating El-Masri's claims could expose classified information.

> In the instant case, this question is easily answered in the negative. To succeed on his claims, El-Masri would have to prove that he was abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program. As noted above, any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument.… These threshold answers alone would

> reveal considerable detail about the CIA's highly classified overseas programs and operations.
>
> (El-Masri 2006: 539)

Under these circumstances, dismissal was necessary.

> [W]hile dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets.
>
> (El-Masri 2006: 539)

On 2 March 2007, the Fourth Circuit Court of Appeals upheld the district court's dismissal (*El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007)). The court reaffirmed the constitutional status of the state secrets privilege. "Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign affairs responsibilities" (El-Masri 2006: 303). The court indicated that the primary legal issue concerned the extent to which privileged information was, in fact, necessary to prove El-Masri's claims. El-Masri conceded that some confidential information might be privileged and, therefore, beyond his reach. He argued, however, that the existence of some confidential information was not sufficient to justify dismissing the entire case. In addition, El-Masri argued that key facts surrounding the extraordinary rendition program were already public knowledge and no longer secret. According to El-Masri, "the CIA's operation of a rendition program targeted at terrorism suspects, plus the tactics employed therein – have been so widely discussed that litigation concerning them could do no harm to national security" (El-Masri 2006: 308). The court, however, disagreed with this characterization. In order to pursue the case, El-Masri would have to produce admissible evidence that the defendants were involved in his detention and interrogation. Such information was not publically available.

> To establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations.
>
> (El-Masri 2006: 309)

At the same time, the defendants could not defend themselves without using privileged evidence. "[I]f El-Masri were somehow able to make out a prima facie case despite the unavailability of state secrets, the defendants could not properly defend themselves without using privileged evidence" (El-Masri 2006:

309). These considerations compelled the imposition of the state secrets privilege.

El-Masri asserted that the court's acceptance of the state secrets privilege would undermine judicial review of executive branch actions and undermine the traditional role of the judiciary. The court, however, disagreed with this characterization.

> We also reject El-Masri's view that we are obliged to jettison procedural restrictions – including the law of privilege – that might impede our ability to act as a check on the Executive.… But we would be guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us – especially when the challenged action pertains to military or foreign policy.
>
> (El-Masri 2006: 312)

While the court was mindful of the consequences to El-Masri in dismissing the lawsuit, it was obliged to do so nonetheless.

For these reasons, the Fourth Circuit affirmed the district court's dismissal of El-Masri's lawsuit. On October 9, 2007, the U.S. Supreme Court refused to accept El-Masri's petition for writ of certiorari, thereby ending the case.

El-Masri's case received significant media attention and political review. In Europe, El-Masri's case was the subject of inquiries by the European Parliament as well as the Parliamentary Assembly of the Council of Europe.[12] These inquiries documented several cases of extraordinary rendition and implicated several European countries as complicit in the rendition program. Criminal investigations in Germany and Spain were also initiated but proved unsuccessful.

In addition to the U.S. proceedings, El-Masri pursued his case in international fora. On April 8, 2008, El-Masri filed a petition with the Inter-American Commission on Human Rights against the United States. The complaint alleged that the United States had violated the American Declaration on the Rights and Duties of Man by subjecting El-Masri to extraordinary rendition and by failing to provide him with a judicial remedy.

> The United States' direct involvement in and failure to protect against the torture, arbitrary detention, and forced disappearance suffered by Mr. El-Masri violated his fundamental right to life under Article I of the American Declaration (the right to life and personal security), as well as his rights to due process of the laws protected under Articles XXV, XXVI, and XVII. His transfer to torture in Afghanistan also violated his rights under Article XXVII (the right to seek and receive asylum and the right to non refoulement). And, the refusal of U.S. courts to provide Mr. El-Masri with a remedy for the violation of his rights under the U.S. Constitution and international law violated his right to resort to the courts under Article XVIII. The United States is either directly responsible for the violations of these

> protected rights, or, alternatively, responsibility is attributable to the United States because of its failure to have acted with due diligence to prevent them.
>
> ("Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits," Int.Am. C. H.R., Apr. 9, 2008, at 4)

And, on 18 September 2009, El-Masri filed a complaint before the European Court of Human Rights against Macedonia alleging several violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[13]

> 148. The ill-treatment and detention of Khaled El-Masri in the Skopski Merak hotel and the failure to prevent him being subjected to "capture shock" treatment when transferred to the CIA rendition team at Skopje airport violate Article 3, Article 5 and Article 8 of the Convention.
>
> 149. The treatment inflicted upon him during his detention in the Salt Pit in Afghanistan should be assessed as ill-treatment that constitutes a violation of Article 3, Article 5 and Article 8, which the Macedonian government is responsible for facilitating by knowingly transferring him into the custody of U.S. agents directly responsible for such ill-treatment even though there were substantial grounds for believing that there was a real risk of such ill-treatment. In addition, in respect of the Article 5 and Article 8 violations, it is also argued that Macedonia should be considered directly responsible for the entire period of captivity from his initial detention on 31 December 2009 [sic] to his return to Albania on 28 May 2004 due to the fact that Macedonia did not merely facilitate the risk of a future violation by a third state but directly participated in commencing and perpetuating an actual and ongoing violation.
>
> 150. The failure to conduct a prompt and effective investigation into the events also violates Article 3 of the Convention, and the continuing lack of an effective remedy breaches Article 13. Mr. El-Masri and the public as a whole have a right to the truth as to the secret rendition programme.
>
> 151. The entire operation was outside the law, in secret, and for the purpose of getting Mr. El-Masri to speak by terrifying and intimidating him. It followed pre-arranged plans set out in CIA memos approved at the highest level that were designed to inflict physical pain and extreme psychological discomfort in order to break his spirit.
>
> (Application, *El-Masri* v. *Macedonia*, European Court of Human Rights, Sept. 18, 2009, at 71)

El-Masri's claims before the Inter-American Commission and the European Court remain pending.

Khaled El-Masri is not the only victim of extraordinary rendition whose case was dismissed pursuant to the state secrets privilege in U.S. courts[14] (Bohannon

2011: 621; Schwinn 2010: 778). In *Mohamed* v. *Jeppesen Dataplan, Inc.*, for example, five foreign nationals brought a lawsuit against Jeppesen Dataplan, Inc., a U.S. corporation that offered aircraft leasing and logistical support. Each of the plaintiffs alleged they had been victims of the extraordinary rendition program. The complaint alleged that Jeppesen

> provided direct and substantial services to the United States for its so-called "extraordinary rendition" program, enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities where they are placed beyond the reach of the law and subjected to torture and other cruel, inhuman or degrading treatment.
>
> (Complaint, *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (No. 08–15693), at 1)

The complaint raised two causes of action: (1) violation of international norm prohibiting forced disappearance; and (2) violation of international norms prohibiting torture and other cruel, inhuman or degrading treatment. After several years of litigation, the lawsuit was dismissed pursuant to the state secrets privilege. The district court found that the core of the lawsuit involved allegations "of covert U.S. military or CIA operations in foreign countries against foreign nationals – clearly a subject matter which is a state secret" (*Mohamed* v. *Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1136 (N.D. Cal. 2008)). On appeal, the Ninth Circuit initially reversed the district court's decision, concluding that the subject matter of the lawsuit was not a state secret and that the court should not consider hypothetical evidence in considering the applicability of the state secrets privilege (*Mohamed* v. *Jeppesen Dataplan, Inc.*, 563 F.3d 992 (9th Cir. 2009)). Sitting en banc, the Ninth Circuit reversed its prior decision and affirmed the district court's dismissal of the lawsuit, indicating that "this case presents a painful conflict between human rights and national security" and reluctantly concluding that the state secrets privilege compelled dismissal (*Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010) (en banc)). Five judges filed a dissenting opinion that strongly criticized the majority position and urged the court to remand the case back to the district court for a more thorough review of the evidence[15] (Mohamad 2006: 1096 (Hawkins, J., dissenting)). On May 16, 2011, the U.S. Supreme Court denied the plaintiffs' petition for certiorari, which ended the litigation.

The case of Maher Arar

In 2002, Maher Arar, a Syrian-born Canadian citizen, lived in Ottawa with his family. At the time, he worked as a telecommunications engineer. On September 26, 2002, Arar was traveling from Tunisia back to Canada after a family vacation. His return flight went from Zurich, Switzerland to New York and then Montreal. While transiting through the New York airport, Arar was stopped by U.S. immigration officials for questioning. Arar was identified by the

Department of State "TIPOFF" system as a "special interest" alien and a suspected terrorist.[16] Immigration officials questioned Arar about possible connections with terrorist groups, including Al Qaeda. Arar was eventually transferred from the airport to the Metropolitan Detention Center in Brooklyn operated by the Federal Bureau of Prisons and held there for nine days. During his detention, he was visited briefly by a Canadian consular official and an attorney. Eventually, the Immigration and Naturalization Service (INS) determined that Arar was a member of Al Qaeda and that he posed a threat to the United States. In consultation with the State Department, the INS determined that Arar was inadmissible and should be sent to Syria.[17] In making this determination, INS and State Department officials received assurances from Syria that Arar would not be subjected to torture if sent there.[18] On October 8, 2002, Arar was taken to Washington, D.C. by private plane and then flown to Jordan. Neither the Canadian consulate nor Arar's attorney were informed that he had been removed. On October 9, 2002, Arar was transferred to Syria where he was held by Syrian Military Intelligence at its Palestine Branch. For several days, Arar was brutally interrogated and tortured by Syrian officials who accused him of being a terrorist and demanded his confession. When he was not being interrogated, Arar was placed in a damp underground cell. On October 20, 2002, the Canadian Embassy discovered that Arar had been transferred to Syria. It immediately contacted Syrian authorities, who confirmed Arar's transfer and detention. However, Arar remained in custody for an additional year. While Canadian embassy officials were allowed to visit Arar during his detention, he did not disclose that he had been tortured because of threats by his captors. On October 5, 2003, Arar was released to the Canadian Embassy and allowed to leave the country. Syrian authorities released Arar, stating they had found no connection between Arar and any criminal or terrorist organization. Arar was never charged with any crime by the United States, Canada, or Syria.[19]

On January 22, 2004, Arar filed a federal lawsuit seeking compensatory damages and declaratory relief against Attorney General John Ashcroft, FBI Director Robert Mueller, and several other federal officials in federal district court for the Southern District of New York.[20] The complaint alleged four causes of action: (1) violation of the Fifth Amendment arising out of Arar's detention in the United States (prior to his removal to Syria); (2) violation of the Fifth Amendment arising out of Arar's detention in Syria and his denial of access to counsel, the courts, and the Canadian consulate; (3) violation of the Fifth Amendment arising out of Arar's torture in Syria; and (4) violation of the prohibition against torture for conspiring with Jordanian and Syrian officials to bring about his torture. According to the complaint, "federal officials removed Mr. Arar to Syria under the Government's 'extraordinary renditions' program precisely because Syria could use methods of interrogation to obtain information from Mr. Arar that would not be legally or morally acceptable in this country or in other democracies" (Complaint, *Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (No. 04–0249), at 2). The complaint sought compensatory and punitive damages as well as a judgment declaring "that the actions of Defendants, their agents, and

their employees, are illegal and violate Mr. Arar's constitutional, civil, and international human rights" (Complaint, *Arar* v. *Ashcroft* 2009: 24).

While the United States was not a defendant in the lawsuit, it moved to dismiss the case pursuant to the state secrets privilege. In support, the United States submitted a declaration from James B. Comey, the Deputy Attorney General which addressed the basis for the state secrets claim.

> The classified information in this case relates to the United States' intelligence activities and intelligence information regarding the plaintiff. It contains numerous references to intelligence sources and methods, the disclosure of which reasonably could be expected to cause exceptionally grave or serious damage to the national security of the United States and its foreign relations or activities. Disclosure of this information would enable adversaries of the United States to avoid detection from the Nation's intelligence activities, sources, and methods, and/or take measures to defeat or neutralize those activities, which could seriously damage the United States' national security interests. In addition, disclosure of the information relied upon to reach each of the three noted decisions would pose an exceptionally grave or serious risk to diplomatic relations and national security.
>
> Any further elaboration on the public record concerning this matter would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent. The classified declarations that I considered in making this privilege assertion provide a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.
>
> Accordingly, I formally assert the state secrets privilege to prevent the disclosure of the information detailed in the classified declarations available for the Court's ex parte, in camera review.
>
> (Declaration of James B. Comey, *Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (No. 04–0249))

On 16 February 2006, the district court dismissed the lawsuit (*Arar* v. *Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006)). The court declined to rule on the U.S. assertion of the state secrets privilege. Instead, the court dismissed the lawsuit on other grounds. With respect to Arar's constitutional claims regarding extraordinary rendition, the court examined their applicability under the *Bivens* doctrine. In this case, the district court determined that special factors counseled hesitation in extending a constitutional claim for extraordinary rendition.

> [T]he task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security. Those branches have the responsibility to determine whether judicial oversight is appropriate. Without explicit legislation, judges should be hesitant to fill an area that,

> until now, has been left untouched – perhaps deliberately – by the Legislative and Executive branches. To do otherwise would threaten "our customary policy of deference to the President in matters of foreign affairs."
>
> (Arar 2006: 283)

Accordingly, the district court dismissed Arar's constitutional law claims. The court also addressed and dismissed the remaining counts. The court held that Arar lacked standing to seek declaratory relief and there was no viable cause of action under the Torture Victim Protection Act.

On June 30, 2008, a three-judge panel of the Second Circuit affirmed the dismissal (*Arar* v. *Ashcroft*, 532 F.3d 157 (2d Cir. 2008)). This decision was upheld by an en banc panel of the Second Circuit on November 2, 2009 (*Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc)). Writing for the en banc majority, Chief Judge Jacobs addressed several issues, including the Fifth Amendment claims and the *Bivens* doctrine. In its *Bivens* analysis, the court first determined that extraordinary rendition constitutes a new context as "[n]o court has previously afforded a *Bivens* remedy for extraordinary rendition"[21] (Arar 2009: 572). The court then examined whether alternative remedial mechanisms existed that provided Arar with an alternative to a civil action. The court acknowledged that the Immigration and Nationality Act offers some forms of redress in the immigration field. It was unclear, however, whether Arar was eligible for such relief or whether such relief would even be meaningful in Arar's situation. The court declined to rule on this point since the constitutional claims could be resolved on other grounds. "In the end, we need not decide whether an alternative remedial scheme was available because, 'even in the absence of an alternative [remedial scheme], a *Bivens* remedy is a subject of judgment … [in which] courts … must pay particular heed … to any special factors counseling hesitation before authorizing a new kind of federal litigation'" (*Arar* v. *Ashcroft*, 585 F.3d at 573 (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007)).

The Second Circuit identified several distinct factors that counseled hesitation in this case. First, the court determined that security and foreign policy considerations in the case were significant.

> A suit seeking a damages remedy against senior officials who implement such a policy is in critical respects a suit against the government as to which the government has not waived sovereign immunity. Such a suit unavoidably influences government policy, probes government secrets, invades government interests, enmeshes government lawyers, and thereby elicits government funds for settlement.
>
> (Arar 2007: 575)

Second, the court indicated that allowing the case to proceed would implicate confidential information, particularly information involving foreign governments. "The extraordinary rendition context involves exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence

issues. The sensitivities of such classified material are 'too obvious to call for enlarged discussion'" (Arar 2007: 576 (quoting *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988)). Of particular concern for disclosure concerned the assurances received by the United States pursuant to the Convention against Torture that Arar would not be tortured.

> Should we decide to extend *Bivens* into the extraordinary rendition context, resolution of these actions will require us to determine whether any such assurances were received from the country of rendition and whether the relevant defendants relied upon them in good faith in removing the alien at issue.
>
> (Arar 2007: 578)

Third, the court expressed concerns that the confidential nature of the subject matter in the case would require significant restrictions on judicial proceedings. The court would be required to conduct *in camera* proceedings and court documents would be redacted. Such actions would undermine the transparency and open nature of judicial proceedings. Fourth, the court indicated that cases involving classified information may subject the government to "graymail" by prospective litigants: "'i.e. individual lawsuits brought to induce the [government] to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations,' or otherwise compromise foreign policy efforts" (Arar 2007: 578–579 (quoting *Tenet* v. *Doe*, 544 U.S. 1, 11 (2005)). But, forcing the government to offer a financial settlement disregards the role of the actual defendants in the litigation. Indeed, private defendants have an interest in the government settling the matter with the plaintiffs, thereby absolving them of legal and financial responsibility.

In prior cases authorizing a *Bivens* action, the court indicated the dividing line between constitutional and unconstitutional action was clear (Arar 2007: 580). In contrast, the legal status of extraordinary rendition is evolving and unclear, and this should be considered in deciding whether a *Bivens* action is appropriate. The court also noted that the policy questions underlying the case should be considered.

> Consider: should the officers here have let Arar go on his way and board his flight to Montreal? Canada was evidently unwilling to receive him; it was, after all, Canadian authorities who identified Arar as a terrorist (or did something that led their government to apologize publicly to Arar and pay him $10 million).
>
> Should a person identified as a terrorist by his own country be allowed to board his plane and go on to his destination? Surely, that would raise questions as to what duty is owed to the other passengers and the crew.
>
> Or should a suspected terrorist en route to Canada have been released on the Canadian border – over which he could re-enter the United States virtually at will? Or should he have been sent back whence his plane came, or to

> some third country? Should those governments be told that Canada thinks he is a terrorist? If so, what country would take him?
>
> Or should the suspected terrorist have been sent to Guantanamo Bay or – if no other country would take him – kept in the United States with the prospect of release into the general population?
>
> (Arar 2007: 580 (citations omitted))

For these reasons, the Second Circuit held that Arar could not pursue a *Bivens* action for the alleged constitutional violations. It, therefore, affirmed the district court's dismissal. In closing remarks, the court suggested that Congress was better situated to provide a remedy. "We recognize our limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition. By the same token, we can easily locate that competence, expertise, and responsibility elsewhere: in Congress" (Arar 2007: 580–581).

Four judges issued dissenting opinions. While they addressed different issues, they each shared a fundamental disagreement with the majority opinion's analysis. Judge Sack, for example, expressed concerns with the majority's application of the *Bivens* test and its special factors analysis. He did not consider Arar's allegations to present a "new context" or that the "special factors" analysis was appropriate in light of the state secrets privilege[22] (Arar 1007: 583 (Sack, J., dissenting)). At a more fundamental level, Judge Sack expressed serious concerns about the majority's desire to reject a *Bivens* remedy, apparently at any price. "We fear that the majority is so bound and determined to declare categorically that there is no *Bivens* action in the present 'context,' that it unnecessarily makes dubious law" (Arar 2007: 583). Judge Pooler took issue with the *Bivens* analysis as well as the majority's dismissal of Arar's claims under the Torture Victim Protection Act (Arar 2007: 624 (Pooler, J., dissenting)). Judge Parker objected to the majority's unwillingness to afford Arar a remedy.

> The majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security. Its approach distorts the system of checks and balances essential to the rule of law, and it trivializes the judiciary's role in these arenas. To my mind, the most depressing aspect of the majority's opinion is its sincerity.
>
> (Arar 2007: 610–611 (Parker, J., dissenting))

Finally, Judge Calabresi characterized the majority opinion as an instance of "extraordinary judicial activism" and criticized its willingness to defer to the executive's assertion of power at the expense of judicial review (Arar 2007: 630 (Calabresi, J., dissenting)).

> It has violated long-standing canons of restraint that properly must guide courts when they face complex and searing questions that involve potentially

> fundamental constitutional rights. It has reached out to decide an issue that should not have been resolved at this stage of Arar's case. Moreover, in doing this, the court has justified its holding with side comments (as to other fields of law such as torts) that are both sweeping and wrong. That the majority – made up of colleagues I greatly respect – has done all this with the best of intentions, and in the belief that its holding is necessary in a time of crisis, I do not doubt. But this does not alter my conviction that in calmer times, wise people will ask themselves: how could such able and worthy judges have done that?
>
> (Arar 2007: 630 (Calabresi, J., dissenting))

On June 14, 2010, the U.S. Supreme Court refused Arar's petition for certiorari, thereby ending the case.

While Arar was unsuccessful in U.S. courts, he received a more favorable response in other forums. Following Arar's release and return to Canada, the Canadian government initiated a public inquiry to examine the circumstances surrounding Arar's rendition and to consider Canada's culpability (Craddock 2009: 621; Roach 2007: 53). The Commission of Inquiry conducted an extensive investigation into the Arar rendition and reviewed the Canadian government's role.[23] It found that the Canadian government provided the United States with inaccurate information regarding Arar and his alleged terrorist connections, which the United States then used as the basis for detaining him and subsequently sending him to Syria.[24] In addition, the Canadian government failed to protect Arar once he was in Syrian custody.[25] On January 26, 2007, the Canadian government formally apologized to Arar for its role in his detention and provided him $10 million in compensation. Prime Minister Stephen Harper issued the apology on behalf of the Canadian government:

> On behalf of the Government of Canada, I wish to apologize to you, Monia Mazigh and your family for any role Canadian officials may have played in the terrible ordeal that all of you experienced in 2002 and 2003.
>
> Although these events occurred under the last government, please rest assured that this government will do everything in its power to ensure that the issues raised by Commissioner O'Connor are addressed.
>
> I trust that, having arrived at a negotiated settlement, we have ensured that fair compensation will be paid to you and your family. I sincerely hope that these words and actions will assist you and your family in your efforts to begin a new and hopeful chapter in your lives.[26]

In addition to *Arar* v. *Ashcroft*, several other cases have conducted a similar analysis of the *Bivens* doctrine in cases of detention and abuse perpetrated during the Global War on Terror. In *Rasul* v. *Myers*, for example, four British nationals who were detained at Guantanamo brought a lawsuit against Secretary of Defense Donald Rumsfeld, Air Force General Richard Myers, and nine senior military officials (Complaint, *Rasul* v. *Myers*, 563 F.3d 527 (D.C. Cir. 2009)

(No. 06–5209)). Their complaint alleged seven causes of action, including violations of the Fifth and Eighth Amendments and violations of international norms prohibiting torture and other cruel, inhuman or degrading treatment. On February 26, 2006, the district court dismissed the majority of these claims (*Rasul* v. *Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006)). The court indicated that the plaintiffs' alleged constitutional rights were not clearly established at the time they were violated and, therefore, their constitutional claims could not be pursued under a *Bivens* action. According to the court, the constitutional rights of "nonresident aliens captured abroad during a time of war and detained within a territory over which the United States does not have sovereignty" were not clearly established at the time of their detention (Rasul 2006: 50–51). Indeed, "the plaintiffs' attenuated connections with the United States coupled with the dispute over whether Guantanamo is within the territorial jurisdiction of the Judiciary would lead a reasonable person to believe that the plaintiffs would not be afforded any constitutional protections" (Rasul 2006: 51). On appeal, the D.C. Circuit Court of Appeals affirmed the dismissal of the constitutional claims (*Rasul* v. *Myers*, 563 F.3d 527 (D.C. Cir. 2009); *Rasul* v. *Myers*, 512 F.3d 644 (D.C. Cir. 2008)).

In *Ali* v. *Rumsfeld*, several foreign nationals incarcerated in U.S. detention centers in Iraq and Afghanistan brought a civil action against Secretary of Defense Donald Rumsfeld. (Complaint, *Ali* v. *Rumsfeld*, 479 F. Supp. 2d 85(D.D.C. 2007) (No. 07–5178)). The complaint raised several causes of action, including violations of the Fifth Amendment and Eighth Amendment and violations of international norms prohibiting torture and other cruel, inhuman or degrading treatment. Similar lawsuits were filed against three other government officials, including Colonel Thomas Pappas, Lieutenant General Ricardo Sanchez, and Colonel Janis Karpinski. The cases were subsequently consolidated into a single action. On 27 March 2007, the district court dismissed the cases, holding that the Fifth and Eighth Amendments do not apply to "nonresident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars" (In re Iraq and Afghanistan Detainees Litig., 479 F. Supp. 2d 85, 95 (D.D.C. 2007)). In addition, the court indicated that special factors counsel hesitation in cases involving military affairs, foreign policy, and national security. Accordingly, a *Bivens* action was not appropriate. This decision was upheld by the D.C. Circuit Court of Appeals (*Ali* v. *Rumsfeld*, 2011 U.S. App. LEXIS 12483 (D.C. Cir. 2011)). The D.C. Circuit agreed "that allowing a *Bivens* action to be brought against American military officials engaged in war would disrupt and hinder the ability of our armed forces 'to act decisively and without hesitation in defense of our liberty and national interests' " (Ali 2011: 29 (quoting In re Iraq and Afghanistan Detainees Litig., 479 F. Supp. 2d at 105)).

The constitution as a barrier to justice and a promoter of impunity

El-Masri v. *United States* and *Arar* v. *Ashcroft* arose out of the Global War on Terror. They both represent efforts by victims to gain redress for their injuries and achieve accountability from perpetrators before a neutral tribunal. In both cases, the United States asserted defenses based on constitutional arguments that were designed to prevent these lawsuits from proceeding. And, in both cases, the courts dismissed the lawsuits without any consideration of the merits of the underlying claims.[27]

Essentially, these decisions "immunized" unlawful conduct since no legal consequences arose from acts of torture, arbitrary detention, and enforced disappearance. The defendants were not held accountable for their wrongful acts. Indeed, these decisions "legitimized" unlawful conduct. By failing to take legal action against the perpetrators, the U.S. legal system implies that the conduct was not illegal or even wrong. And, these decisions "delegitimized" international norms. The Convention against Torture, for example, contains a categorical prohibition against torture. "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (Convention against Torture art. 2(2)). In addition, the Convention against Torture prohibits states from sending people to countries where they may be tortured (Convention against Torture art. 3; Duffy 2008: 373). The International Covenant on Civil and Political Rights prohibits torture as well as arbitrary detention and enforced disappearance.[28] These international norms are undermined in the face of continuing refusals to grant relief for violations.

These decisions also violate the international obligation to provide a remedy for human rights violations. Under international law, states are required to provide a remedy in cases where fundamental human rights norms have been violated. The principle of *ubi ius ibi remedium* – "where there is a right, there is a remedy" – is a well-established principle of international law. The leading formulation of the "right to a remedy" principle comes from the 1928 holding of the Permanent Court of International Justice in the *Chorzów Factory* case: "[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation*" (*Chorzów Factory* (*Ger*. v. *Pol*.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (September 13) (emphasis added)). Nearly every major human rights treaty includes a provision establishing an individual right to an effective remedy.[29] The International Covenant on Civil and Political Rights, for example, provides that "[e]ach State Party to the present Covenant undertakes:"

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

(International Covenant on Civil and Political Rights arts. 2(3), 9(5), 14(6))

The right to a remedy includes the obligation of states to investigate and bring to justice perpetrators who have violated the ICCPR.[30] The Convention against Torture also provides that "[e]ach State Party shall ensure in its legal system that the victim … obtains redress and has an enforceable right to fair and adequate compensation" (Convention against Torture art. 14).

The consequences of these constitutional barriers extend beyond the legal realm. By legitimizing unlawful conduct and delegitimizing the applicable international norms, these decisions place other individuals at risk for similar treatment. U.S. law often serves as a model for other countries, and these decisions are easily transplanted in other legal systems. In recent years, several countries have referred to U.S. actions during the Global War on Terror to justify their own violations of international norms (Shane, *NYT*, October 9, 2011: SR5). These decisions also undermine the legitimacy of U.S. foreign policy, which has long been premised on the promotion of human rights.

There are several ways to address these constitutional barriers.

One approach is for Congress to act.[31] Congress has the authority to investigate alleged wrongdoing by the executive branch. It can enact legislation authorizing causes of action to address claims for extraordinary rendition. Congress can also enact private bills on behalf of individuals harmed by U.S. government action (Pfander and Hunt 2010: 1862; Mantel 2007: 87). These bills would provide direct compensation to these individuals.

The Civil Liberties Act of 1988 offers an example of congressional action in response to human rights abuses (Maki *et al*., 2001: 196; Hatamiya 1993). The Act was adopted by Congress to acknowledge the harms suffered by Japanese-Americans who were interned during World War II and to offer restitution to survivors (Civil Liberties Act of 1988, 133 Cong. Rec. H7555 (1987)). Specifically, it was adopted to:

(1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
(2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
(3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;

(4) make restitution to those individuals of Japanese ancestry who were interned;
(5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law, for –

(A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II;
(B) personal property taken or destroyed by United States forces during World War II;
(C) community property, including community church property, taken or destroyed by United States forces during World War II; and
(D) traditional village lands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use;

(6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and
(7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

As part of the Act, eligible survivors received $20,000 in compensation for their detention. A fund was also established to provide research and educational opportunities regarding the relocation and internment of Japanese Americans. Finally, the National Archives was ordered to preserve any documents relating to the internment program. Each survivor received a formal letter of apology from President George Bush which noted that

> [a] monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.
>
> (Yamamoto and Ebesugawa 2006: 269)

A second approach for addressing constitutional barriers is through executive branch action. The President has the authority to provide ex gratia payments to individuals harmed through U.S. government conduct (Bilder 2006: 433). Ex gratia payments can be offered for humanitarian reasons and without acknowledging responsibility. In 1999, for example, President Clinton authorized a payment of $4.5 million to China that would be distributed to victims of the 1999 U.S. missile strike on the Chinese Embassy in Belgrade (Murphy 2000: 127). According to the U.S. State Department Legal Adviser, the "payment will be entirely voluntary and does not acknowledge any legal liability. This payment

will not create any precedent" (Laris, *Washington Post*, July 31, 1999: A15). Subsequently, the United States and China concluded an agreement that would provide $28 million to China for damages to the Chinese Embassy (Laris, *Washington Post*, December 15, 1999: A32). Unlike the prior payments to the Chinese victims, this payment would be authorized by Congress. In 1988, President Reagan offered compensation to the families of individuals killed by a U.S. missile strike on an Iran Air passenger jet in the Persian Gulf (Maier 1989: 325; Leich 1989: 319). In congressional testimony, the U.S. State Department Legal Adviser noted the use of ex gratia payments in international practice and indicated such payments were recognized by international law[32] (Department of State Bulletin, No. 2139, October 1988, at 58–59).

Several courts have suggested that legislative and executive branch solutions are the most appropriate response in cases of government misconduct that implicate national security. Indeed, the constitutional barriers that precluded both Khaled El-Masri and Maher Arar from pursuing their civil claims were premised on the assumption that such cases are best addressed by the executive and legislative branches of government. In *Arar* v. *Ashcroft*, for example, the Second Circuit indicated that "it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us as judges – to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation" (Arar 2007: 565). In *Mohamed* v. *Jeppesen Dataplan, Inc.*, the Ninth Circuit stated that "[o]ur holding today is not intended to foreclose – or to pre-judge – possible *nonjudicial* relief, should it be warranted for any of the plaintiffs" (Mohamed 2010: 1091 (emphasis in original)). The court then went on to discuss executive branch and judicial branch remedies (Mohamed 2010: 1091–1092).

A third approach for addressing these constitutional barriers is to require courts to reconsider their analysis of these cases (Samson 2011: 439). Because the state secrets privilege and the *Bivens* doctrine are judicially created, the courts can revise their approach to these issues. Rather than deferring to executive branch arguments about national security, the courts can offer more exacting review of such claims. (Margulies 2010; Barron & Lederman 2008: 689; Levinson 2006: 699; Chemerinsky 2005: 73). In *Arar* v. *Ashcroft*, for example, the dissenting judges criticized the majority's approach to *Bivens* and argued the lawsuit should not be dismissed. In *Mohamed* v. *Jeppesen Dataplan, Inc.*, the dissenting judges also challenged the majority's approach to the state secrets privilege. Significantly, the dissenting opinions in both cases expressed concerns about excessive judicial deference to the executive branch and the resulting harm such deference causes to the concept of checks and balances. "Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter" (Mohamed 2010: 1101 (Hawkins, J., dissenting)).

The Seventh Circuit used this approach to the *Bivens* doctrine in *Vance* v. *Rumsfeld*. In this case, two U.S. citizens brought a civil lawsuit against Secretary

of Defense Rumsfeld and several unnamed defendants claiming they had been detained and tortured by the United States in Iraq (Complaint, *Vance* v. *Rumsfeld*, 653 F.3d 591 (7th Cir. 2011) (No. 06–6964)). In 2006, the plaintiffs worked for an Iraqi security services company in Baghdad. After raising concerns about possible corruption, the plaintiffs were detained by the U.S. military.[33] The plaintiffs were first taken to Camp Prosperity, where they were strip-searched and placed in cages. After two days, the plaintiffs were transferred to Camp Cropper, which was located near Baghdad International Airport. The plaintiffs were detained at Camp Cropper for several weeks. Throughout their detention, they were held in solitary confinement and subjected to sleep deprivation and abusive conditions. They were provided limited opportunities to communicate with their families although they were not allowed to disclose their location or conditions of detention. They were not allowed to contact an attorney. During numerous interrogations, the plaintiffs were threatened with physical harm. The plaintiffs were eventually released, and no charges were ever filed against them.

In December 2006, the plaintiffs filed their lawsuit in federal district court and raised fourteen claims, including cruel, inhuman, or degrading treatment in violation of the U.S. Constitution, denial of procedural due process, and denial of access to the courts. On March 5, 2010, the district court dismissed some of the claims but allowed the *Bivens* claims involving cruel, inhuman and degrading treatment under the Fifth Amendment to proceed against Secretary Rumsfeld (*Vance* v. *Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010)). On August 8, 2011, the Seventh Circuit upheld the *Bivens* claims (*Vance* v. *Rumsfeld*, 653 F.3d 591 (7th Cir. 2011)). While acknowledging this case implicated military affairs and the alleged harms occurred in a war zone, the court did not find special factors counseling hesitation. According to the court, "[w]e see no persuasive justification in the *Bivens* case law or otherwise for defendants' most sweeping argument, which would deprive civilian U.S. citizens of a civil judicial remedy for torture or even cold-blooded murder by federal officials and soldiers, at any level, in a war zone" (Vance 2011: 594). In fact, the court found support for the *Bivens* action in congressional legislation authorizing civil lawsuits for victims of torture.[34] Notably, the court recognized the consequences of judicial abstention in such cases. "If we were to accept the defendants' invitation to recognize the broad and unprecedented immunity they seek, then the judicial branch – which is charged with enforcing constitutional rights – would be leaving our citizens defenseless to serious abuse or worse by another branch of their own government" (Vance 2011: 625).

The long-term implications of the *Vance* decision are unclear. The Seventh Circuit vacated the decision on 28 October 2011 and ordered en banc review (*Vance* v. *Rumsfeld*, 2001 U.S. App. LEXIS 22083 (7th Cir. 2011)).

Conclusion

The United States subjected Khaled El-Masri and Maher Arar to extraordinary rendition. Their personal suffering was only heightened by their treatment in

court. Both cases reveal the challenges facing victims of U.S. government misconduct in the Global War on Terror (Langley 2010: 1441; Clarke 2007: 917; Lobel 2008: 479; Satterthwaite 2007: 1333; Weissbrodt and Bergquist 2006: 123).

The consequences of such judicial deference to the executive branch are significant. These decisions obscure the truth (Brown 2011: 193). They deny victims their "day in court." More broadly, the lack of accountability creates a culture of impunity that facilitates further violations of human rights. And, it undermines the rule of law. These decisions have weakened the judiciary by limiting review of executive branch actions, effectively transferring power from the judiciary to the executive branch. When such power is transferred in our system of government, it seldom returns. Regrettably, *El-Masri* v. *United States* and *Arar* v. *Ashcroft* established a dangerous precedent that encourages future administrations to pursue similar abusive policies in the name of national security. While seeking to protect government interests, these decisions have, in fact, undermined them.

> Arbitrary imprisonment and torture under any circumstance is a "gross and notorious … act of despotism." But "confinement [and abuse] of the person, by secretly hurrying him to [prison], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."
>
> (Mohamed 2010: 1101 (Dawkins, J., dissenting) (citations omitted)).

Notes

* Aceves participated in several of the cases described in this chapter. Gershon Shafir and Steven Watt offered helpful comments on earlier drafts. Regina Bagdasarian, Brian Israel, and Kirstin Jarstad provided excellent research assistance on this project.

1 For examples of how the Constitution has been used to protect civil and political rights, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Gideon* v. *Wainright*, 372 U.S. 335 (1963); *Brown* v. *Board of Education*, 347 U.S. 483 (1954). For examples of how the Constitution has been used to undermine civil and political rights, see *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Whitney* v. *California*, 274 U.S. 357 (1927); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

2 For a description of the *Reynolds* case and the facts surrounding the invocation of the state secrets privilege by the United States, see Siegel 2008.

3 Several cases have addressed the state secrets privilege. *Tenet* v. *Doe*, 544 U.S. 1 (2005) (lawsuit seeking injunctive and declaratory relief in case of covert foreign agent); *United States* v. *Reynolds*, 345 U.S. 1 (1953) (lawsuit alleging government negligence in a military plane crash).

4 *Bivens* actions are controversial (Merrill 1985: 1).

5 The term "Global War on Terror" was used by the Bush administration to designate the transnational nature of the conflict.

6 These issues are not unique to the United States (Setty 2009: 201; Kalajdzic 2009–2010: 291).

7 For a detailed account of El-Masri's ordeal, see "Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits," *Int.Am. C. H. R.*, April 9, 2008.

8 El-Masri was represented by the Center for Constitutional Rights.
9 The corporate defendants were alleged to have provided the aircraft used for El-Masri's rendition.
10 The complaint offered a detailed description of the extraordinary rendition program and its functions.

> [I]t permits agents of the United States to detain foreign nationals that it considers terrorist suspects outside U.S. sovereign territory and without legal process; and it permits those agents, primarily through counterparts in foreign intelligence agencies, to employ interrogation methods on suspects that would not be permissible under federal or international law as a means of obtaining information from suspects.
>
> (Complaint, *El-Masri* v. *United States*, at 6)

11 United States' Statement of Interest, Assertion of a Formal Claim of State Secrets Privilege, and Request for Expedited Consideration, *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06–1667).
12 European Parliament, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, A6–0020/2007, January 30, 2007; Parliamentary Assembly, *Alleged Secret Detentions in Council of Europe Member States*, AS/Jur (2006) 03 rev, January 22, 2006.
13 Application, *El-Masri* v. *Macedonia*, European Court of Human Rights, September 18, 2009.
14 The state secrets privilege has been invoked by the United States in other cases arising out of the Global War on Terror (Tien 2010: 675).
15 The dissenting opinion attached an evidence list that identified public, non-secret information regarding the plaintiffs' claims.
16 Office of the Inspector General, Department of Homeland Security, The Removal of a Canadian Citizen to Syria, OIG-08–18 (2008); Office of the Inspector General, Department of Homeland Security, Addendum to OIG-08–18 (2008).
17 Decision of the Regional Director, In the Matter of Maher Arar, October 7, 2002.
18 Article 3 of the Convention against Torture provides member may not "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, December 10, 1984, 1465 U.N.T.S. 85. The United States implemented this obligation through various laws and administrative actions. Pursuant to 8 C.F.R. § 208.8(c), the Secretary of State may seek assurances from a specific country that an alien will not be tortured if the alien is removed to that country. "Once assurances are provided under … this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer." 8 C.F.R. § 208.8(c)(3).
19 For a detailed account of Maher Arar's ordeal, see Center for Constitutional Rights, *The Story of Maher Arar: Rendition to Torture* (2008).
20 Arar was represented by the American Civil Liberties Union.
21 The court's "new context" analysis was presumably based on the Supreme Court's 2007 decision in *Wilkie* v. *Robbins*, 551 U.S. 537, 549–554 (2007). It does not appear, however, that *Wilkie* changes the traditional *Bivens* two-part analysis. For a critique of the court's "new context" analysis, see *Recent Case: Constitutional Law – Bivens Actions – Second Circuit Holds that Alleged Victim of Extraordinary Rendition Did Not State a Bivens Claim*, 123 Harv. L. Rev. 1787 (2010).
22 Judge Sack implied that Arar's lawsuit might be dismissed in other ways such as by application of the state secrets doctrine.
23 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*

(2006); Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (2006).

24 *Report of the Events Relating to Maher Arar* 13–14.

25 Ibid. 14–15.

26 Press Release, Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process, January 26, 2007.

27 The state secrets privilege and the *Bivens* doctrine are not the only mechanisms of judicial restraint available to the courts (Rosen 2011: 5282). The political question doctrine, for example, has also been used to dismiss lawsuits that purportedly infringe on the constitutional powers of the president or Congress (Goldsmith 1999: 1395; Slaughter (Burley) 1993: 1980; Franck, 1992; Glennon 1989: 814). There are also statutory restrictions on actions brought against federal officials (Wilson 2008: 175).

28 Indeed, the United States has asserted that the International Covenant on Civil and Political Rights does not even regulate U.S. conduct taken outside U.S. territory. *See* Letter from the Permanent Representative of the U.S. to the U.N. and Other Int'l Orgs. in Geneva, to the Office of the High Comm'r for Human Rights (January 31, 2006), reprinted as Annex II to the U.N. High Comm'n on Human Rights, Report of the Chairman of the Working Group on Arbitrary Detention on the Situation of Detainees at Guantanamo Bay, U.N. Doc. E/CN.4/2006/120 (February 27, 2006) ("The United States has made clear its position that … the International Covenant on Civil and Political Rights, by its express terms, applies only to 'individuals within its territory and subject to its jurisdiction.'"); U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Third Periodic Reports of States Parties, United States of America, at 31, U.N. Doc. CCPR/C/USA/3 (November 28, 2005) ("The United States recalls its longstanding position that it has reiterated in paragraph 4 of this report and explained in detail in the legal analysis provided in Annex I; namely that the obligations assumed by the United States under the Covenant apply only within the territory of the United States."). Hathaway *et al*., 2011: 389.

29 Universal Declaration of Human Rights, at art. 8 ("Everyone has the right to an effective remedy … for acts violating the fundamental rights granted him"); Convention on Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, 660 U.N.T.S. 195 ("State Parties shall assure to everyone within their jurisdiction effective protection and remedies"); Convention on the Elimination of All Forms of Discrimination Against Women, art. 2(c), Dec. 18, 1979, 1249 U.N.T.S. 13 (establishing legal protection of women's rights against any act of discrimination).

30 Human Rights Committee, General Comment No. 30, U.N. Doc. HRI/GEN/1/Rev. 7 at 196 (2004); Seibert-Fohr 2002: 302; Orentlicher 1991: 237.

31 Many commentators have called for a heightened role by Congress in times of national crisis. Such action is particularly needed in the face of executive branch excess (Barron and Lederman 2008: 941).

32 In his testimony, the Legal Adviser also described the manner in which such payments would be calculated:

> The level of compensation paid on an ex gratia basis is essentially within the discretion of the state offering such payments. Obviously we are interested in providing significant humanitarian relief to the families of the victims, and we will be guided in part by levels of ex gratia payments that have been made in the past.
>
> (Department of State Bulletin, No. 2139, October 1988, at 58–59)

33 The plaintiffs were alleged to have supplied Iraqi insurgents with weapons and explosives.

34 The court discussed both the Alien Tort Statute and the Torture Victim Protection Act, which offer civil remedies to foreign nationals.

> It would be difficult to reconcile the law of nations' prohibition against torture and the remedies United States law provides to aliens tortured by their governments with a decision not to provide these citizen-plaintiffs a civil remedy if they can prove their allegations.
>
> (Vance 2011: 623)

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4 The banality of deterrence

The detention and the denial of asylum seekers after 9/11

Everard Meade

At midnight on July 13, 2002, Federal Bureau of Investigation (FBI) and Immigration and Naturalization Service (INS) agents stormed into the Federal Express World Service Center at the Indianapolis International Airport. They identified a 32-year-old Burmese man, Than Soe, who worked the night shift while finishing a degree at Indiana University. He was handcuffed and hustled out the door in front of his startled co-workers. At an undisclosed location, Than Soe was interrogated for two days, without legal counsel. He was taken to an immigration processing center outside of Chicago and then transferred to a county jail, where he was stripped of his possessions, given a prisoner's jumpsuit, and confined to a cell. Shortly thereafter, he received a "notice to appear" from an immigration judge, informing him that he was subject to "removal" (deportation) from the United States. None of the local news outlets picked up on the story, and his arrest was largely invisible from the community in which he lived. He faced detention and deportation on the exact same evidence that had won him an invitation to the United States and a government scholarship a few years earlier.

Before his arrest, Than Soe was anything but invisible. He was a well-known activist and opponent of the military junta in Myanmar (Burma), who came to the United States in 1996 by invitation, after winning a scholarship from the State Department's Burmese Refugee Scholarship Program, created by Congress to cultivate future democratic leaders in the region. Than Soe applied for the scholarship from a United Nations safe camp in Thailand, where he had taken refuge from a violent crackdown, during which dozens of peaceful protesters were killed, hundreds were arrested, and more than ten thousand fled across the border. After a thorough review of his file, the Immigration and Naturalization Service (INS) concluded that he posed no threat to the United States and granted him "parole," a finding that allows someone who does not otherwise have immigration status to enter and remain in the country without being in government custody.[1]

Than Soe's experience reveals the rise of a new and exceedingly broad notion of deterrence in U.S. immigration policy after 9/11, and the adjudication of asylum claims in particular. This notion of deterrence implies more than just rolling back the hard-won recognition of various kinds of minority rights, valuing security over liberty, or making war on an overly broad set of purported

enemies. Under the mantle of deterrence, overlapping spectacles have displaced the basic human rights of refugees – a spectacle of criminality, or the treatment of asylum seekers as if they are criminals to the point that they appear to be criminals; and "a spectacle of humanitarian succor," as Didier Fassin puts it, or a public narrative about "saving" particular people from atrocity that masks the evisceration of their rights and personhood (Fassin, 2011).[2]

Both spectacles have deep historical roots. There's a long, torrid history of the use of detention as a punitive deterrent and as a weapon in broader culture wars. U.S. officials have used immigration detention to deter political radicals, wartime refugees, interracial couples, and unwed mothers, in addition to expressly excluded ethnic minorities and national groups.[3] The conditions of detention, moreover, have often served as an explicit deterrent. From the Chinese Exclusion Act (1882) to the Mariel Boatlift (1980) migrants and refugees have been locked in the holds of ships, in dockside warehouses, in unventilated freight cars, and in barbed-wire stockades for months on end in order to discourage further migrants.[4] Humiliating health examinations and sanitation procedures mark the collective memory of the Ellis and Angel Island immigration stations, just as the accidental burning alive in 1916 of twenty migrants detained in the El Paso County Jail after a mandatory kerosene bath is seared on the memory of the Mexican border (Lee, 2003; Stern, 1999).[5] Periods of confinement before deportation or deportations to remote locations designed to make the journey more arduous and thus to deter migrants from attempting to re-enter the United States have been a regular feature in Mexican and Central American cases.[6] In the broader body politic, these practices leave behind a series of spectacles – the spectacle of Mexican families huddled behind the barbed wire fence in the improvised "concentration camp" in downtown Los Angeles during "Operation Wetback" (1954), or Haitian "boat people" in a Florida stockade or in tents on a sweltering tarmac at Guantánamo Bay, Cuba – snapshots that render them prisoners of a collective narrative, sometimes sympathetic, sometimes sinister, but rarely evoking their individual dignity and personhood.

There's a shorter but no less egregious history of the adjudication of refugee claims according to the whim and caprice of U.S. foreign policy, rather than the actual threat of persecution facing individual claimants. In the aftermath of global war and genocide, xenophobia and a "fear of races who have known no liberty at all," worked against the re-settlement of European Jews and other displaced peoples in the United States until their acceptance could be construed as part of an aggressive foreign policy.[7] During the Cold War, the United States used political asylum first and foremost as a tool for discrediting the Soviet Bloc, underscoring the brutality of Soviet repression in Hungary (1956), and the tyranny imposed by anti-imperialist revolutions in Cuba (1959), Nicaragua (1979), and Iran (1979).[8] As Gil Loescher reflects, "'freedom fighters' from Eastern Europe, Cuba, Indochina, and Nicaragua have been welcomed with open arms [in order to] … demonstrate the concrete failings of Communist societies."[9] After the chaotic withdrawal of U.S. forces from Vietnam in 1975, it took four years, a genocide in Cambodia, and a massive refugee crisis, with hundreds of

thousands fleeing by sea and overwhelming UNHCR camps in several countries, to prompt the United States to accept and resettle Southeast Asian refugees in an orderly fashion. Before the passage of the Refugee Act in 1980, the United States typically granted asylum to broad groups of individuals, playing the role of postwar power-broker and humanitarian savior, rather than arbiter of human rights.[10]

The Refugee Act of 1980 created the possibility for an individualized, rights-based assessment of asylum claims. The Act is based on the United Nations Convention relating to the Status of Refugees (1951).[11] The authors of the convention intended to provide ongoing solutions to the massive population dislocations and humanitarian crises following World War II. The convention defined a refugee as someone who was already outside of, and unable to return to, her country of nationality or last habitual residence "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." And, it placed a burden on state parties not to return a refugee to their former country if their "life or freedom" would be threatened – known as the principle on *non-refoulement*.[12] However, the convention limited refugee status to those who met the above definition, "*because of events occurring prior to January 1, 1951*."[13] Further, the convention directed signatory or ratifying countries to declare whether the definition would apply to events occurring before January 1, 1951 "in Europe" *or* "in Europe or elsewhere."[14] The United States did not accede to the convention. Thanks in large part to the dynamics of decolonization in Africa and Asia during the height of the Cold War, in 1967, the UN recognized that the world situation continued to produce refugees, the vast majority of whom fell outside the scope of the convention. In response, the Economic and Social Council drafted the UN Protocol Relating to the Status of Refugees, which eliminated the temporal and geographical limitations of the Convention.[15] In 1968, the United States acceded to the Protocol and became obliged to abide by its provisions, including the broadened definition of a refugee and the principle of *non-refoulement*. Twelve years later, in 1980, Congress passed the Refugee Act in order to ensure that U.S. law conformed to the United States' international obligations under the Protocol.[16] The Act also extended the definition of refugees to include both those who had been persecuted in the past and those with a "well-founded fear" of future persecution.[17]

The Refugee Act created a framework for refugees to apply for resettlement from abroad, through official United Nations channels.[18] It also created a mechanism for individual asylum seekers to apply from within the United States – known as "affirmative" applicants, and to be granted refugee status. The drafters anticipated the submission of somewhere between 2,000 and 5,000 asylum applications per year. In the first year alone, however, 26,000 individuals applied for asylum in the United States. Since then, the number of applicants continued to increase, reaching a peak of nearly 200,000 in 1995.[19] Despite the flood of applications, by the late 1980s, the INS had developed procedures for adjudicating unique claims based on individual persecution. A special office handled asylum

claims, and trained asylum officers to interpret country conditions data in light of U.S. asylum law. Through a series of standardized procedures, an individual could file an asylum application, meet face-to-face with an asylum officer and receive notice of the officer's decision within a relatively short period of time. In cases where the officer declined the claim, the asylum seeker was entitled to *de novo* review in front of an immigration judge. After receiving a "notice to appear" and appearing at a "master calendar" hearing, the individual would receive a merits hearing in front an immigration judge, at which point she could present evidence, call witnesses, and have the opportunity to rebut testimony presented by the INS. For those who applied for asylum only after they were placed in removal (deportation) proceedings, the process was the same, except that they would proceed directly to a bond hearing in front of an immigration judge before the merits hearing.[20] A de facto oppositional system developed in which asylum seekers and/or their attorneys would present evidence supporting their claim, and attorneys for the INS would generally question or contest the claim. The immigration judge was free to question both parties, and ultimately to decide the fate of the claim. Both sides retained the right to appeal to the Board of Immigration Appeals (BIA), and subsequently the federal circuit court in the relevant jurisdiction (in the case that the federal court overturned the decision to the benefit of the asylum seeker, the court remanded the case to the BIA for reconsideration). The Attorney General maintained wide discretionary powers to overturn rulings by immigration courts, but seldom exercised this authority.[21]

The threshold for *non-refoulement* was lowered when the United States ratified the U.N. Convention against Torture (1984) in 1994 and passed legislation fully implementing it in U.S. law in 1998. Article 3 prevents the return of any individual to country where "there are significant grounds for believing he might be subjected to torture" and allows this presumption to consider "a consistent pattern of gross, flagrant or mass violations of human rights" in the country in question.[22]

Of course, the foreign policy prerogatives of the late Cold War continued to color asylum adjudications. In a 1984 study, Gil Loescher and John Scanlan documented study how the experience of Haitian refugees in the United States had changed very little since the passage of the Refugee Act. "The denial of virtually every Haitian claim between 1972 and 1980 reflected conscious policy choices," they concluded, and "similar choices continue to affect the processing of Haitian asylum claims today, despite the provisions of the new act."[23] In July of 1981, President Reagan directed the Coast Guard to interdict Haitians at sea and deport them immediately. Haitians who made it ashore faced months of detention in the newly expanded Krome detention center in the Everglades. Returned refugees faced imprisonment, torture, and in some cases, death. The policy continued after the fall of the Duvalier regime in 1986, and the cycle of coups and countercoups that followed over the next twenty years. Cubans who made it to Florida got parole and a good chance of receiving asylum; Haitians were detained, denied asylum, and deported. It's a similar story for Salvadoran and Guatemalan refugees. Tens of thousands fled the genocidal regime in Guatemala and the

brutal dictatorship in El Salvador during the civil wars wracking the region in the 1980s. Despite their abysmal human rights records, both regimes were U.S. allies and the recipients of considerable military and economic assistance. A tiny portion of Salvadoran (less than 5 percent) or Guatemalan (less than 1 percent) applicants received asylum, and the United States even brought criminal charges against U.S. citizens who helped refugees fleeing these regimes to enter or pass through the United States as a part of the Sanctuary Movement.[24]

Immigration officials also faced the conundrum of what to do with non-citizens who were ordered deported to countries with which the United States had no formal diplomatic relations – Cambodia, Cuba, Iraq, Libya, Vietnam, etc. Those who were denied relief under the Refugee Act, or who received relief but were subsequently convicted of drug trafficking, arms dealing, or murder, faced permanent administrative detention after completing their criminal sentences (the same was true for all non-citizens, regardless of their immigration status). In 1996, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act dramatically expanded the number of "aggravated felonies" – deportable offenses under immigration law, many of which are misdemeanors in the relevant criminal statutes. Relatively minor criminal offenses – drunk driving, drug possession, petty theft, etc. – resulted in de facto life sentences. In the case of a Lithuanian refugee facing indefinite detention (combined with a similar Cambodian case), the U.S. Supreme Court ruled that "un-removable" immigrants could not be detained indefinitely, except if they were likely to be deported in the foreseeable future or under "special circumstances" (generally interpreted to mean terrorist activity). The Court did not set new substantive standards for review, but it mandated that every six months, the government had to review the case and make an argument for continued detention.[25] This decision has resulted in the "parole" of some 3,000 long-term detainees.

Needless to say, the asylum system created by the Refugee Act was far from perfect. A recent analysis of tens of thousands of cases from jurisdictions around the country documents extreme variation in asylum adjudications across dozens of variables, when compared to other kinds of legal adjudications.[26] The oppositional system for adjudicating claims, moreover, is highly discretionary – though they face detention in county jails and state prisons, asylum seekers do not have a right to court-appointed counsel, nor do they have a right to see the evidence the government uses to against them; if they "win" relief, the government can appeal and the Attorney General can overrule the immigration appeals court; and courtroom procedure varies dramatically based on the particular immigration judge. All of these inequities aside, since the passage of the Refugee Act in 1980, hundreds of thousands of individuals fleeing persecution have been able to seek safe haven in the United States and to enjoy some of the basic rights and freedoms established by the U.S. Constitution, based primarily the merits of their individual claims. The Refugee Act and the asylum system it created provided a critical foundation for recognizing refugees as persons before the law, with fundamental rights, rather than the human subjects of policy initiatives, whether

geostrategic, cultural, or humanitarian. It was a point of departure and part of a global effort to deal with the human cost of war and dictatorship through an individual, rights-based framework.[27] As Matthew Gibney argues, the ethical and political struggle to create rights-based systems for adjudicating asylum claims in the context of unprecedented waves of displaced peoples and economic migrants, was just becoming institutionalized in liberal democracies around the world on the eve of September 11, 2001.[28]

In the aftermath of 9/11, policymakers defined the deterrence of terrorism to be the primary priority of all U.S. immigration law and enforcement, including the adjudication of asylum claims.[29] They did not, however, clarify the sweeping and indeterminate definition of terrorism under existing U.S. law, and they increased executive discretion over its definition in many circumstances. The Refugee Act itself excluded applicants for asylum who had "persecuted others"; been convicted of "a particularly serious crime"; committed a "serious non-political crime" abroad; or posed a "danger to the security of the United States."[30] The roots of the specific "terrorism bar" to asylum can be traced to the Immigration Act of 1990, a law aimed, ironically, at increasing the number of legal immigrants to the United States, and removing previous restrictions that barred homosexuals and HIV-positive immigrants.[31] The Act defined "terrorist activity" as:

> any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves … the use of any … explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

The USA PATRIOT Act (2001), created a three-tiered definition of "terrorist organizations," the last and broadest of which, "Tier III," only applied for immigration purposes (similar to offenses defined as "aggravated felonies" under immigration law). The Act also defined "material support" to a "terrorist organization" so defined as "terrorist activity," in and of itself. Anyone who provided material support to a group designated as a "terrorist organization," was thus barred from asylum or withholding of removal in the United States.[32]

The Homeland Security Act (2003) abolished the INS and formally redirected all U.S. immigration law enforcement towards the deterrence of terrorism.[33] *The 9/11 Commission Report* raised the specter of fraudulent asylum claims and kept considerable public pressure on immigration officials to prioritize deterrence.[34] As they tried to interpret and implement a policy of deterrence without a clear definition of what it was they were supposed to deter and in an environment of fear and bureaucratic risk aversion, law enforcement at all levels fell back on cultural and historical precedents, many of which had been hotly contested or eliminated in a struggle to fully implement the Refugee Act. The result was an

understanding of deterrence that combined spectacles of criminality and humanitarian succor into a potent and thoroughgoing caricature of all asylum seekers as pure threats or pure victims, defined less by the facts of their claims or a rational risk assessment, than by their agency as persons, by the degree to which they try to assert some kind of control over their predicament – by standing up to oppression, seeking freedom in a new homeland, or demanding respect for their rights. In case after case, the same evidence that allowed an individual to make a credible claim of refugee status, has defined them as a threat to be deterred; and the process of adjudicating their claims, has turned vocal agents into pliant victims in order to "save" them.

The unfolding of Than Soe's case and its uncertain resolution show just how potent this combination has been, how it can override the most basic policy prerogatives and invade the most banal spheres of decision-making, affecting people and places without the slightest connection to Al Qaeda, the belligerents in Iraq and Afghanistan, or any other acknowledged enemies of the United States.

The "terrorist" who wasn't

The highlight of Than Soe's 1996 application, and the part that commanded the attention of the federal agents poring over immigration files after September 11, 2001, was the apparent hijacking of a commercial airliner. In 1989, at nineteen years old, Than Soe (also known as Yeh Yint or Than Lwin), and fellow student activist San Naing commandeered a flight with eighty-eight passengers, en route from Mergui (Myeik) to Yangon (Rangoon), and forced the pilot to divert to Thailand. They claimed to have a bomb in a box of laundry detergent. They were otherwise unarmed. After the plane landed at the U-Taphao air base (180 km southeast of Bangkok), they released thirty-three of the passengers, including all of the children and the elderly on board, and threatened to blow up the plane if their demands weren't met. After a nine-hour standoff, Thienchai Sirisamphan, the Deputy Prime Minister of Thailand, agreed to broadcast a reading of their demands, which included: the release of Buddhist monks, Aung San Suu Kyi, and other political prisoners; the sending of the soldiers who violently suppressed public dissent back to the barracks; and the lifting of a nationwide dusk-to-dawn curfew. Than Soe and San Naing then surrendered to Thai police, leaving the remaining passengers and crew unharmed.[35]

A member of the Thai Bomb Squad told reporters that the detergent box contained hand grenades, but it is unclear if he meant that they had verified the existence of explosives afterwards, or if he was simply explaining how the two students had commandeered the airplane in the first place, and the investigation report was not released to the public.[36] Than Soe has always claimed that he never handled any weapons, and subsequent (classified) reviews of the case by U.S. officials privy to the criminal investigation have not publicly challenged this claim. When two other Burmese students hijacked a commercial airliner the following year, they also claimed to have a bomb in a box of soap, and officials

in India (where the plane landed and they surrendered) verified that there was no explosive device.[37] In any event, Than Soe and San Naing were charged with hijacking, but signed a plea agreement to the lesser offense of threatening a pilot, for which they were sentenced to six years in prison. Two years later they received a royal pardon and they were remanded to a United Nations (UN) safe camp in August of 1992. In 1995, the U.N. High Commissioner for Refugees (UNHCR) recognized Than Soe as a "person of concern" thanks to his high-profile status and likelihood of persecution if returned to Myanmar.[38]

When he applied for the scholarship in 1996, Than Soe had every reason to think that the U.S. government would be sympathetic to his story. The Senate had created the scholarship program in direct response to the plight of Burmese students who fled the military crackdown of 1988, and new immigration policies enacted in 1989 required the Attorney General to report to congress on conditions in the refugee camps along the Thai border.[39] The very day Than Soe and San Naing boarded the airliner, Congress heard testimony condemning the military junta's persecution of student activists. Ten days after the incident, Congress passed a joint resolution condemning the Burmese military junta for the imprisonment, torture, and murder of democracy activists, and expressing strong sympathy with Burmese students who had fled across the border.[40] While Democrats Daniel Patrick Moynihan and Edward Kennedy led the initial charge, the efforts had broad bipartisan support. After visiting several of the refugee camps, California Republican Dana Rohrabacher declared: "These young Burmese men and women are some of the most heroic champions of democracy in the world today." Nebraska Republican Doug Bereuter echoed these sentiments in the vernacular of the late Cold War, calling the head of the military junta, General Ne Win, "even worse than an Asian Noriega."[41] While Than Soe was in prison, the United States withdrew aid and imposed economic sanctions on Myanmar. Congress held dozens of hearings and passed resolution after resolution condemning human rights abuses in the "new killing fields in Burma," celebrating activists like Aung San Suu Kyi (winner of the 1991 Nobel Peace Prize), and calling for new protections for Burmese refugees in Thailand.[42] Hawaii Democrat Neil Abercrombie compared Burmese student activists to the heroic students gunned down in Tiananmen Square, and pledged American solidarity with their struggle.[43] After he was released from prison, U.S. State Department and UNHCR personnel encouraged Than Soe on apply for the scholarship to study in the United States and advised him during the application process.

All of the details of the hijacking were included in his INS file when he applied for the scholarship in 1996, and Than Soe provided U.S. authorities with additional news clippings about the incident. The INS concluded that he should be granted parole based on "urgent humanitarian grounds" – the strong likelihood that he would face torture and persecution if he were returned to Burma, and "public interest concerns" – his taking refuge and studying in the United States matched the stated goals of U.S. foreign policy with regard to Burma. The INS explicitly argued that the hijacking incident did not bar Than Soe from parole, because it was a "peaceful, political act," and one that in no way

indicated that Than Soe was a "terrorist" or "posed a danger to the community or the United States."

Immediately after he enrolled at Indiana University, in September of 1996, Than Soe applied for political asylum in the United States, so that he could formalize his status as a refugee, gain work authorization, and start on a path to permanent residence. Thanks to previous refugee resettlement efforts, the state of Indiana has a large and vibrant Burmese community (hence the hosting of the scholarship program at Indiana University), and Than Soe expected that he would be recognized as a refugee and become a productive member of this community. As part of his asylum application, he again submitted detailed reports on his pro-democracy activities in Burma, on the commandeering incident, and on his imprisonment in Thailand. The Asylum Office in Chicago, however, declined to grant him asylum and referred his application to the immigration judge. (There's no formal explanation for these referrals – a few weeks after a rigorous interview with an asylum officer, the asylum seeker simply receives a notice that the case has been referred to an immigration judge; Than Soe's case was no different in this regard.) After a merits hearing earlier that summer, on July 24, 1997, the immigration judge found that Than Soe did not pose a danger to the security of the United States, but denied his asylum application, ruling that the 1989 hijacking met the definition of a "terrorist act" under U.S. law, and thus barred him from receiving asylum in the United States. On August 4, he revoked Than Soe's parole, and informed him that he was subject to removal from the United States. Dumbstruck, Than Soe was taken into custody and detained in a local county jail.

Officials at Indiana University, including Deans Kenneth Rogers and Charles Reafsnyder, and retired U.S. Congressman and future 9/11 Commissioner Lee Hamilton, condemned the decision and petitioned the INS on Than Soe's behalf. Rogers, who had met Than Soe at the refugee camp in Thailand, was particularly indignant. "Here is a young man who put his trust in the democratic tradition and integrity of the United States Government, has done everything asked of him," he wrote, "[and] his reward for his faith in the words and actions of U.S. government officials is arbitrary detention and impending deportation." On August 29, 1997, after a high-level review of the case, the INS reinstated his parole and released him from detention. Once again, the INS concluded that Than Soe would face extreme persecution if returned to Burma and that his residence in the United States matched U.S. foreign and humanitarian policy goals. The INS did not, however, reconsider his asylum application, nor did Than Soe appeal the immigration judge's decision in this regard, and thus his permanent status remained in limbo. Much to his credit, Than Soe tried to move on with his life. He completed his economics degree in 2000 and began a second degree in computer technology. Along the way, he never tried to hide his past. A July 2001 profile of the scholarship program in the local newspaper used his story to emphasize the severity of the repression in Myanmar. The author noted sarcastically that the military junta referred to the program as "The Indiana University School for Terrorists" and explained the extreme measures that refugees had

taken to flee its wrath, noting: "One student hijacked an airplane from Burma to Thailand to get out of the country."[44]

After his abrupt arrest and the revocation of his parole in 2002, the government initiated removal proceedings against Than Soe. Despite repeated verbal and written requests from his lawyers, the government offered no explanation for his arrest or detention. While these proceedings were pending, Than Soe was detained at McHenry County Jail in the Chicago suburbs. The only difference between "administrative detainees" like Than Soe and the general population of men accused of criminal offenses was that he wore a green jumpsuit and they wore orange – they were housed in the same units, ate the same food, and were subject to the same regimen and restrictions.

At a merits hearing in the fall of 2002, Than Soe presented seventy-two sworn statements from various witnesses as to his character, purpose, and accomplishments as a pro-democracy activist, a scholar, and a member of the Indiana University community, an impressive display of support by any measure. The government presented no sworn statements and called no witnesses. The only "new" evidence the government submitted consisted of three Thai newspaper articles on the commandeering incident, which Than Soe himself had presented in his initial immigration application back in 1996. On February 21, 2003, immigration judge James R. Fujimoto granted Than Soe "Withholding of Removal," which protects an individual from deportation on humanitarian grounds, contingent upon the conditions in their home country, but does not provide work authorization, status for family members, or a path to permanent residency (as does asylum), and relief under the Convention against Torture (CAT), which prohibits the return of anyone likely to be tortured in their home country. Judge Fujiomoto also found that Than Soe was not subject to the statutory bar to asylum for those who had committed "terrorist acts." He couldn't have been more specific: "Mr. S. peacefully commandeered the airplane in order to bring attention to the human rights abuses being practiced by an extremely repressive regime and should not be viewed in the same light as the perpetrators of September 11." "In thirteen years of adjudicating asylum claims," Judge Fujimoto emphasized, he had "never seen an individual with a higher likelihood of being persecuted and tortured by his home government." As for the revocation of parole, Judge Fujimoto flatly declared that there was "no evidence that the decision was predicated on any justifiable ground." If anything, he continued, Than Soe's productive experience in the United States "validates the INS's original decision to grant parole."

The U.S. government, however, appealed the decision. While case was pending with the Board of Immigration Appeals (BIA) and Than Soe was stuck in jail, he filed a writ of Habeas Corpus to force the government to justify his continued detention in a court of law or to set him free. Before the case was heard by a federal judge, however, the government agreed to settle the case. Than Soe would not be deported. He was given an "order of supervision," released from detention (on a $20,000 bond, with weekly reports), and granted immediate employment authorization (he agreed not to accept employment at an

airport, airline, or cargo company). He was not granted asylum, nor was he put on any kind of path to permanent residence. The settlement also included an agreement that Than Soe would cooperate with the U.S. government in seeking to remove him to a country other than Burma, without waiving his right to seek relief or protection if he didn't consent to a given country. The government agreed not to detain him except pursuant to his removal to a third country as agreed, or unless he was arrested for a non-traffic-related offense, and that it would give him fourteen days' notice if it sought to remove him to Thailand.[45]

After seven years of conflicting decisions, after being arrested and detained on two separate occasions on the very same evidence that the government used to grant him admission to the United States as a champion of "American values," and after spending nearly a year in local county jails, confined like any other prisoner, Than Soe decided to try his luck in Canada.

His experience in Canada has proved equally frustrating. After he was turned away at the consulate, Than Soe entered Canada illegally, but then presented himself to immigration authorities and asked for political asylum shortly thereafter. He was initially detained as a flight risk, but then released with a monthly reporting requirement. On January 16, 2004, the Immigration and Refugee Board (IRB) declared him inadmissible, based on the fact that he had "engaged in terrorist activities," as defined by Canadian law (which specifically defines the hijacking of an airplane as a terrorist act), and ordered him deported.[46] Lawyers for Than Soe appealed the IRB's decision in federal court, and asked Minister of Public Safety, Stockwell Day, for an exception (an amnesty from deportation), on the grounds that he posed no threat to the national security of Canada. The President of the Canada Border Services Agency (CBSA) opposed any kind of amnesty for Than Soe, arguing: "Mr. Soe did commit a terrorist act. He did hijack a plane and people could have been injured or killed. This fact cannot be ignored." He added: "Mr. Soe has been upfront and honest about his hijacking. He presently does not appear to be a danger to Canadian society; however, his presence in Canada clearly goes against our national interest. Canada should not harbour individuals who had admitted to committing terrorist acts." The Minister agreed with the CBSA and rejected the claim on March 27, 2006.[47] Than Soe appealed the decision in federal court. On April 30, 2007, Judge Michael Phelan ruled that he could not be returned to Burma, and found that immigration authorities had failed to properly consider a UNHCR recommendation as to the persecution that Than Soe would likely face if returned to Burma, or even Thailand. He remanded the case to the Minister for reconsideration. On June 26, 2007, in response to the original substantive appeal, federal judge Michael Shore confirmed the IRB's decision denying Than Soe eligibility for refugee status in Canada. He referred the case to immigration authorities for a determination regarding the likelihood of persecution should Than Soe be deported to Myanmar, and Than Soe ended up right back where he started.[48] The acts he had committed were too dangerous for him to receive legal status in Canada, but they made him too vulnerable to be returned to his home country. That he posed no personal threat to the community and was, in fact, an upstanding resident and the

champion of a worthy cause kept him out of jail, but as a discretionary measure. He was saved from torture and death, but he had no right to have rights.

In the panicked revision of immigration files after the September 11 attacks, especially after the embarrassing revelation that two of the hijackers were granted visas posthumously, the fact that Than Soe's case would get additional scrutiny isn't surprising at all. One can only empathize with the federal agent who discovered a convicted hijacker working at an airport.[49] But to continue to classify the 1989 commandeering incident as a "terrorist act" in light of the well-documented facts, or to consider Than Soe somehow to pose an ongoing threat to the United States (or Canada) by encouraging other "terrorists" to seek safe haven there, strains credibility. If either country actually perceived him to be a threat, they had far more draconian means at their disposal than the denial of asylum (and they didn't hesitate to use them with other presumed "terrorists"). That both countries refused to deport him on humanitarian grounds and openly celebrated the cause he represents, begs the question – just what or whom was the stated policy of deterring terrorism designed to deter?

If his were an isolated case, one might focus on the hijacking and argue that Than Soe fell through the cracks of a system obsessed with any potential threat to aviation security in the aftermath of 9/11, however remote. But it wasn't. Thousands of refugees have faced the harsh reality of detention in various contract facilities and similarly uncertain outcomes to their asylum claims, many of them based on even more tenuous and contradictory connections to the Global War on Terror. Than Soe's case stands out because of the extreme and public nature of the contradictory interpretations of the same evidence by policymakers at the highest level.

Most detained asylum seekers aren't able to secure competent legal counsel, much less the opportunity to have their stories told and re-told by congressmen, university deans, or the press. Indeed, the extreme secrecy and lack of transparency of the immigration system as a whole, which increased dramatically under the "homeland security" mandate, has allowed the broadest most banal understanding of deterrence to run roughshod over the principles and procedures underlying asylum adjudications. Under this veil, a wide variety of discretionary decisions, investigative and adjudicatory procedures, and administrative practices have reinforced a presumption of fraud and criminality in all asylum claims.

The spectacle of criminality

In a 2006 decision, the BIA confirmed the denial of asylum or withholding of removal to a Burmese national for providing "material support" to the Chin National Front (CNF), a clandestine organization waging armed resistance to the military junta in Myanmar in defense of the ethnic Chin minority. The immigration judge found that she had established a "well-founded fear of persecution," based upon the arrest and murder of her fiancé at the hands of the military junta, and the revelation that she had made a series of cash donations to the CNF from abroad (totaling about $1,100USD). The BIA held that the "Tier III" definition

of a terrorist organization can be used against groups that use force in self-defense against a military regime, even if their position is clearly in line with U.S. foreign policy: "We find that congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic."[50] Such discretion, the BIA found, belongs exclusively to the Attorney General, and the Secretaries of State and Homeland Security. Indeed, the REAL ID Act (2005) gave the Secretaries of State and Homeland Security the discretion to waive these provisions in particular cases or to particular Tier III "terrorist organizations." The following year, the Secretary of Homeland Security issued a discretionary finding that the terrorism bar would not apply to an individual who gave material support to the Chin National Front, so long as that individual was otherwise eligible for relief and posed no danger to the safety and security of the United States. The Attorney General concurred, remanding the original and three related Burmese cases to the BIA, without prejudice to the original precedent.[51] The message was clear – for anyone who couldn't be defined purely as a victim, asylum was not a right, but rather an act of grace, and the exclusive prerogative of the executive branch.

According to a comprehensive report by Human Rights First, the one person who received such a discretionary waiver in 2008 was Saman Kareem Ahmad, a local interpreter for U.S. forces in Iraq, who now serves as an instructor for the U.S. Marine Corps. Before the U.S. invasion, his entire family was killed by Saddam Hussein's gas attacks, and he had fought against the regime ever since. Immediately after a front-page profile of him appeared in the *Washington Post* on March 22, 2008, he was granted a waiver and allowed to apply for asylum.[52]

Meanwhile, another Iraqi Kurd, who had also served as an interpreter for U.S. forces, was denied status in a nearly identical claim. Officers submitted sterling letters of recommendation on his behalf, noting the quality of his work, the "risks to life and limb" and the "personal sacrifices" he had endured in serving them. An immigration judge granted him asylum in full knowledge of his association with the Kurdish Democratic Party (KDP); it was, seemingly, a textbook case. But, when he applied for permanent residency, the interpreter's application was denied precisely because he was "involved with the Kurdish Democratic Party (KDP) and worked for the KDP voluntarily, prior to January 30, 2005, when the KDP became part of the Kurdistan National Government." He had thus committed "acts of material support" to a group which "meets the current definition of an undesignated terrorist organization." The decision detailed how the KDP had coordinated attacks against Saddam Hussein's government from the time of the Iran–Iraq War (1980–1988) through Operation Desert Storm (1990–91), the U.S. invasion and Operation Iraqi Freedom (2003–11). While in the waning days of the war with Iran the United States gave some (rather reluctant) support to Iraq (a close Soviet ally), it would be difficult to construe the KDP as an ideological or tactical threat to the United States then or since. Those on the front lines of the war against Saddam Hussein's regime plainly

viewed the KDP as an ally. More important, as a trusted colleague of U.S. forces in a war zone, the interpreter had been extensively vetted, proved his commitment in the field, and faced an obvious threat of reprisal and persecution based upon that association in postwar Iraq. In the face of public criticism, the Department of Homeland Security reopened the Kurdish interpreter's case along with nearly all the over 600 cases it had denied on similar grounds around the same time, but to date, most of these cases remain on indefinite hold.

The Human Rights First report reveals case after case in which the very same evidence that substantiated a strong asylum claim has been used to detain and deport asylum seekers from the United States. A refugee from Burundi was detained for over 20 months in a succession of county jails because DHS and the immigration judge found that he had provided "material support" to a "terrorist organization" based on the fact that armed rebels robbed him of four dollars and his lunch. A girl kidnapped by a rebel group in the Democratic Republic of the Congo at age twelve, used as a child soldier, and later threatened for advocating against the use of children in armed conflict, had her asylum claim put on indefinite hold based on the premise that while coerced into serving as a child soldier, she had "engaged in terrorist activity." Other cases where the government has raised the specter of terrorism to deny asylum claims or place them on hold include those who have: paid ransoms to kidnappers affiliated with terrorist organizations; provided medical care in war zones without checking the political affiliations of the wounded; made donations to disaster relief efforts; and been the victims of terrorist organizations. According to Human Rights First, the terrorism bar has affected more than 18,000 refugees and there are more than 7,500 pending cases on indefinite hold – the vast majority legal permanent residents and asylees already living and working in the US, who are trying to reunite with their families.[53]

The terrorism bar is only the tip of the iceberg; the most insidious changes wrought by the rubric of deterrence have been procedural and administrative. In order to increase the "efficiency" of deportation proceedings, immigration authorities began to conduct removal hearings with detained immigrants and asylum seekers via video-conference starting in 2002, and the process has become routine across the country.[54] "Efficiency" here means the speed with which individuals are removed from the United States, regardless of the merits of their claims. In a hearing in front of the House Subcommittee on Immigration and Border Security on May 8, 2003, immigration authorities explained the use of videoconferencing as part of a broader effort to coordinate the activities of local, state, and federal law enforcement agencies to expedite the deportation of detained aliens. They made no mention of ensuring due process or the accuracy of individual adjudications, even in cases in which an individual claims to face torture and death if returned to their home country.[55] The government has also touted the purported health benefits of videoconferencing, claiming that it protects immigration judges and other personnel from infectious diseases communicated by detainees – a simultaneous show of prejudice and a tacit admission of their awareness of abysmal detention conditions.[56]

Most asylum cases turn on the perceived credibility of the applicant and her direct testimony in court. Establishing credibility through a video camera is incredibly difficult. The asylum seeker appears in a kind of live mug shot, on a small screen, dressed in a prisoner's jumpsuit against a blank background. Sound and picture interruptions in the satellite feed break up the proceedings, and the detained individual is unable to consult privately with their attorney (who generally sits in the courtroom with the judge). For those who do not speak English, the addition of language interpreters on both sides of the camera further complicates matters, either diluting the personal caliber of the hearing, or, if the judge opts not to have all of the details translated, limiting the portion of the hearing the detained individual can understand. Appearing in front of a camera gives some detainees the impression that they do not have the right to speak. Intimidated or confused, they provide yes/no answers, when more detailed responses would almost certainly strengthen their claims. At an even more prosaic level, in a system where asylum seekers are detained in far-flung contract facilities and do not have a right to court-appointed counsel, physical court appearances often provide the only opportunity for confidential meetings with their attorneys. A fifteen-minute reality check in a private room can give an asylum seeker the confidence necessary to relate their story and stand up to pointed questioning, and it can head-off myths, evasions, and misapprehensions that can sink an otherwise credible claim.

The government began requiring the forensic examination of all identity and other official documents provided by asylum seekers in the aftermath of 9/11. The process accelerated after the Homeland Security Act (2003), and was fully codified in REAL ID (2005).[57] The National Immigrant Justice Center (NIJC) in Chicago represented a Kosovar Albanian asylum seeker, who presented a birth certificate along with his application. Immigration officials sent the birth certificate to the FBI forensic lab for authentication (and placed the application on hold and the asylum seeker in detention). Several months later, the FBI lab made a finding that the document was not authentic, based on comparison with a contemporary birth certificate obtained from the U.S. embassy in Albania. Based largely on this finding, which was utterly immaterial to the "well-founded fear" of persecution documented in the individual's asylum claim, the immigration judge denied asylum, citing "problems with his credibility" derived from suspicion of the authenticity of his birth certificate.

The crux of the problem is not so much that law enforcement officers have taken an active interest in preventing the use of fraudulent identity documents. Most asylum seekers, and especially those presenting credible claims of the most severe kinds of persecution, come from unstable, repressive, and/or "failed" states, where the production of identity documents is irregular and chaotic, if not wholly corrupt. In such places, the ability to procure better documents might well indicate better connections and market access rather than credibility, and the accurate authentication of identity documents is but a mirage. In the worst case scenario, moreover, the U.S. government is depending upon the government accused of persecuting an asylum seeker (or at least failing to protect them) for the validation of

part of their claim (even if they are unaware of the precise details). Furthermore, the perception that forensic examinations produce "hard evidence," as compared to the "soft evidence" of individual testimony – call it the "CSI effect" – places undue emphasis on aspects of an individual claim that are at best peripheral in determining whether or not an individual has been persecuted, or has a well-founded fear of persecution if returned to their home country – the core of what it means to be a refugee.[58] Refugees, moreover, often believe that is better to have false documents than no documents at all, particularly those who have been internally displaced, stripped of their identity documents, or forced to purchase new documents from corrupt authorities in order to be able to move through their home countries and regions on their way to the United States

While the stories of limited access to "enemy combatants" detained in Guantanamo Bay and nationals of Middle Eastern countries detained in post-9/11 sweeps are well known, extreme secrecy and the classification of documents has permeated all aspects of the immigration system. Lawyers for asylum seekers often have to file and litigate Freedom of Information Act (FOIA) claims just to get copies of their client's immigration files, and they don't always succeed – Than Soe's lawyers never saw his complete immigration file. In Chicago, the Midwest Immigrant and Human Rights Center (now NIJC) had negotiated an agreement with the Chicago District INS, whereby immigration officials would provide information regarding the location of detainees, including their country of origin. With this information it was able to plan and execute visits to the more than 20 municipal and county jails housing asylum seekers, with appropriate interpreters, in order to screen potential asylum claims and assure that all detained individuals had access to crucial legal and social services. While this agreement was somewhat unique, and it was the result of a long-term relationship with local immigration officials (including many immigration judges), and like many aspects of the everyday functioning of the immigration legal system in the United States before 9/11, it was the product of favorable discretion exercised by particular officials based on their experience and values. Since 9/11, national policy has eliminated such discretion at virtually all levels in the system. The drumbeat of deterrence, the presumption of criminality it implies, and the risk aversion it forces upon all law enforcement agencies, has made those officials who still have discretion much less likely to exercise it. Legal service providers currently receive little or no information regarding the number, origin, or location of detained refugees and asylum seekers in their regions. Toll-free telephone hotlines advertised in detention centers and periodic "know your rights" presentations are made in these facilities. The trust and reputation of legal service providers in any field, including asylum and refugee law, depend heavily on word of mouth and personal, face-to-face connections. The current practice of restricting initial access to information on detained refugees and asylum seekers directly and consciously erodes the possibility of providing quality legal services to extremely vulnerable populations.

Across the country, immigration authorities now accompany attorneys when they visit detained individuals in order to conduct "know-your-rights

presentations." While there's no evidence that they have interrupted or interfered with the presentations, their presence undermines the effectiveness of the encounter. The advance notice it entails is a logistical nightmare for volunteer attorneys who are trying to respond to the unpredictable arrival of new asylum seekers in real time, to ensure that they do not waive their rights or otherwise do irreparable damage to their claims before getting legal counsel. Moreover, the presence of immigration officials makes asylum seekers much less likely to ask questions, and thus to achieve the kind of basic understanding of their legal situation that has long proved a determining factor in the success of asylum applications. Their presence also blurs the line between the two parties in the minds of many detainees, making it harder for attorneys to gain their trust and provide quality and confidential legal representation. Asylum seekers who have fled repressive regimes and find themselves locked up in local county jails and state prisons are often justifiably suspicious of any and all authority figures in the United States, and collapse the differences between them in their own minds. This is especially true for victims of human trafficking, who have been exploited by various middlemen, including immigration attorneys, in addition to officials in their countries of origin.[59]

Most asylum seekers are lucky to get any kind of legal representation and federal cases are expensive and time-consuming to prepare and litigate. Furthermore, as with the case of Than Soe, after NGOs and legal service providers locate witnesses, gather evidence, and assemble the expertise necessary to sustain a strong claim, the government often settles the case before it is heard by a federal judge, providing some benefit to the individual asylum seeker, but without changing bad practices or exposing them to public scrutiny.

When a broader audience gets a glimpse of the experience of asylum seekers in a highly secretive system, they encounter overlapping spectacles – a spectacle of criminality reinforced by their arrest and detention in remote facilities, the forensic examination of their documents, and the repeated invocation of "terrorism," however banal or spurious the alleged association; and a spectacle of desperation reinforced by hunger strikes, stories of unaccompanied children, "rescues" at sea or in the desert, and a raft of other situations in which refugees appear as groups of desperate people begging for asylum, rather than individuals demanding their rights.

There's no better example of this spectacle of desperation, and the way in which it illustrates how the current war on terror has revived a set of ethical contradictions and historical injustices, than the story of seagoing Haitian refugees arriving in South Florida.

The spectacle of desperation

On October 29, 2002, a 50 ft wooden boat carrying 216 Haitian refugees ran aground in the aquamarine shallows at north end of Biscayne Bay, with the shimmering skyline of downtown Miami, Florida towering in the background. After eight days at sea, the boat skidded to a halt within twenty yards of Hobie

Beach, a narrow strip of sand next to the Rickenbacker causeway (which connects the mainland to Virginia Key and Key Biscayne) just east of where it rises up out of the water into a bridge several stories high. A Coast Guard repair ship had spotted the vessel about two miles offshore and followed it into shallow water at a safe distance, for fear that the passengers crowding the deck would panic and capsize the boat, as had happened with an sailboat overloaded with refugees the previous May.

The homemade vessel was squat and wide in the back, with high freeboard, and a pilot house perched in the middle with a makeshift enclosure behind it that looked like a mobile home, with a roof made out of a roadside billboard for a soccer team. Even weighted down with dozens of people, the bow stood a good six feet above the water, and it took a few jumps by more intrepid passengers to encourage everyone over the side. Desperate men, women, and children plunged into the water and headed for the shore as Coast Guard, Drug Enforcement Agency (DEA), and local police boats buzzed around them. Many couldn't swim or foundered in the confusion, and police threw life preservers to them. Some had children on their shoulders; many held plastic bags with combs, hair gel, and toothbrushes above their heads; others wore suits and ties – they had hoped to make a good impression when they arrived in the United States. At least two pregnant women and eleven unaccompanied children trudged towards the beach with the others, watching as a cavalcade of local law enforcement and immigration officials gathered to meet them. A local television chopper joined seven law enforcement helicopters circling overhead. By 4:00 p.m., CNN viewers across the country watched looped footage of frantic refugees clambering up onto the causeway, dodging traffic and police. According to the *Miami Herald*: "Men hopped into the beds of passing pickup trucks and tried to hitch rides toward gleaming Brickell Avenue, just a mile away. Women ran the other way, toward Key Biscayne, blowing kisses to astonished joggers. Dripping wet children, some wearing their Sunday best, clutched teddy bears or other precious toys."[60] In the whir of helicopters, sirens, and bullhorns, a few refugees crossed the causeway and jumped back into the water on the other side. Police blocked the road at the bridge entrance, checking back seats, trunks, and truck beds for illicit human cargo.

Within an hour, the beach looked like a Red Cross station in a war zone. Behind a cordon of vehicles and yellow police tape, exhausted, dehydrated, and demoralized refugees sprawled out on army blankets and held plastic water bottles up to their parched lips with two hands, zip-ties binding their wrists together. By sundown, they had been loaded into windowless white vans and busses and taken to various detention centers. Over the next couple of weeks, most of them would end up fifteen miles inland, at the Krome Immigration Processing Center at the edge of the Everglades.

A former military base surrounded by razor wire, Krome looks and feels like a prison. As journalist Mark Dow documents in haunting detail, Krome has an infamous record of beatings, sexual assaults, drug-induced restraint, and racial discrimination against black detainees.[61] Rather than a particularly perverse

facility, he suggests that the problem with Krome is simply that it functions like any rough-and-tumble prison at the edge of a southern swamp – with all of the indignities and inequities involved in keeping people locked up for months or years on end, under the authority of under-educated, underpaid, and under-supervised guards – and yet none of the detainees are confined for criminal offenses, nor are their experiences as detainees subject to the same kind of public scrutiny or legal recourse as those accused or convicted of criminal offenses. Since the previous December, Krome had been packed to the gills with Haitian refugees.

On the afternoon of December 3, 2001, a 31 ft sailboat with 185 Haitians onboard ran aground off Elliot Key, after ten days in a storm-tossed sea. When the Coast Guard arrived, some of the passengers swam into the mangroves of Biscayne National Park a few hundred yards away, but most returned to the cutter and they towed the sailboat to a ranger station on Adams Key, and then transported the passengers to immigration officials in Miami Beach the following Day.[62] In response to the incident and the arrival of more than 1,500 seaborne refugees that year, on December 16, 2001, the Bush Administration adopted a policy of denying parole to all Haitian migrants who made it to land, and subjecting them to expedited removal hearings, even if they asked for asylum.[63]

Among the refugees at Hobie Beach in 2002 were brothers Daniel and David Joseph, seventeen and eighteen respectively. They fled Haiti after thugs from former president Jean-Bertrand Aristide's Lavalas Party beat their father severely and harassed their family, when he protested the seizure of part of a plot of land they owned near Cap Haitien. At one point, the boys claimed, several armed men put a tire soaked in gasoline around their father's neck, threatened to light it, and backed down only after a neighbor stepped in and negotiated his release. On another occasion, David Joseph was pelted with stones, tackled, held down and burned with a red hot piece of metal. He had the scars on his face and chest to prove it.[64]

On, November 6, 2002, after securing a $2,500 bond from an uncle in Brooklyn, David Joseph was granted parole by the immigration judge. Over the objections of the INS, the judge found that he posed no significant flight or security risk, and thus he should be released from detention. The government appealed, however, and David remained in custody. From the time they were apprehended, the Joseph brothers were kept together in a hotel by the freeway, where the INS rented an entire floor in order to handle overflow from its detention centers. While their bond appeal was still pending, on February 12, 2003, an immigration judge denied the Joseph brothers asylum. At the beginning of the hearing, they asked the judge for a two-day continuance to allow a volunteer attorney from Catholic Legal Services time to prepare their case, but the judge denied this request and allowed them only ten minutes to testify. They didn't speak English, they had no legal counsel, no documentary evidence, nor any opportunity to call witnesses.[65] Soon after the hearing, the brothers were separated. David, a legal adult, was locked up at Krome and Daniel was detained at Boystown, a juvenile

facility run by Miami-Dade County, where he had started attending school in December.

On March 13, 2003, the BIA denied the government's appeal of the bond decision, agreeing with the judge that David Joseph posed no flight or security risk. As the National Immigration Law Center relates: "In a *per curiam* decision (i.e., a short decision made by a panel of BIA members and not authored by an individual panel member), the BIA concluded that, 'absent contrary direction from the Attorney General,' the broad national security interests invoked by the INS were not appropriate considerations for the purposes of determining release on bond."[66] The BIA explained, "Bond cases before immigration judges are about what the particular alien before the court has done or might do. They are not about what other aliens have done or might do." The specter of a "surge of aliens … by sea," and the difficulty of screening vessels for "aliens seeking to threaten the homeland security of the United States," raised in the government's appeal, was a question of "public policy," not the adjudication of individual claims.[67]

Once again, however, the government appealed, this time to the Attorney General, and David remained locked up at Krome while the appeal was pending. Two weeks after the initial bond decision, the Homeland Security Act had passed, which reaffirmed and expanded the discretion of the Attorney General over "parole" determinations. The newly minted Undersecretary for the Border and Transportation Security, Asa Hutchinson, referred the case to the Attorney General. The referral triggered an automatic stay of the BIA decision, and included a request that the Attorney General stay the adjudication of all other bond requests from individuals who arrived in the United States by boat with David Joseph. People fleeing different things in different parts of Haiti (and no doubt seeking different things in the United States), most of whom had never met each other before the voyage, would be treated as a group, as a boatload of desperate people "from a race that had known no liberty," not as individuals.

On April 17, 2003, Attorney General John Ashcroft formally overruled the BIA decision and argued that releasing David Joseph from detention during his pending asylum claim would pose a serious threat to U.S. national security:

> I conclude that releasing respondent, or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and sound immigration policy. As demonstrated by the declarations of the concerned national security agencies submitted by INS, there is a substantial prospect that the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea. Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. As substantiated by the government declarations, surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and homeland security responsibilities.[68]

Daniel Joseph should be locked up and separated from his younger brother, even if he were three degrees (or more) separated from the threat of terrorism his release supposedly created. This tortuous connection aside, the idea that a "surge" of Haitian migrants could "injure" national security by distracting law enforcement only makes sense if one assumes either a far-fetched conspiracy (for which there was no evidence) or that all seagoing Haitian migrants were "illegal immigrants," and not refugees with credible claims under the Refugee Act. The only evidence that Ashcroft offered consisted of a vague report from the State Department of "an increase in third country nations (Palestinians, Pakistanis, etc.) using Haiti as a staging point for attempted migration to the United States."

Ashcroft further found that the release of the young man on bond undermined the basic aim of the administrative detention of seagoing immigrants from Haiti – to deter further migration. To grant parole in such cases, Ashcroft argued, "hardly provides an airtight assurance against future successful entries by such migrants through legal and extra-legal means." It threatened to undermine the already shaky deterrent value of the existing policy of detaining all seagoing migrants:

> I note, for example, that the policy's strict detention provision is entirely inapplicable to aliens who are admitted or paroled. In any event, even if the new policy somewhat reduced the expectations of further successful U.S. entries, the release of respondent and hundreds of others from the October 29 migrant group would strongly undercut any resultant deterrent effect arising from the policy. The persistent history of mass migration from Haiti, in the face of concerted statutory and regulatory measures to curtail it, confirms that even sporadic successful entries fuel further attempts. I therefore am not persuaded that the new expedited removal policy negates the migration "surge" consideration.[69]

His reference to the "persistent history of mass migration from Haiti" cut to the heart of the matter – for Ashcroft, the purpose of U.S. immigration and refugee law was not to adjudicate individual claims based on their merits, but rather to deter mass migration from undesirable countries. And it was for their own good. Ashcroft added that "such mass migrations would also place the lives of aliens at risk."

Lawyers for Daniel Joseph cited Article 14 of the Universal Declaration of Human Rights (UDHR), which establishes the right of persecuted individuals to seek asylum in other countries. The Attorney General scoffed at the invocation of the UDHR, or any other international law:

> This argument is without merit. First, the UDHR is merely a nonbinding expression of aspirations and principles, rather than a legally binding treaty … In any event, the application of U.S. law to protect the nation's borders against mass migrations by hundreds of undocumented aliens violates no right protected by the UDHR or any other applicable rule of international law.[70]

While the Attorney General is probably too quick to dismiss the scope and historical commitment of the United States to the UDHR, there is little doubt that his prioritization of preventing "mass migrations" over the adjudication of individual claims according to their merits and basic standards of due process plainly violates basic standards of international law. Ashcroft specifically challenged the right of David Joseph to an individualized parole determination, pointing out that a series of decisions in the federal courts affirming the constitutional right of non-citizens to an individualized determination of their detention referred specifically to "legal permanent residents," and David Joseph had not been legally admitted to the country, much less granted permanent status.

When he finally addressed the specific facts of the claim, Ashcroft argued that David Joseph had failed to prove that he did not pose a flight risk. Beyond the fact that the burden of proof weighed on a teenage refugee locked up in a remote detention facility, with little means of building a case, Ashcroft attacked David Joseph's credibility. He argued that reports from the Coast Guard and Immigration officials on the scene on October 29, 2002 strongly suggested that David Joseph was among the migrants who tried to evade law enforcement (although he was not positively identified as such). That he didn't speak English, Ashcroft argued, did not absolve him from disobeying the orders of Coast Guard officers, whose directives were "obvious" enough. Finally, the denial of his asylum claim – the claim based on ten minutes of testimony, without legal counsel or supporting documentation, which was on appeal at the time – increased the likelihood that Daniel Joseph would try to abscond and hide "within the alien community" in the United States.

Protests in Miami and editorials in the *New York Times*, the *Chicago Tribune*, the *Miami Herald*, and many other papers lambasted the decision. This was cold comfort for David Joseph. On August 8, 2003, the BIA ordered the immigration judge to reconsider his asylum application, but he was once again denied relief. After spending nearly two years in detention, on November 30, 2004, David Joseph was deported to Haiti.[71] Most of the people who came ashore with him were deported as well, and except for a brief hiatus in the aftermath of the 2010 earthquake, the Obama administration has continued the policy of detaining and deporting all seagoing Haitian migrants, whether or not they claim refugee status.

On June 8, 2004, during an oversight hearing in front of the Judiciary Committee, Senator Arlen Specter (R-PA) questioned Ashcroft about the D-J decision. Specter noted that when he had asked the Attorney General about the extremely broad discretion that allowed him to overrule the decision of an immigration judge and/or the BIA at an earlier hearing, Ashcroft claimed that he had never exercised that discretion, suggesting that it was reserved for extraordinary circumstances. But then along came "the young Haitian refugee," a case where there was no finding implicating him in terrorist acts or plots. Specter worried that detaining someone without "probable cause" or some "articulable standard," over and above the findings of a judge and a review board, violated "the essence of American justice … evaluating everybody on an individual basis."

Ashcroft responded, first by characterizing the Haitians' arrival as a suspicious and unlawful act, claiming that the ship "evaded interdiction at sea," and that many of the passengers fled from law enforcement when they reached land. He then declared: "Sometimes individual treatment is important; sometimes it's important to make a statement about groups of people that come."

This brief exchange took place in a hearing that focused primarily on the degree to which the Bush Administration had authorized the torture of "enemy combatants." Over and over again, in response to pointed questions and criticism over his refusal to disclose if, how, and when Justice Department lawyers had advised the president that he could authorize torture, Ashcroft declared, "we are at war."[72]

Many critics have pointed out that this "war" has been a war of empty signifiers, "terrorism" first and foremost among them. But for asylum seekers, the broad, indeterminate definition of terrorism has merely exaggerated a more fundamental problem – the primacy of deterrence in asylum adjudications completely undermines what it means to be a refugee, or to provide safe haven to individuals fleeing persecution abroad.

In his epic, seven-volume treatise on violence, William Vollman reminds us that deterrence itself, as it has been mobilized in criminal law and military strategy for centuries, relies upon terror. He defines deterrence as "the infliction of terror for the purpose of disheartening the victim or his people from acting in a way that the deterrers have proscribed." He concludes that "deterrence is only justified when it enforces a legitimate social contract." To work properly, it has to be public and didactic; the target audience needs to know what is being deterred and why. When it punishes ordinary people for being honest or courageous, for telling the truth or having integrity, deterrence becomes an instrument of tyranny. Paraphrasing Seneca, Vollman warns that an excess of deterrence "corrodes loyalty and fear into desperation."[73]

There's little evidence that the primacy of deterrence in U.S. immigration law after 9/11 has devolved into a self-referential defense of dictatorial authority, or even the kind of self-fulfilling prophesy that Kathryn Olmsted finds in the history of conspiracy theories in the United States (including those surrounding 9/11).[74] But there's little doubt that it has transformed ordinary, honest, courageous individuals into desperate people, or that the spectacle of their presumed criminality and desperation has facilitated the evisceration of their rights.

Refugee status is a basic building block of human rights, a test of their transcendence of the boundaries of citizenship, designed to reaffirm the personhood denied by war and tyranny. When it becomes a weapon of war, a tool for stripping away that personhood, whatever the underlying intentions, the implications reach far beyond any particular armed conflict or presidential administration. These are the small stories, the thousand and one seemingly innocuous decisions, shortcuts, and evasions that threaten to turn a moral panic into a permanent war.

Notes

1 Under U.S. immigration law, "parole" is a finding at the discretion of the Attorney General, allowing someone to be physically present in the United States, without being formally "admitted" (often because they are otherwise "inadmissable"). It is the same mechanism by which individuals are released from mandatory immigration detention. See INA § 212(d)(5)(A).

2 *Humanitarian Reason: A Moral History of the Present*, Rachel Gomme trans (Berkeley: The University of California Press, 2011), ix.

3 On the use of detention to deter interracial marriage, see the case of Maggie Woods, *The New York Times*, September 11, 1898; *Washington Bee*, September 20, 1898; Emma Lou Thornbrough, *T. Thomas Fortune, Militant Journalist* (Chicago: The University of Chicago Press, 1972), 129–30; and Roger Lane, *William Dorsey's Philadelphia and Ours: On the Past and Future of the Black City in America* (Oxford: Oxford University Press, 1991), 37. In 1894, Louise Hessing was detained at Ellis Island, when she arrived pregnant and unmarried from Germany, despite abundant evidence that she had been engaged to be married when the husband-to-be had run off, and a supportive family in Chicago guaranteed that neither she nor the child was likely to become a public charge. *San Francisco Chronicle*, October 28, 1894. In 1893, Viennese opera singer Martha Houer was detained for months at Ellis Island after she eloped with wealthy German Max Lindenbaum. They announced themselves as a married couple, but they hadn't actually married yet and her father wired immigration officials, informing them that he disapproved of her marriage and she was detained. *San Francisco Chronicle*, October 20, 1893. Sixteen-year-old Lee Mee Ho was detained for two months and then only released to the custody of a Methodist mission to prevent her arranged marriage, *San Francisco Chronicle*, September 16, 1904.

4 *Tucson Daily Citizen*, June 18, 1954; *Arizona Daily Sun*, June 29, 1954; *Los Angeles Times*, June 20, 1954; *Yuma Daily Sun*, June 12, 1954. Juan Ramón García, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954* (Greenwood Press, 1980), 197; Rachel Bluff, *Immigrant Rights in the Shadows of Citizenship* (New York: New York University Press, 2008), 228, 238–42.

5 Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era, 1882–1943* (Chapel Hill: The University of North Carolina Press, 2003), 124–7; *Chung Fook* v. *White* (1924) (disease). On the El Paso incident, see Alexandra Minna Stern, "Buildings, Boundaries, and Blood: Medicalization and Nation-Building on the U.S.–Mexico Border, 1910–1930," *The Hispanic American Historical Review*, Vol. 79, No. 1 (Feb., 1999), 41–81.

6 For example, two ships, the *Emanipation* and the *Mercurio*, took deported migrants from Port Isabel, Texas to the Port of Veracruz, 500 miles to the south and sometimes further, in order to "teach them a lesson" and discourage the deported from recrossing the border. *El Paso Herald-Post*, August 29, September 28, 1956. On August 26, 1956, a group of deportees led a mutiny, busting out of the hold and forcing the captain to enter the Port of Tampico (rather than going all the way to Veracruz). (Some accounts suggest that the captain pulled into Tampico because one of the passengers was sick.) Thirty-six men jumped overboard in Tampico harbor and at least five drowned. *Brownsville Herald*, August 27, 1956; *El Paso Herald Post*, September 10, 1956. Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004), 319–20.

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11 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954. Available via: http://www1.umn.edu/humanrts/instree/v1crs.htm.
12 Article 33. – Prohibition of expulsion or return ("refoulement"), 1. "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
13 Article 1, A. (2).
14 Article 1, B. (1).
15 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967. Available via: http://www1.umn.edu/humanrts/instree/v2prsr.htm
16 The Refugee Act of 1980 (Pub. L. 96–212, Mar. 17, 1980, 94 Stat. 117).
17 Ibid.
18 For details on the functioning of the Refugee Resettlement program, see the U.S. department of Health and Human Services at: www.acf.hhs.gov/programs/orr/policy/refact1.htm.
19 Barnett, 151–65.
20 For basic information on the asylum application process, see MIHRC's "Asylum Training Manual for Attorneys." See p. 22 for a flow chart outlining the various steps in the asylum application process. Available via: www.asylumlaw.org/docs/united_states/MIHRCmanual2003.pdf.
21 There is currently some dispute over the range of the Attorney General's authority to overturn decision by the BIA. However, before such disputes ever reached the upper echelons of the federal courts, the USA PATRIOT Act of 2002 reinforced the AG's discretion, heading off future challenges.
22 Article 3:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85. See also *Immigration and Naturalization Service* v. *Cardoza-Fonseca*. 107 S.Ct. 1207.
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439–505; Mark Danner, *The Massacre at El Mozote: A Parable of the Cold War* (New York: Vintage, 1993), 1–85; Elizabeth G. Ferris, "The Politics of Asylum: Mexico and the Central American Refugees," *Journal of Interamerican Studies and World Affairs*, Vol. 26, No. 3. (Aug., 1984), 357–84. See also *United States of America, Plaintiff*, v. *Maria Del Socorro Pardo De Aguilar, et al., Defendants*, No. Cr 85–8 Phx-Ehc, United States District Court for the District of Arizona, 1985 U.S. Dist.; and *American Baptist Churches, et aAl., Plaintiffs, V. Richard Thornburgh, et al., Defendants*, No. C-85–3255-Rfp, United States District Court For The Northern District Of California, 760 F. Supp. 796; 1991 U.S. Dist.

25 *Zadvydas* v. *Davis*, 533 U.S. 678 (2001).

26 Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York: NYU Press, 2009).

27 Samuel Moyne, *The Last Utopia: Human Rights in History* (Cambridge: Belknap/ Harvard University Press, 2010).

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29 Title I, Section 101 of the Homeland Security Act (2003) sets the first three priorities of the Department of Homeland Security as: "A) Prevent terrorist attacks; B) Reduce the vulnerability of the United States to terrorism; and C) Minimize damage and assist in the recovery from terrorist attacks." Title IV, Section 402, which sets out the responsiblities of the Director of Border and Transportation Security, defines its top priority as: "preventing the entry of terrorists and the instruments of terrorism into the United States."

30 8 U.S.C. § 1158(b)(2)(A) (2000 & Supp. 2007). For a detailed review of each of these categories, see Won Kidane, "The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination," 41 *U. Mich. J.L. Reform*, 675–9.

31 Pub. L. 101–649, Immigration Act of 1990.

32 Pub. L. 107–56, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

33 Pub. L. 107–296, Homeland Security Act of 2002.

34 *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (Washington, D.C.: Government Printing Office, 2004), 161.

35 "Two Burmese Hijack Plane, Then Surrender," *Reuters*, October 7, 1989; *New York Times*, January 9, October 7, 1989; *The Times of India*, October 7, 8, 1989. Than Soe's accomplice in the commandeering incident was San Naing (also known as Ye Thiha).

36 *Sunday Times* (London), October 8, 1989.

37 *The Times of India*, November 13, 1990.

38 As definied by the UNHCR's *Protecting Refugees: A Field Guide for NGOs* (#GV.E.99.0.22, 2nd edition Dec 2001), a person of concern is:

> A generic term used to describe all persons whose protection and assistance needs are of interest to UNHCR. These include refugees under the 1951 Convention, persons who have been forced to leave their countries as a result of conflict or events seriously disturbing public order, returnees, stateless persons, and, in some situations, internally displaced persons. UNHCR's authority to act on behalf of persons of concern other than refugees is based on General Assembly resolutions.

39 *Congressional Record*, Vol. 101, (July 19, 1989), S8283. The senate expanded a scholarship program for Tibetan refugees to include Burmese students and pledged to grant a minimum of fifteen scholarships per year.

40 "The Fight for Freedom and Democracy in Burma," *Congressional* Record, vol. 101 (October 5, 1989), E 3301. S. Con. Res. 61 condemned the military junta for the

arbitrary imprisonment and killing of democracy activists, and blamed it for the death of 2,000 peaceful demonstrators in 1988. *Congressional Record*, vol. 101 (October 17, 1989), H7101–3.

41 "Democracy and Human Rights in Burma," *Congressional Record*, vol. 101 (October 17, 1989), H7101–3; "Support of Basic Human Rights and Democracy in Burma," *Congressional Record*, vol. 101 (October 24, 1989), S14029; "Human Rights Abuses and Anti-Democratic Activities by the Government of Burma," *Congressional Record*, vol 101 (May 11, 1990), S6064; and "Repression in Burma," *Congressional Record*, vol. 101 (October 27, 1990), S17762.

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43 "Critical Human Rights Situation in Burma," *Congressional Record*, vol. 102 (August 1, 1991), H6260.

44 *Bloomington Herald-Tribune*, July 21, 2001.

45 "Stipulation for Dismissal and Compromise Settlement," *Than Soe* v. *Tom Ridge, Secretary, Department of Homeland Security*, No. 03 Civ. 1635, 2003 U.S. Dist (N.D.ILL July 25, 2003).

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5 Religion out of place

Islam and cults as perceived threats in the United States

Peter Gottschalk

The group appears un-American, and dangerous. They prefer their own company and cultivate an aloofness from their neighbors, which only deepens the suspicions of federal law enforcement agencies. Religion features prominently in the lives and worldview of the community's members, suggesting they have no independent perspectives outside of what their sacred book and its authoritative interpreter dictate. Moreover, they actively preach against America's prevailing social and moral order, impatiently waiting to participate in the immanent, god-guided upheaval that will establish, finally, a world of justice and righteousness. Disgruntled former members have defected and warned against the burgeoning trouble brewing within the group's center, including the mistreatment of girls. Adding their own warnings, at least one organization offers professional opinion to law enforcement and news outlets regarding the larger dynamics of coercion, manipulation, and threat involved in the group.

Today, many if not most Americans would assume this description refers to Muslims. However, in 1993 it would have been seen to portray the Branch Davidians, who lived in a semi-secluded retreat outside Waco, Texas until an FBI assault led to its fiery destruction in 1993. This parallel helps demonstrate how many of the dynamics at work in imagining and scrutinizing the Branch Davidians as a dangerous cult are currently at play in the efforts of some Americans to portray all Muslims as a threat. Although the perceived otherness of the Branch Davidians as a cult diverges dramatically from that of Islam as a religion, the parallel between their respective marginalization proves illuminative in three ways. First, both examples reflect tensions endemic in the United States between secular ideals and a normative Protestant nationalism. Second, both demonstrate the mutually reinforcing roles of professional provocateurs and news media in creating sensationalized threats. Third, both instances show how the creation of a religious threat can serve the interests of particular political actors. These dynamics have readily reappeared during two recent controversies: the Park51 project and anti-Sharia amendments.

Before beginning, two presuppositions of my argument need to be established. First, this comparison is not meant to suggest that the Branch Davidian tradition and Islam are the same in their outlook, goals, structure, or history. One has existed for half a century and the other for fourteen centuries. One has few

adherents today and the other has more than one billion. The comparison between Islam and the Branch Davidians should not be construed, either, as an effort to describe them as the same "type" of religion. For my purposes here, their comparability derives from the observation that despite their vast differences, these two traditions could be similarly demonized by media representatives, government officials, and professional provocateurs.

The second presupposition of this essay's argument is that the most recent manipulation of anti-Muslim sentiments represents only the latest eruption of an Islamophobia latent in the foundations of American society. Like molds that release their spores under the right conditions of dampness and warmth, American Islamophobia has pervaded the structures of European–American culture from the construction of Old World colonies in North America, yet manifests itself forcefully only in certain historical seasons. Unlike mold, expressions of Islamophobia differ in form according to conditions. During the initial European colonization of the Gulf coast, it could be seen when Spaniards avoided the choice of Muslims from the enslaved captives offered for sale by Africans. During America's first overseas war – the early nineteenth century battles with the Barbary Coast states – it became evident in popular calls for "Turk" and "infidel" blood, mistakenly linking these Moors and Arabs with the Ottoman sultan who they no longer served. Throughout the 1973 oil crisis, popular resentment fed vicious anti-Arab stereotypes of OPEC members that often caricatured them as Muslim too. In the 1979–1980 Iranian crisis, Islamophobia swelled with fears regarding the power of a politically charged Muslim populace to create an Islamist government capable of humbling the US through the seizure of its embassy staff. The catastrophic attacks of 2001, the wars in Iraq and Afghanistan, and high profile arrests of militant Muslim Americans resuscitated fears that many, if not all, Muslims deserved suspicion, even as many more Muslims domestically and abroad partnered with non-Muslim Americans in efforts to curb Islamic violence (Gottschalk and Greenberg 2007). Any endeavor to confront and minimalize Islamophobia must start with a recognition of this historical and enduring persistence of prejudice, then proceed to an understanding of the particular political, economic, social, and racial elements that help typify it at specific historical moments. The professional provocateurs, media personalities, and political players mentioned in this paper are not responsible for creating Islamophobia. Instead, they actively or inadvertently recraft latent sentiments into polemically charged claims adapted to fulfill their interests in contemporary conditions.

To summarize, contemporary controversies regarding the Park51 mosque and Sharia law represent a historically specific confluence of endemic American Islamophobia and enduring tensions between secular commitments and Protestant norms. Before examining each of these occasions for the exertion of anti-Muslim sentiment, a short history of the Branch Davidians will provide some basis for comparison of the dynamics of marginalization. Although professedly Christian, members of this community – even before the BATF assault – found themselves as marginalized, suspect, and subject to scaremongering as do many Muslims in America today.

The Branch Davidians

Ben and Lois Roden formed the Branch Davidians in 1955 as an offshoot from Seventh Day Adventism. Their expectation of an immanent apocalypse following their interpretation of the Bible – the Book of Revelation in particular – continued the Adventist millennialist heritage with its history of great disappointments. Most famously, leader David Koresh (formerly Vernon Howell) prepared the community to relocate from their separatist compound in Texas to Israel, where they would prepare for and greet Christ's return, while bracing themselves against the accompanying oppressions of Satan. Outside Waco, they had fashioned a separatist community named Mount Carmel with its own economy, money, and mores, the latter of which included Koresh's marriage to several church members, including adolescent girls. Despite their separatist preference, the community remained integrated into society in Waco and beyond. For instance, among other enterprises upon which the Davidian's finances relied was the purchase of components that allowed Koresh to retool semi-automatic rifles into automatic rifles. He then openly sold these at gun shows. Although their isolation was not complete, it did allow most members to focus on the purpose for which they joined the community: to learn from and participate in the world Koresh foresaw through his biblical interpretation. Convinced that he could guide them through the text to reveal God's plan and direction while drawn to the shared values of Mount Carmel's moral community, members accepted the rudimentary living conditions of the compound in the barren landscape surrounded by central Texas' long horizons.

However, in 1993, before the Branch Davidians felt directed to affect their relocation plan, the Bureau of Alcohol, Tobacco, and Firearms (BATF) launched an armed assault on the community in the attempt to serve subpoenas for alleged weapons violations regarding the rifle upgrades. Repelling the BATF with gunfire only to be then besieged by the Federal Bureau of Investigation (FBI), the community was thrown into turmoil as the cosmic denouement they had expected seemed to have arrived earlier than anticipated. Surrounded by a ring of federal law enforcement officers, badgered by helicopters and armored vehicles, and deprived of communication and electricity, Koresh and his fellow church members drew on the Bible's apocalyptic books to gradually reinterpret their situation. They concluded that the end time they had anticipated for the near future had come to pass now. While some Branch Davidians elected to leave during the fifty-one day siege, most decided to stay. Steeling themselves for the final assault they knew would come, the seventy-four church members remaining in the compound perished when a failed FBI effort to flush them from their home using CS gas inserted by M60 tanks resulted in the immolation of the compound and most of those within.

Today, a small Branch Davidian community continues at the site, their modest white church built atop the buried ruins of the previous Mount Carmel building. Few among them are likely to find commonality between their predecessors and Muslims. Obviously the Branch Davidians' short history,

millennialist worldview, and separatist society diverge significantly from most of the millennia old and culturally transnational traditions associated with Islam. However, it will be exactly these differences that make more pronounced the commonality of Muslim and Branch Davidian suspicion, marginalization, and exclusion in the United States. These, in turn, highlight the pervasive Protestant and secular commitments of American mainstream culture, as demonstrated in each of the following three dimensions of Islamophobic responses to 9/11.

Park51

As a prayer leader of a mosque in Lower Manhattan since 1983, Imam Feisal Abdul Rauf had sought to relieve the overcrowded conditions there by creating an Islamic center nearby, which would also replace the lost prayer space workers previously used in one of the World Trader Center towers. The new center, variously referred to by its supporters as "Park51" and "Cordoba House," would stand two and a half blocks from Ground Zero, two blocks closer than any existing mosque. By the time a community board met in May 2010 to deliberate on the plan, the debate in New York City already had become raucous (Hernandez 2010). It also had gained the attention of political leaders across the nation, some of whom seemingly had more investment in gaining notoriety from their stand than in understanding clearly those upon whom they cast suspicion. One leader, Mark Williams of the Tea Party, opined on his blog that Muslims "worship the terrorists' monkey god," apparently confusing Allah with the Hindu deity, Hanuman (Goodman 2010). Although most Manhattan residents supported the project (Quinnipiac University Polling Institute 2010), by August polls suggested that seven out of ten Americans opposed the center's construction (CNN 2010). This represented a remarkable turn from less than a year before, when few resisted the idea, despite coverage of the plans in the *New York Times* and Fox's "O'Reilly Factor." Indeed, conservative talk show host Laura Ingraham concluded a 2009 interview of Daisy Khan, Imam Rauf's wife, with the remark, "I like what you're trying to do" (Eliot 2010). Despite this somnolent start and the community board's May 2010 vote twenty-nine to one in favor of the center (ten members abstained), resistance soon flared. How it did is instructive since a confluence of factors played a critical role in the popularization of this controversy, as they would in other mosque as well as anti-Sharia contestations in the same period. These factors include professional provocateurs, political leaders, and the media. (Much of the following timeline follows Eliot 2010.)

The day after the community board supported the Cordoba House proposal, the *New York Post* ran a story provocatively entitled "Panel Approves 'WTC' Mosque" (*New York Post* May 6, 2010). Simultaneously, Pamela Geller, founder and executive director of the group Stop the Islamization of America (SIOA) posted an essay on her website entitled "Monster Mosque Pushes Ahead in Shadow of World Trade Center Islamic Death and Destruction" (Geller 2010). The next day, she announced a campaign to stop the project. On May 13, Andrea Peyser began her *Daily News* column by declaring "A mosque rises over Ground

Zero. And fed-up New Yorkers are crying, 'No!' " The column, accompanied by a photograph of a man doing an Islamic prayer in a battle scarred room, declared that the center would open on the tenth anniversary of the attacks. In response, Peyser promoted a protest planned by SIOA, which she described as a "human rights organization" (*New York Post* May 13, 2010). Soon an op-ed by columnist Diane West in the *Washington Examiner* declared that "The second attack on the World Trade Center is coming" in the form of the Cordoba House named after "an early caliphate that, of course, subjugated non-Muslims" (West 2010). By June, Newt Gingrich, Sarah Palin, Rudy Giuliani, and Tim Pawlenty joined a gathering chorus of conservative politicians decrying the project (Elliot 2010). By August, when a majority of Americans polled negatively toward the Park51 proposal, commentator Glenn Beck tied the Islamic center with the alleged efforts of Muslims to implement Sharia in the United States (Beck 2010) and Rush Limbaugh connected the debate to birther conspiracies regarding "Imam Obama" (Limbaugh 2010).

While the formation of popular perceptions regarding the Branch Davidians diverged substantially from those surrounding Cordoba House, the dynamics at work did not. The BATF's investigation that preceded the assault coincided with two media projects on the Davidians: one by the Australian television show *A Current Affair* and the other by *The Waco Tribune-Herald*. In fact, the BATF took the Australian report as a background source in support of its incursion and interviewed the show's main source, a disaffected former Davidian. The bureau also negotiated with the *Tribune-Herald*'s editor to postpone his reporters' efforts to complete their "Sinful Messiah" series on Koresh, which coincided with BATF preparations. When it stepped in to relieve the BATF, the FBI used the now published articles as an intelligence source (Tabor and Gallagher 1995: 80–93).

These collusions between the media and law enforcement had three immediate effects. First, local media figures were already attuned to BATF preparations for their assault on the Branch Davidian's Mount Tabor compound and, thus, primed to respond with intensive coverage. Second, the agency enjoyed media verification of its charges regarding weapons violations and child abuse. The heavy reliance upon disgruntled former Branch Davidians, one of whom had turned to the media to excoriate Koresh after a failed bid to replace him as leader, helpfully skewed the reporting to support the bureau's allegations. And third, when the BATF assault resulted in the deaths of four agents and the wounding of sixteen others (as well as ten casualties among the Davidians), the agency had media immediately available to broadcast its version of the fatal events, while it curtailed the ability of the Davidians to publicly provide their own account (Hall 1995: 215; Reavis 1995: 41–3, 176; Tabor and Gallagher 1995: 82–8, 105; Wright 1995: 87–8).

These collusions laid the basis for the echo chamber that soon crystalized around the Branch Davidians. "Cult specialists" joined media and law enforcement authorities in creating a mutually reinforcing set of assumptions that became increasingly unquestonable with each day of the fifty-one-day standoff. The narrative the BATF developed relied on a characterization of the group as a

cult, building forcefully on similarly sensationalized portraits promoted by Australia's *A Current Affair* and the *Tribune-Herald*'s "Sinful Messiah" series. When the FBI replaced the BATF as the authority in charge of the situation and as it established its siege of the compound, it attuned its strategies to a "blockade/hostage" scenario. This model cast Koresh as a charismatic, maniacal cult leader who had brainwashed his followers to act contrary to their will (Ammerman 1993: 5; Sullivan 1993: 7–8; Tabor and Gallagher 1995: 97). Such a conclusion paved the way for members of the anti-cult movement to enter the situation as "authorities" to whom the FBI turned to better understand the dynamics at play. This movement had developed in the 1970s in response to parents upset by their children's decision to join nonmainstream religious movements, and was boosted by the mass suicide of members of Jim Jones's Peoples Temple in 1978 and its accompanying media frenzy. As a collection of professional "deprogrammers," the Cult Awareness Network (CAN) became one of the most prominent representatives of this movement and apparently provided the "cult experts" to whom the FBI referred most during the standoff. In telling contrast, the FBI does not appear to have approached any of the scholars of religion at neighboring Baylor University – even though some were familiar with the Branch Davidians (Shupe and Hadden 1995: 195) – while the bureau also rebuffed offers of support from two biblical experts who demonstrated an ability to understand Koresh's perspective. As the nearly two month long siege developed into a media spectacle, the views of most Americans were shaped by the portrayal of the Branch Davidians as a cult, as promoted by the narratives of federal law enforcement, the media, and the anticult movement.

Overall, therefore, the dynamics at play in both the Park51 controversy and the Branch Davidian assault/siege paralleled one another. In each case government or political actors sought to align public representations in a manner that portrayed a religious community as a threat to Americans and their social order, while media outlets turned to professional provocateurs as so-called experts in their efforts to capitalize on a news spectacle. However interesting, this parallel is not very meaningful until we understand how the *mere presence* of Muslims and the Branch Davidians provoked disproportionate responses both locally and nationally because of the particular qualities of American secularism. The final component of analysis helps explain why all Muslims have come under suspicion since 9/11 through their association with Islam while all Christians have not despite the association of the Branch Davidians (or, for that matter, the Jonestown suicides) with Christianity. This analysis, aided by the work of Talal Asad, reveals how Islamophobia flourishes within the tensions between mainstream American commitments both to secular ideals and to a Protestant norm.

Secularism and the Sharia threat

Secularism has had an interesting history as a term. Initially used within a church context, the word later indicated the separation of property and other objects from religious control. Some would argue that a society's separation into secular

and religious realms is one prerequisite for its characterization as modern. The Renaissance had promoted a humanism presuming an innate reason among individuals. Although this fueled the Protestant Reformation's emphasis on individual interpretation and faith, the wars fueled by sectarian difference that swept Europe soon thereafter convinced many Enlightenment thinkers that religion interjected irrationalities that eroded the foundations of the emerging public sphere. Some philosophers, like Thomas Jefferson, championed a privatization of religion that would be protected from government interference so citizens could freely develop their moral conscience, which would guide their individual acts as members of the nation.

Asad helpfully notes that only certain types of religion are considered compatible with modernity. Such a religion must provide an experience at home and in school that fashions subjects of public culture according to appropriate sensibilities and perspectives while accepting its properly restricted place in the private sphere. Religions, then, challenge the assumed order when they become de-privatized. Presumed to be inherently coercive, encumbering members with the heavy yoke of tradition and nonreflectivity, religions threaten to cripple citizens' individualism and rationalism by which they discursively engage one another and create the public sphere (Asad 2003: 183–6).

Asad's analysis helps us understand in part, then, why – in the eyes of many Americans – the Park51 project impugned Islam as a *religion* while the standoff outside Waco impugned the Branch Davidians as a *cult*, but not Christianity en total. Indeed, the term "cult" safely served to isolate Koresh and his community from the mainstream American concept of Christianity, thereby protecting a normative Protestant model of Christianity from suspicions that "normal" Christians might transgress the private sanctuaries of home and church, within which US society trusts them to maintain their religious lives. In contrast, political opportunists, professional provocateurs, and media outlets perpetuate Islamophobic stereotypes of Islam as *exactly the kind of religion that does not abide by the necessary limits of secularism*. This helps explain the prominence of Sharia in recent controversies in which it has no immediate role. For instance, during the Cordoba House outcry, dozens of protesters in 2010 donned identical, printed signs inscribed with the word "Sharia" in dripping, blood red color (*New York Times* 2010), giving voice to the allegation that Imam Rauf would use the site to impose Sharia on the US (and evidencing the organization of some protestors at least). Such provocations regarding Sharia provide a lightning rod that channels the electric fear and abiding anxiety among Americans regarding religion out of place into controversies that may have nothing to do with Islamic law. At the time of writing, twenty-three state legislatures had passed or were considering proposals to ban Sharia law from courtrooms (Ali *et al.* 2011: 38). Despite the fact that Sharia finds its way into legal chambers only on rare occasions when both sides of a civil case are Muslims who agree to abide by it (in the same manner as Halakah – Jewish law – is used), the same combination of media, political, and "expert" forces have propelled the issue into the national limelight in ways that further demonstrate Asad's arguments.

A key proponent of the anti-Sharia movement has been David Yerushalmi. According to the Center for American Progress, Yerushalmi serves a number of think tanks that have promoted anti-Sharia legislation, including the Society of Americans for National Existence (SANE, which he founded), Stop Islamization of America (SIOA), and American Laws for American Courts (initiated by the American Public Policy Alliance, or APPA). Yerushalmi and his confederates have been so successful that, as the American Bar Association noted, many state legislators have crafted anti-Sharia bills that borrow verbatim from the model language provided by the APPA (Ali *et al.* 2011: 36–9). Like the Cult Awareness Network, many of the organizations with which Yerushalmi works promote the fear of religious threat, and perpetuate their own existence by doing so.

While CAN, by definition, delineated religion proper from predatory or manipulative religion ("cults") in order to not challenge a normative American Christianity, SANE implicitly promotes a similarly normative "Judeo-Christian" model in its effort to portray Islam as alien and ill-suited to the United States. Authors with such views often employ the rhetorical tactic of declaring, first, that only some Muslims threaten America before, second, describing what they perceive as the actual problem, which they then claim is central to Islam. Hence, they can deny allegations of Islamophobia while still implicating most, if not all, Muslims. In an article entitled "The Shariah Threat to America" that earlier appeared on the SANE website, Yerushalmi provides one such instance. Initially he claims a US "political order based upon an equal treatment before the law as grounded in a constitution founded upon the Judeo-Christian tenet that society consists first of individuals who come together to form a People through representative government." In contrast, he then argues, certain Muslims represent a "jihadi existential threat." Although much of his rhetoric focuses on militant Muslims, Yerushalmi's repeated efforts to link their violence to Sharia ultimately casts a shadow over all Muslims, whom he declares universally bound to the same "theo-political-military-legal doctrinal system" in order to overcome their linguistic, ethnic, and cultural diversity. In accord with the discursive strategy, the author feigns a discriminating approach to his topic but concludes with an all-inclusive suspicion that collapses the myriad Muslim traditions into a singular, Sharia-centered mass (Yerushalmi 2010).

In the same article, Yerushlami argues that Muslim commitments to Sharia threaten not only the culture of non-Muslim Americans, but also their very lives. He solemnly warns that Sharia dictates the murder of those who do not convert to Islam. Moreover, he cautions that this is not so just in extremist interpretations of Sharia, but in the essential core of all Sharia. Demonstrating yet another aspect of the post-9/11 Islamophobic phenomena, the author substantiates his argument through reference to a report by Frank Gaffney of the Center for Security Policy (CSP). Just as media outlets help affirm the conclusions of anti-Muslim proponents, professional Islamophobes reinforce one another's conclusions as well, while most accredit themselves as "director" or "president" of foundations, centers, and organizations (often of uncertain size) that they established. Hence, Yerushalmi underlines a component of Gaffney's report that

notes how Sharia derives from the Quran, hadiths, and "agreed interpretations," reasserting the implication that the threat derives not from a minority of militant Muslims alone, but from the foundations of Islam itself (Yerushalmi 2010). The tactic of at once appearing to recognize diversity among Muslims while collapsing many or most into a singular threat represents a common trope among many Islamophobic authors.

Meanwhile, various media news outlets have taken up Yerushalmi's allegations and provided them a far wider airing than he could manage himself. For instance, a few days before the 2010 commemoration of the 9/11 attacks, *The Wall Street Journal* published a commentary co-authored by Yerushalmi warning against "institutional shariah." Meanwhile, between 2008 and mid-2011, the *Washington Times* published eight commentaries penned by the CSP's Gaffney that warned of America's Sharia threat. Each op-ed cited Yerushalmi as a "Sharia expert," although nothing in his online biography suggests any such training. Indeed, the biography reflects the circular reinforcement of such claims to authority by declaring that Yerushalmi "is today considered an expert on Islamic law" without naming those who endorse him as such, while proclaiming that "he has published widely on the subject" without declaring the qualifications of his publishers. Yerushalmi and Gaffney's commentaries serve to strategically and mutually reinforce Islamophobic messages while encouraging citizens to confront the Muslim menace. In one instance, Gaffney celebrated a lawsuit that claimed that the federal government had failed to maintain separation of church and state when it bailed out AIG, which provided "Sharia-compliant products" (i.e., Islamic finance for homeowners' insurance).

> It seems likely that the depositions that will now be taken by [litigant] Mr. Murray's legal team – securities litigator and Shariah expert David Yerushalmi and attorneys at the Thomas More Law Center, led by its director Richard Thompson – will shed important light on the federal government's understanding of authoritative Islam's seditious program. It may also reveal the extent to which U.S. officials have, with their failure to comprehend the true nature of the threat we face, acted, either wittingly or unwittingly, in ways that have enabled it to metastasize further.
>
> (Gaffney 2009: 17)

Deploying a strategy that professional provocateurs have mastered, Gaffney used his position as *Washington Times* columnist to promote Yerushalmi's endeavors, legitimating himself in his by-line as president of an institution (the CSP), while associating Yerushalmi with yet another institution (the Thomas More Law Center). While Gaffney cautioned that hundreds of millions of Muslims have no antagonism toward the United States, he declared that all of those who adhere to Sharia seek to replace independent nations with a singular caliphate. He lumped these "many millions" into an unqualified entity called "authoritative Islam" that he characterized as seditious, cancer-like, and potentially in league with US officials. Once published in popular news outlets like *The Wall Street Journal* and

the *Washington Times*, these essays often end up posted on the authors' blogs, their centers' website, and/or the blogs and websites of their colleagues and their organizations, seemingly bearing the imprimatur of an authoritative news source and increasing the likelihood of more media coverage. The power of this cycle of mutual reference, media access, and promoted authoritativeness cannot be underestimated, as the spiraling rise of several otherwise uncredentialed experts demonstrates.

One of Yerushalmi's latest efforts to broaden suspicion of Muslims has been his 2011 article, "Shariah: The Threat to America," co-authored with an Israeli academic and published in *Middle East Quarterly*, an arm of the Middle East Forum run by Daniel Pipes. Fellow provocateur Pamela Geller promotes the article on her *Atlas Shrugs* website, supporting Yerushalmi's effort to merge fears about Sharia law with those regarding mosques. As she writes, "The empirical evidence is deeply disturbing, but not surprising. An overwhelming number of American mosques teach, advance, promote violent jihad as dictated by Islamic teaching." Based on a reputed survey of one hundred American mosques that determined 81 percent of mosques promoted violence, Geller's website provides the list of "shari'a-adherent behaviors" the poll takers (who are not identified) observed, such as the clothing worn by worshippers, the "alignment of men's prayer lines," and if the "imam or lay leader wore watch on his right wrist" (sic). Geller praises the authors for correlating this purported evidence of devotion to Sharia with instances when the imam "recommended violence-positive material" (a term that Geller never defines completely). The result, she claims, proves the link between a dedication to Sharia and militant jihad (Geller 2011).

However, as with the Branch Davidian and Park51 controversies, the Sharia fear mongering benefits political actors who add their voice to coincide with, to reaffirm, and to be reinforced by the views promoted by media outlets and professional Islamophobes. Not coincidentally, Geller begins her deliberation of Yerushalmi's "Shariah: The Threat to America" by referencing the recent hearings undertaken by Representative Peter King (Long Island, New York). She uses the book to justify the hearings and to upbraid those who associated them with McCarthyism and witch hunts. As chairman of the House Committee on Homeland Security, King called the hearings, entitling them "The Extent of Radicalization in the American Muslim Community and That Community's Response." While Senator Joseph Lieberman (Connecticut) had held sixteen similar hearings between 2006 and 2009 and Representative Jane Harman (California) held six, those giving testimony on these occasions tended to affirm that terrorism was a problem neither stemming from Islam itself nor common to all Muslims (Fahrenthold and Boorstein 2011). In contrast, King has declared without substantiating evidence (and despite contradicting evidence) that 80 to 85 percent of mosques are run by extremists and that Muslims have refused to cooperate with law enforcement officials. Indeed, he has gone on record as saying that "unfortunately, we have too many mosques in the country." As another example of how the normative quality of Christianity in the US fosters a

popular sense of diversity and acceptance for Christianity and singularity and alienness for Islam, King's personal connections to Ireland's conflict with Britain (in which Catholic and Protestant antagonisms play no small role) has not led him to criticize the number of churches there or their need for investigation (Shane 2011).[1]

While some participants in the 2011 House hearings sought to affirm that Islam was not under suspicion, others such as freshman Representative Jeff Duncan (3rd District, South Carolina) expressed fears of Sharia that returned Islam itself to the center of suspicion. Duncan's statement began by differentiating between the religion of Islam and "Islamism," which he defined as a political ideology, before shifting attention to the Declaration of Human Rights in Islam of the Organization of Islamic Cooperation. He noted that this organization (a loose collective of fifty-seven Muslim majority countries that models itself after the United Nations) states, "Islamic sharia is the only source of reference for the explanation or clarification of any of the articles in this declaration." Duncan then claimed that any effort to subvert the US Constitution represented sedition. Finally, he turned to one of his witnesses, Arizona physician Zuhdi Jasser, to ask whether he believed the federal government had tried well enough to understand the role of Sharia in shaping Muslim efforts to join law enforcement in countering jihadi violence. In line with the common rhetorical tactic, Duncan's haphazard argumentation ultimately undermined his initial disclaimer that the problem stems not from Islam but from Islamism, weaving as it does a disjointed line of thought connecting Sharia to one of the most prominent international Islamic organizations and the threat of domestic sedition and jihadi turmoil.

The roles of Jasser and other self-identified Muslims chosen by King to speak at the hearings represent yet another parallel with the interplay between government, media, and experts during the standoff with the Branch Davidians. King's hearings, like the investigations of the BATF, fore-fronted the voices both of disaffected members from the suspect group and from the alienated families of other members. While omitting any representation from the country's larger Muslim organizations such as the Islamic Society of North America and the Council of American Islamic Relations, King arranged for four Muslims to speak on the first day. One was Representative Keith Ellison (5th District, Minnesota), the first Muslim to be elected to Congress, and the only Muslim witness called who did not have a personal investment in furthering the radicalization question. In contrast, Jasser is president and founder of the American Islamic Forum for Democracy, an organization that portrays itself as providing the world's Muslims a democratic alternative to "Islamism," despite evidence that in many countries most Muslims reject the legislative involvement of religious leaders (Rheault and Mogahed 2007). After Jasser, the next two giving testimony were relatives of two young Muslim men who had become radicalized and violent. Abdirizak Bihi, who identified himself as Muslim, repeatedly used the term "brainwashed" to describe what happened to his nephew and other young men in Minneapolis' Somali American community, who had left the United States to fight for the al-Shabab group in Somalia. Similarly, Melvin Bledsoe,

whose son Carlos (known as Abdul Hakim Mujahid Muhammad after his conversion to Islam) killed an American soldier and wounded another after returning from Yemen, used terms like "programming" and "brainwashing" in his testimony. While both Bihi and Bledsoe emphasized that they knew many more Muslims who were not radicalized or dangerous than those who were, their testimonies were riddled by the understandable pain of family members of youth who spiraled into violence, arrest, and/or death. Unlike CAN – which never attempted to associate the Branch Davidian "threat" with mainstream Christianity – professional experts such as Jasser routinely take these personal tragedies as evidence of a challenge far larger than the handful of extremists active in America. Repeatedly claiming a Muslim identity for himself, Jasser builds his and his organization's work on the effort to bring a democratic alternative to the world's Muslims. His testimony in the King hearings reiterated his sense that an "Islamic enlightenment" was required among American Muslims in order to dispel the threatening force of anti-secular Islamism that multiculturalism and political correctness have protected. Nowhere does he suggest that the recent violence and threats of violence by a handful of American Muslims might have economic and political roots, as Bihi did in regard to estrangement among some Somali Americans in Minnesota. In fact, while a 2010 Gallup poll found American Muslims less likely to strongly identify with the United States than American Protestants, they were also less likely to identify with their religion and those worldwide who share it (Younis 2011). The situation appears more complicated than Jasser or the other expert Islamophobes allow, dedicated as they are to reducing most Muslims to a malaise fated by their supposed Shariamindedness.

Outcomes

The prevalence of both Park51 and the anti-Sharia campaign in the 2010 elections served Tea Party and Republican Party efforts to harness Islamophobia by nationalizing local and state controversies. The implications of this strategy are profound, and help explain the propagation of anti-Islamic and anti-Muslim sentiment in a post-9/11 America that, before the 2010 elections, showed evidence of moving beyond its prejudices. A recent report by the Institute for Social Policy and Understanding ominously demonstrates how previous mosque construction controversies – such as those in Voorhees, New Jersey; Scottsdale, Arizona; and Savannah, Georgia – all proved resolvable because they originated from very local concerns regarding parking, traffic, zoning, and neighborhood design that local actors could, and often did, negotiate. In contrast, national Islamophobic organizations – like Pamela Geller and Robert Spencer's Stop the Islamization of America and Yerushalmi's Society of Americans for National Existence – successfully galvanized political support in their efforts to portray projects like Park51 as indicative of the anti-American aggressions essential to Islam as a religion and Muslims as a monolithic community (Foley 2010: 11–16, 51). Their presence is detected in the dozens of identical, professionally

produced, anti-Sharia signs used by protestors of the Park51 project. While media outlets committed to promoting conservative agendas contribute in their own ways, the overall endeavor to provide balanced reporting ensures the repetition and amplification of some of the most egregious claims, especially during the election cycle. So, for instance, in 2010 Nevada senate candidate Sharon Angle declared that "Muslims want to take over the United States" and implement Sharia. New York governor candidate Carl Paladrino declared Muslims not to be Americans and Cordoba House to be "a monument to those who attacked our country." While North Carolina candidate Renee Elmers described Park51 as a "victory mosque," another candidate from the state, Ilario Pantano portrayed it as a "martyr marker."

The rhetoric appears to be having its intended effect. A Pew Foundation poll found that the percentage of Americans with a favorable view of Islam declined from 41 to 30 percent between 2005 and 2010. In contrast with the 27 percent of Democrats with an unfavorable view of Muslims in 2010, 40 percent of independents and 54 percent of Republicans held such views (Pew 2010b). Meanwhile, the Southern Poverty Law Center reported a 50 percent surge in hate crimes against Muslims as reported to the FBI between 2010 and 2011, which it concludes "to reflect the consequences of a rise in anti-Muslim rhetoric from groups like Stop Islamization of America," particularly around the Park51 proposal (Southern Poverty Law Center 2012). Meanwhile, the percentage of Americans who believe President Obama to be a Muslim increased from 11 percent in 2009 to 18 percent a year later (Pew 2010a: 1).

While many Americans, including Christian ones, remain uncomfortable with the Evangelical activism that has pervaded federal and state elections in the past decade, most do not tend to become suspicious of Christians or Christianity as a whole. While many Americans champion a Christian legalism – for instance though campaigns to place representations of the Ten Commandments in courtrooms or to forbid homosexuality due to biblical interpretations – many others would consider this to be an issue of extremism or of fundamentalism, not of Christianity itself. By characterizing Christians who politically proselytize as "fundamentalists" and "evangelicals," secularists criticize them while safely leaving unchallenged an unquestioned Protestant norm, much in the same manner as the public accepted David Koresh as the "wacko from Waco" and the Branch Davidians as a "cult" without impugning all ministers or followers of Christianity.

In contrast with the latitude even many secularists allow in accepting a Christian normativity, the suggestion that some Muslims intend to influence the government and public spheres triggers preexisting fears that Islam is inherently destabilizing to the existing order. Viewed as highly prone to violence and dedicated to values that supposedly subvert the American way of life, when Muslim individuals and groups resist these political, private, and media stereotypes, they open themselves to an additional caricature of being overly reactive to critique. Meanwhile, media savvy individuals learn how to promote themselves through Islamophobic networks and public acts, such as the 2011 trial and burning of the Quran and on-going anti-Sharia legislative campaigns. Because an international

audience of Muslims follows American news sources, they learn of US anti-Islamic events even when mainstream news outlets forego coverage. Such was the case when Terry Jones burned a Quran in March 2011. While most Americans initially knew nothing about it due to a praiseworthy effort by most news companies to starve the Florida pastor of publicity, it became a well-known event in the US after protestors in Afghanistan rioted when they learned of it through media outlets.

Such events evidence with sad certainty how successfully the worst expectations of non-Muslim Americans and both domestic and international Muslims can be reinforced by design. Many Muslim are convinced that the United States is engaged in a protracted – if not permanent – war against Muslims and Islam, and their occasional violent responses strengthen the stereotypes held in the United States. The possibility of merging American Islamophobia with forms found elsewhere reached a terrible crescendo in the massacre of seventy-seven Norwegians by Anders Behring Breivik in 2011. Laced throughout his 1,500-page epistle explaining his actions are quotes from Pam Geller, Daniel Pipes, Jonathan Spencer, and other Islamophobic popular authorities on Islam. Breivik believed their words helped justify the scores of murders he committed in the name of preserving a "Christian" Norway from "Islamic imperialism," which has been protected by "cultural Marxists" (Hegghammer 2011). Although Islamophobic roots amply course through both European and American histories and cultures, the legacy of 9/11 has ensured that non-Muslim American and European fears of Muslims have crystalized into a particularly dangerous form of Islamophobia whose reiteration by media outlets, professional provocateurs, and political interests creates a message mutually reinforced in the echo chamber.

Note

1 King provides an unusual case in which the boundary between government official and professional provocateur blurs, as his novel, *Vale of Tears* (2004), depicts a courageous legislator attempting to uncover a conspiracy among Muslim and Irish terrorists.

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Part II

Globalization of the war on terror

6 Fighting phantoms

The United States and counterterrorism in eastern Africa

Jeremy Prestholdt

The September 11, 2001 terrorist attacks precipitated a reorientation of American foreign policy. Security concerns in the wake of September 11 created a new organizing principle for American foreign relations in Africa, a continent where U.S. interests were in decline. Specifically, Washington began to see East Africa, the site of two major al Qaeda attacks in 1998, as both a potential "breeding ground" for terrorists and safe haven for al Qaeda. U.S. Navy aircraft flew reconnaissance missions over Somalia in the weeks after September 11, and in 2002 the U.S. military established a Forward Operating Site in Djibouti – the only operable U.S. military base on the continent – under the command of the newly constituted Combined Joint Task Force-Horn of Africa. Many American policymakers believed East Africa to be a critical front in the unfolding global war on terror.

Despite the U.S. military presence, America's war on terror in East Africa would largely be fought by proxy. In 2002 the United States began to provide unprecedented counterterrorism aid to partner security forces in the region. Over the next decade Kenya, Ethiopia, Uganda, Somalia's Transitional Federal Government, and other East African nations received security aid in the form of training, materiel, and logistical support. America and its partner states shared a common interest in neutralizing al Qaeda, but regional recipients of aid likewise pursued their own agendas, even when these compromised long-term U.S. goals. Though eastern Africa is technically a non-combat theater, the United States has mobilized all branches of the armed forces and employed a number of counterinsurgency techniques tested in Afghanistan and Iraq. The region now boasts the largest American military presence on the African continent since 1993 (Naylor 2011d). In short, American policy makers have coordinated increased security assistance with diplomatic pressure, development assistance, and military operations in an effort to integrate American "hard" and "soft" power in eastern Africa.

Though American counterterrorism strategy in eastern Africa bears similarities to U.S. efforts in Afghanistan, Pakistan, and Yemen, the region contrasts with south-central Asia and south-west Arabia in two significant ways. First, since the U.S. embassy bombings in 1998 the al Qaeda cell in eastern Africa has posed no clear threat to the United States. Second, though elements of Somalia's

al Shabaab pledged allegiance to al Qaeda in 2012, the al Qaeda presence has been limited to a handful of operatives whose influence has been minimal (Rosenau 2005; Lahoud 2012). America's war in the region, popular reflections on terrorism, and, at times, the actions of partner states have focused closely on this small group of al Qaeda operatives and those associated with them. Between 2001 and 2011 the primary target among these operatives was an enigmatic young man named Fazul Abdullah Muhammad. Often referred to in the press as a "master-terrorist," this diminutive al Qaeda tactician from the Comoros Islands was the object of legend in and beyond East Africa until his death in 2011.

Fazul Abdullah Muhammad personified the specter of terrorism in Africa. He played an important role in the 1998 Nairobi embassy bombing, which killed 212 people and wounded at least 4,000. He also helped plan the 2002 car bombing of an Israeli-owned hotel, and simultaneous attempt to down an Israeli airliner, near Mombasa, Kenya. Fazul was commonly presumed to be al Qaeda's key strategist in Africa and so became the focus of one of the greatest manhunts in African history. The search for Fazul has been only one dimension of America's counterterrorism program in eastern Africa, yet Fazul and the East African cell's association with Somalia's Islamic Courts Union were the primary public rationale for America's support for the Ethiopian invasion of Somalia in 2006 and direct U.S. military intervention in 2007. Likewise, in neighboring Kenya many high-profile counterterrorism efforts between 2002 and 2011 revolved around Fazul, from celebrated terrorist trials to extraordinary renditions. Adding to his mystique, the media mythologized Fazul to a degree only paralleled by Osama bin Laden. The international press described Fazul in nearly superhuman terms, a phantom-like "master of disguise" capable of attacking America and its allies at will.

This chapter traces the intersecting trajectories of policy and projection since September 11. I explore America's engagement in eastern Africa, the actions of regional allies, and media coverage of terrorism in the region as examples of the confluence of counterterrorism policies, inter-state relations, and mythologies of al Qaeda. The search for Fazul and his closest associates provides a unique vehicle to track evolving U.S. counterterrorism strategies in Africa, including security aid, extraordinary rendition, and military intervention. At the same time, speculation about Fazul offers a window on popular perceptions of a war without boundaries, perceptions that have encouraged a disproportionate response to al Qaeda. To contextualize the multiple uses of Fazul I begin with a reflection on two tropes – one official, one popular – that have framed American counterterrorist initiatives in and beyond East Africa: *war* and *specters*. I then address the development of the Fazul mythos and its convergence with American foreign policy as well as partner nations' counterterrorism efforts. More precisely, I explore perceptions of Fazul as a "master-terrorist," attempts to capture or kill him, and his rhetorical utility as a primary face of terrorism in the region. I conclude by considering the circumstances of Fazul's death and its lessons for American counterterrorism in eastern Africa.

Of war and specters

For many Americans the psychological trauma of September 11 precipitated new modes of self-perception and new ways of interpreting events around the world. The attacks came to be seen as a national *zeitbruch*, or radical break in American history. Americans felt a sense of shock and humiliation that soon engendered a psychology of victimhood (Pyszczynski *et al*. 2003; Stein 2003; Jackson 2005; Prestholdt 2010). The intense feeling of victimization, moreover, birthed a self-righteous spirit of counteraction. Yet, the relatively limited information that the popular press offered about al Qaeda did not satisfy the collective need either to make sense of September 11 or envision effective responses to it (Kellner 2003). The spirit of counteraction and a general unfamiliarity with the September 11 attackers, their motivations, and their goals seeded intersecting discourses of war and specters. In this section I wish to demonstrate how these discourses created possibilities and occlusions. On the one hand, the metaphor and practice of global war restructured U.S. foreign policy. On the other hand, the discourse of specters obscured the interests of, and amplified the threat posed by, America's enemies in this new war. When combined with the spirit of self-righteous vindication, these discourses produced a potent rhetorical cocktail that elevated a small number of radicals to an existential threat and encouraged extraordinary means to address it.

Total war on a small, fractured network of militants was not inevitable. Rather, the war on terrorism developed from a narrow interpretation of the September 11 attacks. Immediately following the attacks the Bush administration categorized September 11 as an act of war and so concluded that the appropriate response was mobilization for war. This concept of a full-scale war with terrorists signalled a departure from previous U.S. policies towards terrorism and the al Qaeda network specifically. Recall that despite the fact that Osama bin Laden publicly declared war on the United States in 1996, the Clinton administration did not perceive the 1998 embassy bombings in Nairobi and Dar es Salaam or the 2000 USS Cole attack in Aden as tantamount to acts of war (Bin Laden 1996). Nor did President Clinton refer to American cruise missile strikes on suspected al Qaeda targets in Sudan and Afghanistan in 1998 as salvos in a war. Likewise, during his first several months in office George W. Bush did not declare that the United States and al Qaeda were at war. Moreover, before September 11 the United States relied primarily on the FBI and the American legal sytem to spearhead its response to al Qaeda attacks. By August 2001, four of the U.S. embassy bombers had been extradited to the United States and convicted in American criminal courts.

Yet, the scale and horror of September 11 prompted President Bush, and even some in the media, to invoke the rhetoric of war soon after the planes hit the World Trade Center and Pentagon. In his address to the nation on September 11 President Bush typified the attacks as "acts of mass murder." However, he would later relate that as soon as he heard that a second plane hit the World Trade Center he believed that the terrorists "had declared war." "I made up my mind at

that moment," the president recounted, "that we were going to war" (Bush 2010: 2–3; Woodward 2003: 15).[1] Moreover, after surveying the damage to the Pentagon President Bush deemed the attacks "a modern-day Pearl Harbor" (Bush 2010: 137). On September 12 the president expressed his view of the attacks to Pentagon officials. According the Under Secretary of Defense for Policy, Douglas Feith, when the President visited the Pentagon the day after the attacks he entreated the staff to "have a mindset of fighting and winning a war" (Bush 2003a: 4; Feith 2008: 12). Bush was creating a new paradigm for America's response to terrorism.

The following day, September 13, the President publicly referred to the attacks as "despicable acts of war" and convened a meeting with the National Security Council, the Attorney General, and the FBI Director. National Security Advisor Condeleeza Rice reviewed the previous two days' discussions with the group, starting with what she referred to as "the concept": the notion that because terrorists represent a network, September 11 was not a single event but part of "a broad war" (Feith 2008: 13). On September 15 the President called the National Security Council to Camp David. According to Secretary of Defense Donald Rumsfeld, a proposal to strike al Qaeda bases in Afghanistan with cruise missiles – strikes akin to those ordered by President Clinton in 1998 – met with the President's disapproval. The President wanted American forces on the ground in Afghanistan as quickly as possible. On September 18 both Houses of Congress granted the President authorization to use all means available to counter the terrorist threat. America's war on terror was now set in motion, and the idea that military intervention was the correct response to September 11 entered the epistemological unconscious (Rumsfeld 2011: 359, 371; Bush 2003a: 8).

Mobilizing the U.S. military for a full-scale war against a handful of radicals seemed absurd to some critics of the Bush administration, but the metaphor and practice of war offered much-needed direction in an uncertain time (see Gershon Shafir and Cindy Schairer in this volume). More precisely, the invasion of Afghanistan translated an obscure terrorist threat into a territorialized, conventional war intelligible to the American public. However, this overwhelming military response to terrorism, first in Afghanistan and later in Iraq, Pakistan, Yemen, and Somalia, elevated a small group of militants to archrivals in a global conflagration. Debates raged over the definition of America's adversary – "terror," "violent extremism," jihadists – but the discourse of war faced few detractors in the United States. War became a totalizing language and policy that coded official actions.

In a state of war the American public tolerated new checks on its civil liberties. The U.S. Armed Forces deployed Civil Affairs units around the world in efforts to "win the hearts and minds" of populations suspected to be sympathetic to terrorists (see below). American officials refered to all terrorist suspects, including in some instances American citizens, as "unlawful enemy combatants." As combatants, presumed terrorists could be attacked and killed anywhere in the world without indictment or trial. Moreover, since captured terror suspects

were combatants, not criminals, they were remanded to detention facilities, including Camp Delta, Guantanamo Bay, where they were tried by military tribunals. Under this new paradigm, almost any action by a presumed terrorist was considered an act of war. For instance, when three detainees at Guantanamo Bay killed themselves in June 2006 the military referred to the suicides as acts of "asymmetric warfare" (Falkoff 2007: 2).[2]

Concurrently, the popular media searched for ways to describe the forces of global terrorism and an indefinite war. Some experts offered valuable insight into al Qaeda personalities and their motivations, but the news media more commonly mystified al Qaeda. These mystifying frames, developed to explain the threat to America, rhetorically detached al Qaeda from politics and temporality. Because America's enemies were both unfamiliar and ill defined, reporters and analysts regularly resorted to apparitional metaphors. Al Qaeda became a "phantom enemy," a "ghost nation" (Jennings and Moran 2001; Halberstam 2001; Varadarajan 2001). Expanding parameters of the war on terror and confusion about its aims encouraged this discourse of specters. In the first weeks of the war in Afghanistan *Time* magazine referred to insurgents as "phantom enemy fighters" (McGirk and Ware 2002). After the fall of the Taliban al Qaeda seemed to disappear, "transforming themselves into phantoms" in the words of one *Deutsche Welle* commentator (Philip 2004). In late 2002 Western news agencies even reported that an al Qaeda phantom ship was plying the Mediterranean, likely plotting an assault on European shores (BBC Worldwide Monitoring 2002).

The war in Iraq produced more specters. During the November 2004 attack on the insurgent stronghold of Fallujah, NBC reporter Kevin Sites echoed earlier descriptions of al Qaeda by referring to Iraqi insurgents as a "phantom enemy" (Sites 2004; Harnden 2004). Even the U.S. military appropriated the discourse of phantoms. The most notable examples were the U.S. assault on Fallujah in 2004, dubbed Operation Phantom Fury, and a 2008 offensive called Operation Phantom Phoenix. Three years later Osama bin Laden's death resurrected the discourse of specters. While bin Laden's death was cathartic for a generation of Americans haunted by fears of another catastrophic terrorist attack, many wondered if in death the world's most notorious terrorist might remain a "spectre for the world" (Burke *et al.* 2011; Deutsche Presse-Agentur 2011).

The language of phantoms was perhaps an inescapable response to the horror and media excess of September 11. Born of general uncertainty, this rhetoric referenced the perceived immateriality and deterritorialized nature of al Qaeda's threat. However, the discourse of phantoms also obscured the material and territorial constraints of al Qaeda while masking the interests of diverse and often disconnected operatives. Recourse to mystifying language contributed to incredible speculation, such as al Qaeda's phantom ships or the notion that Fazul Abdullah Muhammad was a James Bond-like "master spy" (National Geographic Channel 2006). Just as American policy makers had embraced al Qaeda's rhetoric of war, the international media's mystical frame for understanding al Qaeda seemed to mirror militants' understanding of the jihad as a

metaphysical struggle shorn of political or geographical coordinates (Devji 2005). Al Qaeda wished to present itself as freed from territoriality, a force that knew no boundaries, and the rhetoric of phantoms confirmed al Qaeda as a threat that was everywhere and yet nowhere.

The making of a master-terrorist

In eastern Africa, after September 11 the practice of war and the rhetoric of specters coalesced around a small al Qaeda cell and one of its central strategists, Fazul Abdullah Muhammad. Fazul trained at an al Qaeda camp in Afghanistan in the early 1990s. In 1998 he assisted in the planning of the Nairobi embassy bombing and fled Kenya soon after the attack. Because of his role in the attack, the FBI placed Fazul on its most wanted list. In mid-2002 Fazul returned to Kenya and lived under an alias in the remote Swahili town of Siyu where he taught at a girl's madrassa. In November he coordinated the simultaneous attacks on an Israeli-owned hotel and a Tel Aviv-bound airliner near Mombasa. Soon thereafter he married a young woman in Siyu, began planning a second attack on the U.S. Embassy in Nairobi, and traveled between Kenya and Somalia. In Somalia, Fazul trained a number of Islamic Courts Union (ICU) fighters, including a great number of foreigners. Fazul was in Somalia when the Ethiopian army overthrew the ICU in January 2007. He, along with at least one other member of al Qaeda's East African cell, fled to the Kenya–Somalia border region and only narrowly averted capture by U.S., Ethiopian, and Kenyan forces. Many in Fazul's company, including his first wife, crossed the border to relative safety in Kenya. Fazul remained in Somalia for several more weeks.

Despite Ethiopia's occupation of Somalia, limited evidence has come to light of Fazul's movements after 2007. Media sources placed Fazul in Kenya and Tanzania in 2008, but the following year other reports suggested that the wanted terrorist was back in Somalia. In 2009 multiple sources claimed that he became the intelligence officer for the Somali insurgent group al Shabaab, which gained international attention in the wake of the Ethiopian invasion (see below). In this capacity, Fazul is claimed to have assisted in the planning of the 2010 World Cup bombings in Kampala. Subsequent reports were vague and contradictory, but Fazul's memoirs reveal that until at least 2009 he remained on the periphery of al Shabaab, primarily offering advice and assisting in the training of fighters (Lahoud 2012a). He likely lived in al Shabaab controlled southern Somalia or Mogadishu for much of 2010 and 2011. In June 2011, as I will outline in the concluding section, Fazul was killed by Somali government forces in Mogadishu.

Fazul's dossier suggests that he was a formidable operative, a shrewd strategist who successfully evaded authorities for more than a decade. But Fazul was also a man with minimal education, who possessed few technical skills and negligible resources. All of his operations seem to have been conducted on a shoestring budget. For example, after the Nairobi embassy bombing he fled his

safe house in a Mitsubishi Lancer that needed a push-start, and he could not even afford to pay the crew that he hired to clean the house. Fazul stayed one step ahead of the authorities, but he was at times careless. In 1998 the FBI was able to establish his true identity by tracing calls he made from the safe house in Nairobi to his mother's home in the Comoros. When FBI investigators arrived in the Comoros they discovered that the wanted terrorist had, in fact, returned to visit his family before going into hiding. Though Fazul escaped, the FBI recovered a laptop he entrusted to his relatives. The computer's hard disk contained emails from the Nairobi cell that allowed FBI agents to reconstruct the embassy bombings, identify his co-conspirators, and apprehend other operatives.

Fazul's carelessness helped investigators unravel the 2002 Mombasa bombings as well. On his departure from Kenya in 2003 Fazul gifted his niece the mobile phone he had used to call other al Qaeda operatives. Authorities monitoring these operatives' activities tracked down the phone and discovered that Fazul had returned to Kenya. More surprisingly, when investigators arrived in the small town on the northern Kenyan coast where Fazul had lived in hiding, they discovered that he was the coach of a soccer team named "Al Qaeda" (Mutiga 2009). In 2007 and 2011 Fazul allowed yet more of his laptops containing sensitive information to fall into the hands of the authorities. For instance, in 2007 authorities recovered a laptop from his wife. The laptop's contents were not made public, but investigators claimed that its files provided great detail on al Qaeda operations in the region (Okwembah 2007).

Popular reflections on Fazul have offered a contrasting picture. Fazul has been credited with skills, resources, and influence well beyond his means. As I have argued elsewhere, such misrepresentations were not the invention of overzealous counterterrorism agencies. To the contrary, the rhetorical making of Fazul into a fantastical "master-terrorist" was largely the product of fanciful reporting (Prestholdt 2009). Specifically, popular reflections on Fazul fit him into the entertainment industry's familiar profile of the diabolical über-terrorist. Fazul was called a charismatic "master of disguise," a "computer whiz" with the skills to "blend in" wherever he goes. In an effort to attract readers, the popular press portrayed Fazul as a sophisticated secret agent who, like a character from the television show *24*, was cash-flush and tech-savvy. What gives gravity to these distortions of Fazul's capacity is the fact that they tacitly confirmed the necessity of all-encompassing efforts to capture or kill him. American and East African security forces exploited larger-than-life accounts of Fazul to justify a number of actions.

Many elements of Fazul's mythos can be traced to a 1998 FBI profile. Though most of the information in the profile was accurate, two references seeded sensational descriptions. In the FBI wanted poster's sparse language, authorities explained that "Mohammed likes to wear baseball caps and tends to dress casually," adding he is "very good with computers." In the last decade investigators and reporters have taken these trivialities to incredible ends. Fazul may have favored baseball caps, but no evidence exists that he ever changed his

appearance. Nonetheless, reporters regularly refer to him as a "master of disguise." In 2007, the Associated Press came to the remarkable conclusion that Fazul was "able to appear" South Asian, African, or Arab (Associated Press 2007c). In Kenya, Fazul's ability to evade capture was so legendary that observers commented that he seemed to be able to disappear "into thin air," "like a phantom" (Ngotho 2006; Makokha 2011).

The Times (UK) explained that Fazul was able to orchestrate terrorist attacks because he was a man who boasted "the confidence, money and style to blend into any society he chooses" (McGrory and Clayton 2003). When details surfaced of Fazul's return to Kenya in 2002 authorities were at a loss to understand how a wanted man could travel freely in the region and even carry out a second attack. The collective answer from investigators, the U.S. military, and the press was that Fazul had an incredible ability to "blend in." In 2004, reports that Fazul was living in a small town to the south of Mogadishu, and that he regularly appeared in public, prompted reporters to ask Brigadier General Mastin Robeson, then commander of the U.S. military's Djibouti-based Combined Joint Task Force–Horn of Africa, if it would be possible to apprehend Fazul in Somalia. "It's difficult to get anybody who can 'blend in' to the countryside," Robeson replied (Reuters 2004).

The FBI's description of Fazul as "very good with computers" translated into other misrepresentations. As the information officer for the Kenyan cell in 1997–1998 Fazul regularly used email to communicate with other al Qaeda members. In contrast to his co-conspirators, he also knew how to type. As with information about his clothes, Fazul's computer skills morphed into fanciful descriptions of him as a "computer whiz." Reporters even dubbed him a "charismatic genius" of considerable talent (England 2003; Ngotho 2008). While such characterizations were outlandish, others were nearly impossible to verify. The Voice of America referred to Fazul as a "top commander" in al Shabaab, while other sources dubbed him as al Shabaab's leader (Wright 2003; Bar 2009; Baldauf 2010; Joselow 2011). Such accussations may have been baseless, but they suggested that Fazul was a considerable threat to Somalian and regional stability.

Because Fazul was effectively America's most wanted man in Africa, virtually any person or place circumstantially related to him became an object of suspicion. For instance, many experts began to see Fazul's home country of the Comoros as a terrorist haven, despite the fact that radicalism in the Comoros is minimal. In an article describing the Comoros as "fertile ground for extremist recruiters," one analyst went so far as to describe the Comoros as "Afghanistan with fish" – hardly an apt metaphor for the politically unstable but relatively peaceful island nation (Morland 2004). More informed analyses, ones that recognize that the Comoros has not been greatly influenced by Salafism, have nonetheless equated the Comoros with terrorism. For instance, a 2007 article in the *Economist* convincingly demonstrated that Fazul's trajectory was extraordinary for a Comorian. Nonetheless, the piece concluded with the revelation that everyone in the Comoros is a potential terrorist. The article described Comorian Islam as "lax," a departure from the Wahhabi teachings that inspire many jihadists, but

arrived at the contradictory conclusion that this laxity could make the Comoros an ideal location for terrorists to hide and recruit (*Economist* 2007). Fazul's association with Siyu, on the small island of Pate in Kenya, produced similar conclusions. Though Fazul is the only al Qaeda operative known to have lived on the island, one reporter fantastically dubbed Pate the "terror island" (Mutiga 2009). Knowledge of Fazul's presence on Pate Island engendered sensational accounts of Kenya's coast, but it also drew a concerted response from the U.S. military.

The phantom menace

In 2002 America's military mobilization in East Africa began in earnest. Many policy-makers believed that the invasion of Afghanistan would lead to a flood of jihadists escaping southwestern Asia for East Africa. Indeed, in 2001 and 2002 intelligence sources had tracked a small number of operatives across the Arabian Sea to eastern Africa. Policy makers feared that Somalia could rapidly develop into another Afghanistan and thus require significant investment, possibly even U.S. ground forces. With the invasion of Iraq gearing up, from the perspective of the Bush Administration a third major front in the war on terrorism was unacceptable. Therefore, in late 2002 the U.S. military's Central Command created the Djibouti-based Combined Joint Task Force–Horn of Africa (often referred to as HOA) in an effort to check al Qaeda's influence in the region (Deutsche Presse-Agentur 2002; Carafano and Gardiner 2003). Though the mass movement of terrorists to the region did not materialize, the U.S. military, at times in collaboration with the CIA, took two tacks: it built bilateral relations with regional governments and, as we will see in the next section, launched unilateral missions inside Somalia. The first tack was designed to address what policy-makers saw as the close relationship between weak states and violent extremism. HOA began to focus its attention on aiding East African nations to exert greater control over "ungoverned" spaces, including coastlines and borders (West 2005: 6). Following the 2002 terrorist attacks in Kenya and the discovery that Fazul Abdullah Muhammad had not only traveled between Somalia and Kenya by boat but also lived on Pate Island, the northern coast of Kenya became a primary focus of American attention. HOA established a Contingency Operating Location near Lamu on the northern Kenyan coast, and military advisors initiated joint exercises with the Kenyan Navy.

In addition to training Kenya's security forces, HOA offered development and humanitarian assistance to a number of allies, including Ethiopia, Djibouti, Tanzania, Rwanda, and Burundi, in the form of Civil Affairs projects. These operations, which hoped to win East African "hearts and minds," were deemed a way of ensuring long-term stability in the region. One of the greatest recipients of HOA development assistance was the northern coast of Kenya, particularly Lamu and Pate Island, where Fazul lived in 2002. These projects have ranged from digging wells and building water catchments to constructing or refurbishing schools and offering medical services to rural communities. Most Civil

Affairs projects have met with the enthusiastic approval of target populations because the military brings critical services to areas neglected by local and federal governments. At the same time, many communities have been suspicious of the military presence as they presume that less altruistic motives – intelligence gathering, for instance – lie behind the aid (Anonymous 2008; Bradbury and Kleinman 2010).

While Civil Affairs units sought to win the "hearts and minds" of East Africans, American foreign policy-makers pressured regional states to pursue more robust counterterrorism initiatives. As further encouragement, from late 2002 the United States began to offer enlarged security aid packages to Kenya, Tanzania, and Uganda (Aronson 2011). Provisions of security aid and military to military training quickly expanded national counterterrorism agencies and created entirely new ones. The case of Kenya is instructive in this regard because Kenya has received more pressure to address the problem of terrorism and more direct security aid than any other nation in the region. U.S. assistance to Kenya has sustained a multifaceted counterterrorism program that has led to the interdiction of many terrorist suspects. However, it has also indirectly contributed to human rights abuses, including illegal detention and extraordinary rendition (see below). Thus, Kenyan initiatives have compounded a deep sense of alienation felt by many of Kenya's Muslim citizens (Prestholdt 2011).

Since late 2002 the United States has trained hundreds of Kenyan security officials in the United States, many who are now part of the American-funded Antiterrorism Police Unit (ATPU), Kenya's elite, semi-autonomous counterterrorism force (Wax 2003a). The United States also assisted in the creation of Kenya's Joint Counterterrorism Task Force, a National Counter-Terrorism Centre (a semi-autonomous department of the NSIS), and the National Security Advisory Committee (Harmony Project 2007; Muhula 2007). In 2004 the Kenyan government announced plans to consolidate its investigation and prosecution branches to form a supra-agency tasked solely with the war on terror. At the same time, the United States established an East African Counterterrorism Initiative (EACTI), which earmarked $100 million to assist regional security forces. Kenya received $88 million of the EACTI funds (*East African Standard* 2004a; Harmony Project 2007; U.S. Department of State 2004; Bradbury and Kleinman 2010).[3] Recently, the United States initiated its most ambitious project to date: the Partnership for Regional East Africa Counterterrorism (PREACT). A mutlilateral body, PREACT seeks to build the capacity of East African partners in order to counter terrorist threats in the region and harmonize efforts among military, law enforcement, and development actors (Benjamin 2011; Wycoff 2012).

U.S. security aid and pressure on regional governments to act against the terrorist threat began to bear fruit almost immediately. In 2002 both Tanzania and Uganda passed national antiterrorism legislation loosely based on the American Patriot Act. Though a similar bill foundered in Kenya's parliament, America's counterterrorism investments in Kenya seemed to pay dividends with the arrests of an ever increasing number of suspected terrorists. But pressure on and aid to

Kenya produced a series of contradictory and unintended effects as well. In the months that followed the 2002 Mombasa attacks and President Mwai Kibaki's inauguration, the Kenyan government began to address the threat of terrorism in earnest. In addition to the Kibaki administration's interest in thwarting future attacks, the Kenyan government began to see counterterrorism as both an economic instrument for Kenya's security forces and a tool to leverage its diplomatic relationship with the United States (Prestholdt 2011). American emphasis on counterterrorism and the increasing volume and diversity of U.S. security aid to Kenya soon engendered an uncanny correlation between American criticisms of Kenyan authorities, Kenyan leaders' high profile meetings with American officials, and on-the-ground operations or terrorist indictments in Kenya. Kenyan authorities painted dramatic pictures of their efforts, thus placating the United States and ensuring the flow of security aid, but did less to address real security threats.

One of the best examples of the correlation of American pressure, security aid, and on-the-ground action in Kenya came in June 2003. Outgoing U.S. Ambassador to Kenya Johnnie Carson publicly criticized both the Daniel Arap Moi and Kibaki administrations for not making a single conviction related to the 1998 embassy bombing. Ambassador Carson pointed out that while other nations that suffered attacks had arrested and convicted suspects, Kenya had not (*BBC News* 2003).[4] Soon thereafter police targeted those circumstantially connected to Fazul Abdullah Muhammad, and Justice Minister Kiraitu Murungi reported that suspects linked to the 2002 attacks would be tried. If there was any question about the timing of the indictments Minister Murungi explained that the U.S. ambassador's public criticism had forced his hand. "We have decided to go public to show that as a matter of fact we are taking action," Murungi told reporters (Wax 2003b).

Kenyan investigators had already questioned Fazul's in-laws in Siyu, but in the wake of Ambassador Carson's criticism police arrested Fazul's father-in-law Kubwa Muhammad, brother-in-law Muhammad Kubwa, neighbor Said Saggaf Ahmed, and fellow teacher Aboud Rogo. All four were charged with murder in connection with the 2002 bombing (Maliti 2003a). Since the suspects were charged with a capital offense, the case first went to the Chief Magistrate's Court where it was vetted to determine if it was strong enough to stand in the High Court (the only legal body in Kenya that hears capital offense cases). However, before the process was complete the law was changed to require that all murder cases bypass the Chief Magistrate and go directly to the High Court. The timing of the legal change corresponded with the fifth anniversary of the embassy bombings. Thus, one day before the anniversary, state prosecutors filed new, more severe charges in the High Court and indicted three more men. Now the defendants were not only charged with murder in connection with the 2002 bombing but also, in a nod to Ambassador Carson, the 1998 embassy bombing (*Daily Nation* 2003; *East African Standard* 2003; Majtenyi 2003).

As Kenya's high-profile terrorism trial began, the government gained diplomatic dividends. In October 2003 President George W. Bush invited President

Mwai Kibaki to the White House. Kibaki was the first African head of state recognized by the Bush Administration with a state visit and counterterrorism was at the top of the agenda. President Bush billed the invitation and dinner as a message to Kenya that "we like the cooperation … particularly on counterterrorism" (Bush 2003b; Gedda 2003). Soon, however, the terrorism trial in Nairobi took a series of surprising turns. The prosecution brought charges against one more defendant, Mohammed Ali Saleh Nabhan, while the High Court dropped capital charges against three others. However, the three were rearrested the day of their release and charged with conspiracy, which put their case in a lower court (Maliti 2003b). The trials quickly devolved into fiasco. In mid-2005 the conspiracy trial ended after the prosecution failed to introduce a single witness who could connect the defendants to the attacks. Perhaps the greatest surprise came in the murder trial when the Criminal Investigations Department officer who led the investigations, Joseph Mugwanja, admitted that there was no conclusive evidence linking the defendants to the bombing. He acknowledged that he may have "worked with the wrong facts and arrived at wrong conclusions" (*Daily Nation* 2005).[5]

In the years since the trials Kenyan investigators have sought to draw positive domestic and international attention to their counterterrorism operations. One apparent strategy has been to time high-profile counterterrorism operations to coincide with events of significance to U.S.–Kenya relations. Perhaps the best example of this strategy came on the tenth anniversary of the U.S. Embassy bombing when the specter of Fazul was once again the centerpiece of Kenya's counterrorism efforts. In early August 2008, just four days before the anniversary, the ATPU claimed that Fazul was living in the coastal town of Malindi. Information leaked to the press suggested that he had come to Malindi for kidney dialysis and was hiding in a seaside villa. Police claimed that Fazul had escaped their ambushes, but they assured the public that they were on his trail. In the meantime, the owner of the villa, his young son, and wife – who would later die in custody – were charged with abetting Fazul (Mudi 2011).

In the weeks following the failed ambush Kenyan police reported several Fazul escapes (*Daily Nation* 2008). He was sighted in a van heading towards Mombasa and police claimed to have just missed him in an upscale Nairobi neighborhood. When evidence of Fazul's presence was exposed to public scrutiny, police claims proved dubious. For example, no healthcare facility in Malindi possessed a dialysis machine (Mburu 2008). More questionable was the only hard evidence the police could offer: Fazul's passports confiscated during the Malindi raid. The passport photos showed a man who, perhaps close in age to Fazul, was certainly not him. The search for Fazul reached its crescendo on the tenth anniversary of the U.S. Embassy bombing. As the international media focused on Kenya, the authorities flexed their muscles. In their hunt for Fazul, police and sniffer dogs searched every vehicle, person, and bag leaving Mombasa. The world heard that a key al Qaeda operative was in Kenya and that security forces were marshalling all of their resources to apprehend him. America pledged continued counterterrorism aid to the Kibaki administration.

The phantom menace ensured the flow of U.S. aid, but America's return on its counterterrorism investments was more ambiguous.

In the weeks that followed the anniversary of the 1998 bombings more Fazul sightings were reported in neighboring Tanzania. One Tanzanian newspaper even claimed that terrorists were threatening its staff in an attempt to prevent the paper from publishing stories about Fazul. In September, similar reports of Fazul's presence in Uganda prompted a national security alert (Ombati 2008). Much as in Kenya, no proof of Fazul surfaced in either Tanzania or Uganda, yet United Press International would later report that Fazul was recalled from his activities in Tanzania to head al Qaeda operations in Somalia (*This Day* 2008; United Press International 2010b). While the phantom menace seemed to be everywhere in late 2008, the U.S. military concentrated its search for Fazul on one place in particular: southern Somalia.

America's war in Somalia

With the establishment of HOA in Djibouti and northern Kenya, the U.S. military began to take direct action against al Qaeda operatives in Somalia. As early as 2003, units composed of the military's Joint Special Operations Command (JSOC) and CIA agents, collectively known as Task Force Orange, began making forays from Nairobi to Mogadishu. Dubbed Operation Black Hawk, these efforts were designed to collect information about the al Qaeda cell, limit its tactical capability, and kill al Qaeda operatives, or, failing this, encourage Somali militants to capture them. Operation Black Hawk was among the most successful American programs to date as it set up a network of cell phone monitoring devices in Mogadishu and recovered scores of surface-to-air missiles akin to those used in the 2002 Mombasa attacks. However, CIA intelligence assets found little evidence of a significant al Qaeda presence in Somalia (Naylor 2011a).

Concurrently, a covert element of HOA termed the Joint Special Operations Task Force–Horn of Africa (JSOTF-HOA) launched a separate operation focused solely on Fazul Abdullah Muhammad called Operation Bowhunt. In the wake of the Mombasa attacks Fazul was considered the top high-value target in the region. With the aid of a high-speed catamaran and Kenyan authorities, Operation Bowhunt scoured the shallow waters of the Kenya–Somalia border region in search of Fazul. However, in August 2005 authorities would discover that Fazul was not in the northern coastal region but instead had relocated to Mombasa. CIA operatives monitoring a suspicious email account tracked the account user to an internet café near Mombasa's Central Police Station. Kenyan police sent to arrest the account user found two suspects and took both into custody. Before arriving at the police station one of the suspects, a young Mombasan named Feisal Ali, set off a grenade. In the ensuing chaos the second suspect fled. Police would later discover that the second suspect was Fazul and that he was likely planning another attack in Kenya (England 2004; Naylor 2011b).

Soon after Fazul's escape JSOC began supplying a number of logistics resources to the search for al Qaeda cell members in eastern Africa. In December 2006 the Ethiopian invasion of Somalia offered an ideal opening to scale up JSOC's activities (Naylor 2011b). In late 2006, Ethiopian, Somalian, and American intelligence sources claimed that Fazul and other high-value targets were in southern Somalia. Earlier that year a militant coalition called the Islamic Courts Union (ICU) effectively brought an end to nearly fifteen years of civil war in Somalia. The ICU was a loose confederation of clan leaders, Islamists, and authorities in Somalia's Islamic court system – the only administrative body to have maintained a semblance of order (including the suppression of piracy) during a decade and a half of war. This broad coalition was able to challenge Somalia's unpopular and besieged Transitional Federal Government (TFG) and broaden its sphere of influence to include the nation's capital, Mogadishu, in mid-2006. By the end of the year, the ICU emerged victorious and threatened the TFG in their Baidoa stronghold (Barnes and Hassan 2007; Verhoeven 2009). However, neighboring Ethiopia saw the ICU as a proxy for Ethiopia's long-time enemy, Eritrea, which Ethiopian policy-makers presumed to be aiding Oromo National Liberation Front insurgents in eastern Ethiopia. To limit Eritrea's influence in Somalia, Ethiopia attempted to use its considerable military power to bolster the TFG. Nevertheless, by late 2006 the ICU had hemmed in the TFG, and only a contingent of Ethiopian troops stood between the TFG and annihilation.

American policy-makers were deeply suspicious of the ICU because of its purported links to al Qaeda. Intelligence sources were particularly concerned about one faction that was gaining power within the ICU: *al Shabaab*, or "the youth." Some of al Shabaab's leaders – including Mukhtar Ali "Robow," Aden Hashi Farah "Ayro," and Ahmed Abdi Godane – trained or fought in Afghanistan. More important, U.S. intelligence claimed that al Shabaab leader "Ayro" was sheltering Fazul, Saleh Ali Nabhan, and other al Qaeda operatives (Hansen 2008). To counterbalance the increasing power of the ICU and capture high-ranking al Qaeda members, the CIA covertly funded a consortium of warlords known as the Alliance for the Restoration of Peace and Counter-terrorism (ARPCT). According to John Prendergast of the International Crisis Group, the United States funneled between $100,000 and $150,000 per month to ARPCT in 2006 (Lacey 2006). This strategy succeeded in rendering a small number of al Qaeda associates to Djibouti and Afghanistan, but it also empowered al Shabaab. In the ensuing confrontations between the ICU and ARPCT, al Shabaab proved itself an elite fighting force capable of holding their own against the warlords. By June 2006 al Shabaab had assisted the ICU to expand its control to Mogadishu and much of the country (Hansen 2008).

U.S. officials now feared that Somalia was fast becoming a nation like Afghanistan under the Taliban. An overtly religious, albeit moderate, movement had come to power, and if reports that elements within the ICU were sheltering Fazul were true, the new government in Mogadishu might offer al Qaeda a safe haven in Africa. This was unacceptable to the Bush administration. Neighboring

Ethiopia was less concerned about al Qaeda, but it had no interest in an Islamist government in Mogadishu. More to the point, Ethiopia wished to ensure some measure of control over the situation in Somalia. Fearing that the ICU could gain full control in Somalia and that Eritrea would thus gain the upper hand, the Meles Zenawi government decided to take whatever steps necessary to keep the TFG in power. In December 2006 Ethiopia mobilized for a full-scale assault on the ICU (Prince 2010; Axe 2010; Bamfo 2010). On December 14, when the Ethiopian invasion of Somalia was imminent, Assistant Secretary of State for African Affairs Jendayi Frazer characterized the leadership of the ICU as "extremists to the core," and controlled by "East Africa al Qa'ida cell individuals" (Menkhaus 2007: 378). Frazer's reference was unmistakable. Though the State Department produced no conclusive evidence of Fazul's influence, officials pointed to Fazul as a key player in the ICU, who were now deemed extremists (MSNBC 2007; CNN *Inside Africa* 2007). America would stand behind its Ethiopian ally in the Somalia war. It would also launch its own attacks in southern Somalia.

Ethiopia's vested interests in Somalia and its proxy war with Eritrea drew little attention beyond the Horn of Africa. At the same time, Fazul's presence validated America's support for the Ethiopian invasion as well as America's own interventions.[6] Much like the U.S. State Department, the American popular media portrayed the invasion and subsequent U.S. actions as necessary. Drawing on earlier fantastic accounts of Fazul, news outlets presented the master-terrorist as a threat quite out of proportion to his abilities, a contagion that required U.S. military action. In early January 2007 David Schuster of MSNBC's *Hardball* asked terrorist expert Bob Windrem about the state of the war on terrorism in Africa. Windrem explained that the jihad now threatened to reach every corner of the African continent:

> beyond Somalia there has also been concern about rising jihadist support in places like northern Nigeria, among certain Muslims in South Africa, as well as various and sundry places along the Mediterranean littoral, the Libyans, and the Tunisians, and the Egyptians, and the Algerians … and the Moroccans, all of whom have participated in various and sundry al Qaeda attacks; so Africa, both North Africa and southern Africa, as well as East Africa, has been seen as a boiling pot, essentially, for al Qaeda, and the US has even gone so far as to consider establishing an Africa command to deal with the threat.
>
> (MSNBC *Hardball* 2007)

Cast in this light, Fazul's links to the ICU seemed a harbinger of an Africa quickly falling under al Qaeda's influence. This was far from true, but the Bush administration harbored similar concerns. In February the President ordered the creation of a new command for Africa that would be tasked with coordinating U.S. security efforts across the entire continent. By the end of the year Africa Command (AFRICOM) reached operational capacity.

In early January 2007 the invading Ethiopian army routed Somalia's ICU and its al Shabaab elements. The ICU was crumbling, but U.S. military sources believed that as many as 3,000 foreign jihadists – including Fazul – had congregated in the southern coastal town of Ras Kamboni, one of the last strongholds of the ICU and site of militant training camps. As the Ethiopians advanced, the U.S. military used satellites to track suspected ICU fighters. They relayed these positions to Ethiopian helicopter gunships, which targeted remaining ICU troops in southern Somalia and northern Kenya (Agence France Presse 2007). The U.S. military then launched its own attacks. The most high-profile assault came on January 7 when Air Force gunships based in Ethiopia struck targets in the Ras Kamboni and Kismayo areas where the White House believed the "principal al-Qaida leaders" to be based.

On the second day of the attacks the U.S. military announced that Fazul was dead. One day later it retracted the statement. The Pentagon confirmed that Fazul and the other operatives had escaped, but insisted that the mission was a success by revealing that its objectives were much broader than the neutralization of Africa's most wanted terrorist (*New York Times* 2007). A month later, Pentagon sources leaked information to the *New York Times* suggesting that the targets of the attacks had included ICU leaders, and not just foreign fighters, though none of the ICU's upper echelon had been killed (Gordon and Mazzetti 2007). Over the following months more former ICU leaders would be targeted. While these revelations might have raised questions about U.S. foreign policy in the region or the identities of those who were killed, American military escalation in Somalia passed with little reflection. Fazul's presence, it would seem, was sufficient justification for American efforts to liquidate opponents of Somalia's transitional government and thus assist the Ethiopians to install the TFG in Mogadishu.[7]

After the Ethiopian invasion many of the ICU's moderate leaders escaped to Eritrea and Kenya. They also shrewdly distanced themselves from the radical elements of the ICU movement, including al Shabaab. Back in Somalia the Ethiopian invasion bled into a complicated war. Ethiopia's occupation and support for the TFG gave al Shabaab militants a clear target as well as a popular recruiting tool. Al Shabaab marshaled a convenient nationalist rhetoric, claiming that they would free Somalia from foreign invaders, Ethiopian as well as American. The group soon became a powerful insurgent force willing to use tactics imported from Iraq and Afghanistan to challenge the occupation, including suicide bombing, assassinations, and roadside bombs. As Stig Jarle Hansen has demonstrated, alongside its nationalist rhetoric al Shabaab began to espouse an ideology similar to that of al Qaeda, one which interpreted the war against the Ethiopians, and later the African Union peacekeepers, as a theater in the larger confrontation between Muslims and the West (Hansen 2008, 2010; Marchal 2009). Though al Shabaab's tangible links with al Qaeda were minimal, coverage of Somalia in the international media suggested that al Shabaab had fallen under Fazul's leadership (Associated Press 2007b). Fazul's memoirs, however, offer a very different picture. Fazul was both suspicious and critical of al Shabaab because he believed that it was doing little to

gain local support while doing much to create divisions within the broader Islamist movement in Somalia (Lahoud 2012a).[8]

Stripped of the more moderate ICU umbrella, al Shabaab was reborn in the Ethiopian occupation of Somalia. Ethiopia's actions therefore had the opposite of their intended effect. In 2007 the extremist fringe of the ICU became precisely what U.S. officials feared most: a radical, pan-Islamist insurgent group that sought links with al Qaeda. Al Shabaab would later lose its popular appeal as a result of its brutality and strict application of Islamic law, but the insurgents were able to wage a successful campaign against the Ethiopian occupation force and capture substantial territory in southern and central Somalia, including much of Mogadishu (Hansen 2008). Militants even expanded the war to other countries via terrorist attacks in Uganda and Kenya. For instance, al Shabaab targeted Uganda because Ugandan troops constituted a substantial portion of the African Union soldiers defending the Somali transitional government in the wake of the January 2009 Ethiopian withdrawal.

In July 2010 al Shabaab bombed a restaurant and nightclub in Kampala during the World Cup finals. At least seventy-four people were killed in the blasts, making them the deadliest terrorist attacks in East Africa since 1998. Authorities in neighboring Kenya have likewise attributed multiple bombings to al Shabaab and its sympathizers. For example, two people died in 2010 when a man attempting to board a Kampala-bound bus in Nairobi detonated a grenade (Ombati 2010). Less than a year after Kenya's invasion of Somalia, militants staged a coordinated attack on two churches in Garissa, North Eastern Province, which killed seventeen people and injured scores more. What is most alarming is that the frequency of such attacks increased dramatically in 2012 and included numerous assaults in Nairobi, Mombasa, and the Somalia border region (CNN 2012; Reuters 2012). In the wake of the Kenyan invasion of Somalia terrorism in Kenya has become a greater concern than ever before.

The United States has developed a multi-track strategy to respond to the rise of al Shabaab, the threat it poses to its neighbors, and its increasingly formal links with al Qaeda. Depending primarily on hard, or "kinetic," power, the core goals seem to be to neutralize al Shabaab by killing its leaders, as well as al Qaeda cell members, and severing ties between al Shabaab and al Qaeda. The most widely reported element of this strategy is a program of targeted strikes against both al Shabaab and al Qaeda targets. Less evident is another critical dimension: extraordinary renditions to Somalia and other East African nations. Finally, the United States has begun to provide significant military aid to the TFG and the African Union Mission in Somalia (AMISOM) forces, while at the same time cultivating a semi-autonomous Somali counterterrorism force.

As we have seen, the United States initiated a program of sustained kinetic power in Somalia in the days after the Ethiopian invasion. In addition to the publicized Air Force attacks, since 2007 the U.S. military has employed missiles, drones, and clandestine Special Forces to strike targets in Somalia (Mazzetti and Schmitt 2011).[9] For instance, during the Ethiopian invasion JSOC deployed members of SEAL Team 6 and the Air Force 24th Special Tactics Squadron

alongside elite Ethiopian forces. Their targets were high-value individuals, Fazul in particular. Though the Ethiopian leadership became concerned that U.S. attacks might discourage other African nations from committing troops to Somalia, over the following months America's target list grew to include a number of high-ranking al Shabaab leaders, "infrastructure targets" in military parlance (Woodward 2010; Naylor 2011c). In May 2008 the United States claimed a significant success in its Somalia mission with a missile strike against Aden Hashi Farah "Ayro" and Sheikh Muhyadin Omar. Both al Shabaab leaders were killed.

In September 2009 JSOC launched their most spectacular assault to date in Somalia. In an operation dubbed Celestial Balance, Navy SEALs intecepted the convoy of Saleh Ali Nabhan, an al Qaeda operative and close associate of Fazul, who JSOC had been monitoring for years (Gettleman and Schmitt 2009; United Press International 2010a; Naylor 2011b). SEALs killed Nabhan and, in a rehearsal of the Osama bin Laden raid, delivered the terrorist's body to a naval vessel where it was given Islamic funeral rites and cast into the Indian Ocean. Much as in Pakistan, since 2009 the Obama administration has expanded its program of targeted killings in Somalia. In the summer of 2011 alone U.S. forces carried out at least four strikes on al Shabaab, followed by several more in the fall and winter (Ibrahim 2012). This uptick in Special Forces activity, and the establishment of new drone bases in Ethiopia and the Seychelles, suggests that America's military engagement with eastern Africa is steadily expanding.

A less dramatic development in the wake of the Ethiopian invasion was a new policy of extraordinary rendition within East Africa, which coordinated the efforts of U.S., Kenyan, Ethiopian, and TFG counterterrorism forces. During the Ethiopian invasion of Somalia hundreds of refugees crossed from Somalia into Kenya. Though most of these refugees entered Kenya without incident, Kenyan authorities detained roughly 150 people from more than eighteen nations, some as young as seven months (Kimathi and Butt 2007; Human Rights Watch 2008). Kenyan police transferred the group, which included Fazul's first wife and her children, to Nairobi where Kenyan and American investigators vetted the detainees. Most were held without charge for weeks. Before the detentions could draw a concerted response, Kenyan authorities, with U.S. assistance, transferred at least ninety of the detainees, including thirty-four women and children and at least nine Kenyan citizens, to Mogadishu (Mwagiru 2007; Rice 2007). In Somalia, most of the suspects were handed over to the Ethiopian military. The Ethiopians in turn transported the entire group to Addis Ababa (Associate Press 2007a).

While in Ethiopian custody the detainees underwent weeks, and in some cases more than a year, of confinement and interrogation. Most were denied access to lawyers and family members. Some detainees were subjected to solitary confinement, stress positions, and psychological as well as physical torture (Grey 2007; Human Rights Watch 2008). American representatives did not torture detainees, but over a roughly four-month period the Ethiopian military delivered suspects to American interrogators each day. Once the interrogations were complete most

of the foreign nationals were released. However, many of the Ethiopian detainees disappeared, while the Kenyan government refused to acknowledge that any of its nationals were held in Ethiopia. Only after significant pressure from Kenyan civil society, the release of a series of damning international reports on Ethiopia's detention facilities, and the publication of the passenger lists from the secret rendition flights did the Kenyan government retrieve its citizens from Ethiopian detention.

Despite international outrage over what came to be known as the "African Guantanamo," the practice of extraordinary rendition in East Africa persisted. For example, in 2011 reporter Jeremy Scahill uncovered evidence of other cases of extraordinary rendition from Kenya to Somalia. Scahill interviewed Ahmed Abdullahi Hassan, a Kenyan citizen of Somali descent who was rendered by the Kenyan government to Somalia in 2009. According to Scahill, American authorities relayed concerns about Hassan to Kenya's ATPU, which then rendered him to Somalia. Hassan was taken to an underground detention facility in Mogadishu run by Somalia's National Security Agency (NSA) where he was held without charge (Democracy Now 2011). Hassan's story offers a window into the most secretive aspect of America's strategy in East Africa. According to a senior Somali intelligence official, the United States has begun to build an intelligence infrastructure in Somalia similar to that in Kenya. The United States pays the salaries of Somali intelligence agents and, in return, the CIA and U.S. military intelligence are given access to detainees. Additionally, the CIA has begun training its own semi-autonomous counterterrorism force at a compound in Mogadishu built for this purpose (Scahill 2011). These programs aim to skirt the corruption and infighting of the TFG while ensuring that U.S. investigators have direct influence over counterterrorism operations as well as unrestricted access to suspects.

The final track in America's Somalia strategy is the direct funding of regional militaries, particulary security forces from Uganda and Burundi, which are the backbone of AMISOM. For instance, a recent U.S. defense spending bill proposed over $75 million in counterterrorism aid to fight al Shabaab, including funds to Uganda and Burundi as well as Kenya, Djibouti, and Ethiopia (Scahill 2011). According to the *New York Times*, in 2011 the Pentagon facilitated a $45 million military aid package to AMISOM forces that included surveillance drones and night-vision equipment (Mazzetti and Schmitt 2011). By late 2011, direct aid to AMISOM totalled as much as $400 million (Gettleman 2011). The Obama Administration evidences no interest in a more significant American military presence in Somalia, and so investment in AMISOM provides the cheapest and most significant check on al Shabaab's power in Mogadishu and southern Somalia. Moreover, U.S. policy-makers harbor a distrust of the TFG because of the rampant corruption and infighting that has marred its tenure. As a result, while the United States has pledged aid in cash and kind to the TFG, the bulk of U.S. security aid is directed towards the foreign military presence in Somalia (BBC News 2009).

What is noteworthy about such allocations of aid is that they do little to ensure the stability of the only viable government body in Somalia, the TFG.

In short, the United States has invested in foreign militaries as a short-term means of eliminating al Shabaab but has done far less to build the capacity of a state that may, in the long run, ensure that Somalia does not become a terrorist safe haven. At the same time, the United States is supplying multiple East African militaries with ever-greater martial and intelligence gathering means. Not only does the United States demand little accountability in return for such resources, but such aid has indirectly assisted Kenya and Ethiopia to carve out spheres of influence in Somalia, which may further weaken the Somalian government. The United States and its regional partners may defeat al Shabaab, but Somalia's future is far from certain.

Unexpected victories

Just before midnight on June 7, 2011 the thirteen-year manhunt for Fazul Abdullah Muhammad came to an end. Fazul and his Kenyan driver, Musa Hussein Abdi (a.k.a. Musa Dheere), traveled a dark road on the outskirts of Mogadishu. They were crossing from al Shabaab territory into a suburb controlled by the TFG. While it is not clear if the pair made a wrong turn, were given false assurances that they would be allowed across the border, or were led into a trap by al Shabaab leaders who viewed Fazul as an impediment to the merger with al Qaeda, they were stopped at a TFG roadblock. After a brief exchange the TFG commander ordered Musa Dheere to turn on the vehicle's interior lights so that the soldiers could see his passenger. Dheere complied, then flicked the lights off before the soldiers could identify Fazul. When the checkpoint commander instructed him to turn the lights on again, someone in the vehicle opened fire on the soldiers. A short gun battle ensued and within minutes both Fazul and Musa Dheere were dead. What happened next was as incredible as any turn in the Fazul story: nobody recognized the most wanted terrorist in Africa (Omar 2011).

TFG soldiers found laptop computers, mobile phones, and $40,000 in the vehicle. They also found medical supplies, a fraudulent South African passport, pictures of Fazul's children, a Kalishnikov rifle, and a rapid fire BB gun. Despite the multiple American strikes in Somalia, a $5 million bounty, the fact that Fazul's driver attempted to conceal his passenger's identity, and a cache of evidence, none of the government soliders recognized al Qaeda's most important operative in East Africa. Instead, they divided Fazul's possessions, impounded his vehicle, and later threw his body in an unmarked grave. Photojournalists visited the scene and snapped pictures of Fazul, but none of them recognized him either. Only the following day, after Somalia's NSA reviewed evidence confiscated from the scene, was Fazul disinterred and samples of his DNA flown to U.S. intelligence officers in Nairobi for testing. This remarkable lack of recognition was not a function of an elaborate disguise. As photos taken at the scene of the deadly exchange attest, Fazul looked exactly as he did in his 1998 FBI wanted poster; he had not even changed his hairstyle. If there was any lingering doubt about his identity, the "master of disguise" was carrying a copy of his Comorian passport. Despite Fazul's death, his myth remained bulletproof. Soon

after the Mogadishu shootout CNN referred to Fazul as a bombmaker with "disguises that enabled him to move in and out of Somalia," while Kenya's *Daily Nation* similarly described him as an "expert in the art of disguise" (Lister and Verjee 2011; Mutiga 2011).

The circumstances of Fazul's death and the evidence recovered from his vehicle offer an extraordinary window on al Qaeda's presence in the region. They also exemplify the challenges American strategists face in eastern Africa. The most notable fact established by Fazul's death is that although the CIA operated a counterterrorism training facility in the Somali capital and AMISOM boasted over 6,000 soldiers in Mogadishu at the time, the most wanted man in Africa moved relatively freely. Amazingly, Fazul felt secure enough in Mogadishu to travel with just one guard, Musa Dheere, who was both well known to counterterrorism forces and easily distinguishable because he only had one leg. Fazul's relative freedom of movement in Somalia's capital suggests that America's greatest weakness in its East African war is not the size or capability of its allied militaries but the caliber of its intelligence. The U.S. military had the tactical capacity to launch a surgical strike against Fazul, much as it had against Aden Hashi "Ayro" and Saleh Ali Saleh Nabhan. Yet, it seems that American kinetic power and security aid foundered on an inability to pinpoint Fazul. Moreover, while Fazul's death may prove the greatest victory in the war on terrorism in East Africa, the United States can take no credit for it. Despite the hundreds of millions of dollars spent on regional militaries, warlords, counterterrorism training, monitoring equipment, and targeted strikes, neither the United States nor American-trained forces killed Fazul. Instead, this singular victory was attributable to rank-and-file TFG forces, the allied military that has benefited the least from U.S. security aid.

Two months after Fazul's death the war in Somalia took another surprising turn when al Shabaab hastily withdrew from its positions in Mogadishu. A combination of conditions, including those of al Shabaab's own making, crippled the insurgency in the first half of 2011. In the spring, AMISOM enjoyed a series of military successes. Perhaps more importantly, dwindling revenues – in part as a result of American efforts to cut off remittances from the Somali diaspora and trade at Ras Kamboni – and mounting tensions among al Shabaab's leaders corroded al Shabaab's tactical capabilities. The final, and perhaps most signficant, factor contributing to al Shabaab's retreat from Mogadishu was the 2011 drought. Al Shabaab did little to plan for or alleviate hunger in the areas under its control. Thus, as the severity of the drought increased, people began to starve. To make matters worse, al Shabaab leaders banned foreign aid organizations and prohibited cilivians from seeking food outside their areas of control. Drought became famine and al Shabaab found itself unable to control the humanitarian crisis (Agence France Presse 2011; Gettleman and Ibrahim 2011).

By August 2011, famine left al Shabaab weaker than at any point since 2008 and thus the insurgents withdrew from Mogadishu. In an attempt to capitalize on this weakness, and in retaliation for the cross-border abductions of four Europeans, the Kenyan government began its own operations in Somalia in October

2011. The invasion, dubbed Operation Lindi Nchi (Defend the Nation), encountered little resistance from al Shabaab. Kenyan forces soon captured the strategically important port of Ras Kamboni in southern Somalia. The Kenyan military, aided by local militias, then pushed north. Kenya's stated goal is to secure its borders, but it has actively supported an erstwhile buffer state in Jubaland that it will likely seek to fortify. Soon after the Kenyan invasion the Ethiopian military crossed the Somalia border into the Shabelle Valley. In alliance with local militias, it too appears to be staking out a sphere of influence. It remains to be seen if Kenya, in its first foreign military intervention, and Ethiopia, in its second incursion into Somalia since 2006, can deal a death blow to al Shabaab.

The series of events related to the thirteen year hunt for Fazul and his closest associates offer a microcosm of the "mission creep" that has bedeviled America's war on terrorism. Immediately before and in the wake of the 1998 embassy bombings American efforts focused on investigating al Qaeda cell members and bringing them to justice. The goal of finding al Qaeda cell members remained paramount after September 11, but the Department of State, CIA, and military each took more active roles. By 2003, American initiatives had expanded beyond investigation to include the training of regional police and military forces, establishing a semi-permanent position for American armed forces in the region, and conducting joint CIA–Special Forces operations. Later, this CIA–Special Forces coalition employed ARPCT warlords as a proxy force to check the power of the Islamic Courts Union. At the same time, the United States put greater diplomatic pressure on partner nations to find and imprison terrorist suspects, while both the Department of State and military engaged in "hearts and minds" projects.

With the Ethiopian invasion of Somalia in 2006, U.S. military capacity expanded to include air strikes and clandestine ground forces in southern Somalia. To assist the search for high value al Qaeda members, the United States encouraged a program of extraordinary rendition from Kenya to Somalia, Ethiopia, and beyond. U.S. interests also began to extend beyond "hearts and minds" campaigns and attempts to capture or kill al Qaeda cell members to weaking al Shabaab through targeted assasinations of its leaders. Concurrently, the United States offered significant military assistance to regional partners in the fight against al Shabaab. Thus, by 2012 America's counterterrorism program was more complex than ever before. Though no evidence of a direct threat to the United States from eastern Africa has come to light, America's counterterrorism campaign boasts a robust combination of "hearts and minds" efforts, a CIA counterterrorism program in Mogadishu, extraordinary rendition, targeted strikes, pressure on regional governments, and increasing security aid to regional militaries.

American policy-makers have responded to September 11 with a combination of "hard" and "soft" power designed to counter jihadist violence and recruitment in eastern Africa. This strategy has led to the capture or assassination of several members of al Qaeda and al Shabaab. It has also engendered strong bilateral relationships and tendered valuable information about al Qaeda's network beyond eastern Africa at a much lower cost in American lives and money than

have the wars in Afghanistan and Iraq (Naylor 2011d). Nonetheless, America's eastern Africa policy has drawbacks. First, it entails an over-reliance on America's regional partners for intelligence, the apprehension of suspects, and military engagement. This, in turn, ensures that the particular interests of each partner ultimately determine the yield of U.S. aid investments. The cases of Kenya and Ethiopia are instructive in this regard.

A necessary reliance on Kenyan authorities has incentivized counterterrorism to the point that the police have regularly taken unnecessary, heavy-handed, and ineffective actions. Such actions have alienated and angered Kenyan Muslims such that, despite America's "hearts and minds" efforts, many feel more marginalized than ever before. Ethiopia's pursuit of its geopolitical interests in Somalia has had more deleterious effects on America's counterterrorism agenda. Ethiopia unilaterally invaded Somalia, at least in part, as a means of undercutting Eritrea's influence in the Horn of Africa region. Yet, the Ethiopian intervention replaced a moderate Islamist group with extremists who invited Islamist radicals from abroad, introduced terror tactics from Iraq and Afghanistan, coordinated attacks in other East African nations, and swore allegiance to al Qaeda. Six years after the first Ethiopian invasion the U.S. military and CIA have succeeded in killing several al Qaeda operatives, but the war in Somalia has become a regional conflagration in which Somalia's rebels are now more closely linked with al Qaeda than ever before and terrorist attacks across the East Africa region are on the rise.

The second limitation of America's attempt to counter the influence of al Qaeda in eastern Africa is that it has not addressed the fact that al Qaeda's jihad, like other forms of terrorism, is not ultimately a martial strategy. It is, in the minds of al Qaeda's ideologues, an attempt to shift the consciousness of the Muslim masses and thereby both grow the pan-Islamist movement and inspire other violent acts. Al Qaeda has not realized this quixotic goal. In fact, al Qaeda's prescriptions for political reform now face their most serious challenge in the waves of pro-democracy mass action across the Middle East and North Africa. Nonetheless, al Qaeda has succeeded in gaining the world's attention, drawing sympathizers to its message, and fashioning itself into an entity perceived by many to be far greater than a small conglomoration of militants. The war on terrorism's scope and targets are more obscure than previous conflicts, and so it follows that its phantoms are more incredible. But by resorting to the discourse of specters we forget that this is precisely the perceptual frame that al Qaeda propagandists work tirelessly to fashion (Devji 2005; Saniotis 2005). By publically overrating the threat posed by al Qaeda and the scope of the necessary response, we justify extravagant and sometimes counterproductive expenditures while granting people like Fazul status, power, and influence that they could not otherwise attain (Coolsaet 2005). From a position of weakness, al Qaeda's only prospect for long-term success is such circular amplification: the projection of itself as a placeless, fomenting entity that can only be defeated by overwhelming force – by total war.

The discourses of war and specters have made al Qaeda into an existential enemy. Multiple sources – media, government, military – have encouraged this

amplification and so reinforce America's disproportionate response to the threat of terrorism. Jihadists have become powerful because we are lost in this fog of war, unable to appraise the real capacities of our enemies or recognize the limitations of our perceptional frames. More than a decade after September 11 the specters that emerged from the psychical debris of the attacks in New York and Washingon are legion. Through both official policy and popular projection they have facilitated a political moral panic, the dimensions of which are staggering. As artifacts of imagination these phantoms cannot be defeated through security aid, diplomatic pressure, or military action alone. Only by addressing our misconceptions about al Qaeda and reassessing our response to the threat that it poses can we design appropriate strategies to address violent extremism in eastern Africa and around the world.

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Notes

1 German Chancellor Gerhard Schröder similarly referred to September 11 as a "declaration of war against the entire civilized world" (Erlanger 2001).
2 The U.S. State Department even viewed the 2008 post-election violence in Kenya through the prism of the war on terrorism. Though the violence had no relation to pan-Islamist agendas, Assistant Secretary of State for African Affairs Jendayi Frazer believed that the situation in Kenya was critical because terrorists "might seek to exploit the situation for their benefit" (U.S. Embassy Addis Ababa 2008).
3 In 2008 US military to military assistance helped to develop a new Kenyan Army unit, the Ranger Strike Force, which U.S. government sources claimed would act as a front-line against "infiltrators and armed groups" (U.S. Department of State 2009).
4 Kenyan authorities apprehended one of the embassy bombers, Mohamed Al-Owhali, immediately after the attacks. He was quickly extradited to the United States, convicted by a New York court in 2001, and is now serving a life sentence for his role in the Nairobi embassy bombing.
5 Legal proceedings were not yet over for one defendant, Omar Said Omar, who was rearrested and convicted on firearms charges. Since there was no evidence that Omar lived in the flat where the weapons were found, the conviction was overturned on appeal (Kwamboka 2008).
6 In hindsight, it appears that before 2007 al Qaeda experienced significant difficulties operating in Somalia (Menkhaus 2004; Harmony Project 2007; Lahoud 2012a).
7 Soon after the publicized strikes, the Ethiopian leadership began to see American gunship assaults as a liability to their efforts to attract support from other African nations. The American air raids were discontinued (Naylor 2011c).
8 Nelly Lahoud suggests that these criticisms may have informed Osama bin Laden's decision to withhold formal affiliation with al Shabaab. Ayman al Zawahiri, on the other hand, was more inclined to build links with the Somali insurgents, and thus less than a

year after the deaths of bin Laden and Fazul, al Zawahiri announced the merger of al Qaeda and al Shabaab (Lahoud 2012b).

9 Dana Priest and William A. Arkin (2011) contend that some of the drone attacks in Somalia have been conducted by the CIA.

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7 Counter-revolution in U.S. military affairs

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On January 20, 2002, slightly more than four months after the airplane hijackings and collisions into the World Trade Center in New York City, the Pentagon building in northern Virginia and a field near Shanksville, Pennsylvania, U.S. President Bush delivered his "State of the Union" address to the US Congress and followers worldwide. He declared that the USA was fully "at war" and identified three countries, Iran, Iraq and North Korea as forming an "Axis of Evil." The speech that Bush read aloud accused the governments of all three countries of repressing their citizenry and building "weapons of mass destruction," but reserved its most lengthy and detailed criticism for Saddam Hussein in Iraq, "a regime that has something to hide from the civilized world." David Frum, the primary author of Bush's address, said later that he had been told by fellow presidential speechwriter Michael Gerson to build an argument for overthrowing the regime of Saddam Hussein in Iraq and link it in some rhetorical fashion with US efforts to pursue terrorist organizations worldwide, notably the group called Al Qaeda that was understood to be behind to airplane attacks (Frum 2003). This speech, its authors and its deliverer that night all had worked together to help set in place a proschema or *casus belli* for an eventual military assault on Iraq.

As Gershon Shafir and Cindy Schairer outline in their chapter, this US "State of the Union" address was one of several deft and dramatic expansions of what and whom constituted the enemy of the US state after 9/11 and would become its targets in a wide-ranging war known as the global war on terror (GWOT) and more colloquially among US soldiers as "the long war." As the authors also point out, regime change in Iraq and the concomitant assertion of US sovereign authority and war-making powers, including the latter's international legal re-codification, had been sought especially by a coterie of conservative activists in the US since at least the end of the Cold War in 1989.[1] Shafir and Schairer have identified this attempt to redefine US war-making capacities as one of three major "counter-revolutionary agendas" that purposefully were brought to the fore in the aftermath of the 9/11 attacks.

This essay takes up one central feature of this recent project to alter US war-making capacities: the remarkable re-invigoration of "counter-insurgency" warfare (or COIN, following its military acronym) as a battlefield approach. COIN is defined as the ensemble of smaller-scale "population-centric" operations

and techniques explicitly designed to secure legitimacy of rule through winning the "hearts and minds" of a population, a phrase that US President Kennedy first used in 1963 to describe US objectives in Latin America (Dickenson 2009). COIN draws upon a panoply of military, economic, political and sociocultural components and is contrasted with warfare that more narrowly emphasizes large-scale operations with heavy battlefield weaponry designed to destroy enemy forces and resources. In military shorthand, COIN combines both "hard" and "soft" power, drawing on kinetic and non-kinetic weaponry.

The return of COIN to the center of US military doctrine is well-documented and continues to be widely discussed and debated within the armed forces and in civilian sectors (Bumiller 2012). At this writing, the Obama Administration, even as it moves toward ending the US wars in Iraq and Afghanistan, has reiterated the centrality of the counter-insurgency doctrine, emphasizing especially its high-tech, intelligence-centric, clandestine and "special operations" dimensions for future US military efforts, particularly in Asia, while keeping the sociocultural "nation-building" dimensions as a secondary strategy. This COINing of the US military has extended into civilian life as well, not only orienting approaches to domestic security and policing, but also driving new directions in public and academic research. Among the most well reported is the military's outreach toward the social sciences, especially scholars who study and analyze culture, broadly defined. Another side of COIN has meant significant funding for new research in military and security technologies, well beyond weaponry. From the vantage of the early twenty-first century, this COIN-infused security doctrine is defining not only US warfare abroad, but also domestic security and social life in deep-set ways reminiscent of the Cold War.

Rather than a step-by-step history of COIN's development from the standpoint of its present stature, this essay instead makes sense of its current configuration by viewing it from a less visible perspective that comprises a part of its counter-revolutionary past. This unconventional vantage is found by beginning with one of COIN's most visible expressions and then moving through it to discern some of its relatively occluded content. In the process, the essay highlights the consolidation of a more deep-set, less-visible, and long-term social project oriented toward defeating what have been defined as "Maoist" and "Marxist" guerrilla struggles in Asia, Africa and Latin America since the 1960s. In this, COIN literally is a counter-revolutionary agenda, even as this agenda is popularly understood now to have revolutionized the US military and its future role in conflicts world-wide (Heuser 2007). As a surprising and unrecognized historical continuity, anti-Maoism is the approach that informs the US strategic goal to "rebalance toward the Asia-Pacific regions," which is motivated in part by China's growing strength in the region.

The two sides of the coin

Slightly more than a year after Bush's Address, the US military led a sustained air, land and sea based assault on the country of Iraq, seizing control of the

capital city, Bagdad, after less than three weeks of fighting. From the perspective of the US war-planners and commanders as well as the numerous media reporters who had been invited to cover the attack, it seemed like a masterful military success, echoing the swift US-led invasion of Afghanistan carried out the previous year. The attack followed a military strategy that had congealed since the 1990s and was solidly established with the appointment of Donald Rumsfeld as Secretary of Defense in January 2001. Known as the Revolution in Military Affairs (RMA), it featured an emphasis on rapid air and ground attacks coordinated and controlled via sophisticated communication and information technologies.

Echoing the neo-conservative political goal of changing the legal terms of US warfare, RMA was a significant variation to the dominant approach known as the Weinberger Doctrine, which stipulated that US military force would only be used in situations involving vital national interests and would employ overwhelming force in order to guarantee that the military could achieve decisive victory in short order. The Weinberger Doctrine had defined US military strategy since the end of the Vietnam War and was part of a general reaction against the earlier approach advocated by secretary of Defense Robert McNamara, that allowed for small-scale deployments with circumscribed objectives.

On May 1, President Bush hailed the US-led incursion in Iraq as an unqualified "victory," famously landing as a passenger in a 1970s-era Lockheed S-3 anti-submarine reconnaissance airplane on the aircraft carrier USS *Abraham Lincoln* and delivering a short address under a fluttering banner that read: "Mission Accomplished."[2] In remarkably short order, however, small-scale guerilla-style attacks on US forces and their newly recruited and trained Iraqi Security Forces as well as sites of vital infrastructure in the country began to climb dramatically, especially in the provinces of Baghdad and Al Anbar. This growing and increasingly multiplex insurgency initially was dominated by former Saddam and Baath Party supporters and later included an array of religious and nationalist militias from within and outside of Iraq – hardly unified, but all deeply opposed to the US invasion and occupation. Civilian and combatant casualties climbed into the thousands as a result of both the insurgency and US-led "counter-insurgency" operations, notably in Fallujah and Mosul at the end of 2004 and continuing into 2008. Several US officials acknowledged that they were fighting a difficult guerilla war that included a significant level of popular support and that there was little possibility of a quick resolution to the conflict.

From the perspective of the US military, a central challenge was how to diminish the appearance that US forces were illegitimate invaders and occupiers of Iraq. A key part of this effort to secure legitimacy – the classic challenge addressed by COIN – entailed promoting popular elections in the country and the formation of a national Iraqi civilian government by January 2005. In the face of widespread criticism that popular elections amidst the violent fighting would be little more than a propaganda charade, US General John Abizaid, Commander of the United States Central Command – which oversees all US

military activity across northeast Africa, the Arabian Peninsula and southern and central Asia – appeared on the popular US television show, "Meet the Press" (that aired on September 26, 2004). Host Tim Russert peppered the General with questions about the viability and legitimacy of such an election in Iraq, pointing out that regions of the country were so stricken with conflict that fair balloting would be impossible.

Abizaid said:

> My belief is that elections will occur in the vast majority of the country. I can't predict 100 percent that all areas will be available for complete, free, fair and peaceful elections … That having been said, if we look at our previous experiences in El Salvador, we know that people who want to vote will vote.

At that moment, for a US TV news watching public, 1980s El Salvador had been rhetorically transformed into a successful "model" to be applied in Iraq. The next day *New York Times* columnist David Brooks echoed and expanded on Abizaid's Iraq–El Salvador comparison with a short op-ed titled "The Insurgency Buster." Recounting the violence surrounding El Salvador elections in the early 1980s, Brooks argued that the elections, among many things: "proved how resilient democracy is"; "undermined the insurgency"; and "produced a President, José Napoleón Duarte." Gesturing toward the possible future in Iraq (and also with respect to impending elections in Afghanistan), Brooks referred in a particular way to a period in Salvadoran history:

> A democratically elected leader … can do what Duarte did. He can negotiate with rebels, invite them into the political process and co-opt any legitimate grievances. He can rally people on all sides of the political spectrum, who are untied by their attachment to the democratic idea.

Slightly more than a week after this call to "do what Duarte did," US Vice President Cheney made the same comparison in the context of a public debate with Democratic Vice presidential challenger John Edwards. "Twenty years ago we had a similar situation in El Salvador," Cheney said.

> We had a guerilla insurgency [that] controlled roughly a third of the country, 75,000 people dead. And we held free elections. I was there as an observer on behalf of the Congress … And as the terrorists would come in and shoot up polling places as soon as they left, the voters would come back and get in line and would not be denied their right to vote. And today El Salvador is a [whole] of a lot better because we held free elections … And [that concept] will apply in Afghanistan. And it will apply as well in Iraq.

The following month, November 11, 2004, Donald Rumsfeld offered a version of the El Salvador comparison when he visited El Salvador and gave an

address at the US Embassy, thanking El Salvador for sending troops to Iraq. He also touted El Salvador as an exemplary model of how a country can move from civil war to become a stable democracy and close US ally (Associated Press 2004; US Department of Defense 2004).

Two months later, on January 8, 2005, the popular US magazine *Newsweek* carried an article by Michael Hirsh and John Barry suggesting that US military leaders privately were discussing the "the Salvador option" as a way to combat the insurgency in Iraq (Hirsh and Barry 2005). Like the other references to El Salvador, features of the country's recent history were culled to provide a model for future US conduct in Iraq. However, the *Newsweek* article marked a significant alteration. In this case, the "El Salvador option" referred not to elections, but to the possibility of training special Iraqi attack groups by US advisors. The article quoted anonymous sources within the US defense establishment who said that officials were directly discussing the tactic, but that no official decision had been reached about deploying it. The article also described private debate about whether the CIA or US Pentagon would have control over the project. Most glaringly, however, the article performed a rhetorical move in its second full paragraph, linking such training with the formation of paramilitary "death squads" as, the article suggested, the US had done in El Salvador during the 1980s. This triggered a veritable tidal wave of public discussion and echoes of the claim worldwide. "El Salvador-Style Death Squads to be Deployed by US Against Iraq Militants," announced the London *Times* on January 10, 2005, citing the *Newsweek* story.

At a news conference on January 11, Rumsfeld called the idea of an El Salvador option "nonsense." Yet within two weeks, the famous investigative journalist Seymour Hersh published an essay in the US magazine *The New Yorker* effectively substantiating the claim that the US Pentagon was discussing the "Salvador Option" for Iraq. Quoting an anonymous source in the intelligence community, Hersh also linked the "Option" with a specific kind of clandestine fighting. According to Hersh,

> The President has signed a series of findings and executive orders authorizing secret commando groups and other Special Forces units to conduct covert operations against suspected terrorist targets in as many as ten nations in the Middle East.… The new rules will enable the Special Forces community to set up what it calls "action teams" in the target countries overseas which can be used to find and eliminate terrorist organizations. "Do you remember the right-wing execution squads in El Salvador?" the former high-level intelligence official asked me, referring to the military-led gangs that committed atrocities in the early nineteen-eighties. "We founded them and we financed them," he said. "The objective now is to recruit locals in any area we want. And we aren't going to tell Congress about it." A former military officer, who has knowledge of the Pentagon's commando capabilities, said, "We're going to be riding with the bad boys".
>
> (Hersh 2005)

Within days of the appearance of the article, US Department of Defense Spokesman Lawrence DiRita issued an impassioned statement that attempted to identify several errors in Hersh's article, though without addressing its central argument about expanded Pentagon authority for covert actions and tactics abroad.

Throughout 2004–05, "the El Salvador Option," as it publically circulated, had moved from promotion of wartime elections to also include specially trained "action teams" for covert activities, including assassinations. Its appearance as a kind of ideological formation was tied to official and unofficial statements publically circulating in the media. Its authorship was collective and diffuse and included the media together with state officials, but as a discursive entity it referred to Salvadoran history in particularly sharp ways for its audience. In its first variant it was an example of democratic consolidation under US leadership; in the second, it was US-orchestrated small-scale warfare with targeted killings and abductions of specific people. Like two sides of a single coin, the Salvador Option appeared as a viable model for dealing with the multiplex Iraq insurgency. It seemed a rational response to an unexpected situation, though critics decried it as an especially brutal manner of reacting. The sense that the US state was a rational entity, acting in the form of decision-making, properly (or not) selecting from a quiver of options was the dominant image.

Rational choice among options

As a chief architect of the US military invasion of Iraq in 2003, Paul Wolfowitz helped translate what has been known as "neoconservative" political doctrine into concrete policy under the presidential administration of George W. Bush. Among the features of the loose body of principles that make up the "neocon" perspective is an unabashed celebration of the US nation-state as the preeminent political, military and moral leader of the world. Accordingly, this entails unquestioned global military superiority coupled with the capacity and commitment to act with "moral clarity" and pursue issues unhindered by forms of tolerance and accommodation. As I have mentioned, one feature of the doctrine called for re-organizing the US military into a more rapid strike force, so that it could be used more widely and with greater frequency. Neocon doctrine and the desire for quick action and the expectation of swift results informed the invasion of Iraq and the goal of transforming the country into a US-modeled free-market democracy (Ayyash 2007). Shortly before President Bush made the infamous carrier landing, Paul Wolfowitz had contacted an "old friend" named Jim Steele and suggested that he join the newly appointed Jay Garner as an advisor on restoring and developing electrical power in Iraq (Anderson 2004). At the time, Mr. Steele was President and CEO of a large electrical utility company, TM Power Ventures, based in Houston, Texas. Steele also had served as a vice president and managing director at Enron Corporation, participating in a controversial project in Guatemala that included illegal hiding of Enron's taxable US income. According to Steele, Wolfowitz suggested that this professional background in electrical power and energy development would be useful in

Iraq and that he might serve as senior US advisor to the Iraqi Electricity Commission.

Upon arrival in May 2003, however, Steele switched his orientation and took command of a US advisory team that organized, trained and then regularly operated with a special team of police known as the National Iraqi Police Service Emergency Response Unit. Steele publically claimed that in March 2004, he "participated in the raid that resulted in the capture of Saddam's former Minister of Interior, General Mohammed Zimam Abdul Al-Razzaq, the four of spades with a bounty of one million dollars on his head" (PMSB 2008). Consistent with the "establish legitimacy" challenge and the desire to diminish the appearance that the US was an occupying invading force, the "White House" issued a press release in February that placed a slightly different emphasis on the agents of this capture as well as marking the date as the weekend of Saturday, February 14, 2004:

> Iraqi police are helping to make their country more secure by investigating, identifying, and arresting former officials of Saddam's regime. This weekend, the National Iraqi Police Service Emergency Response Unit arrested Muhammad Zimam abd al-Razzaq al-Sadun, who is a former Ba'ath Party Regional Command Chairman. His arrest shows that the new Iraqi police force is taking responsibility for Iraq's security.
>
> (White House Press Release 2004)

Behind this manner of representation, by May 2004 Steele's Emergency Response Unit (ERU) had became the initial building block from which the US military began to develop a "third force" to work along with the reconstituted Iraqi police and army. A private contracting agency, US Investigations Service (USIS), owned at the time by the DC-based investment consortium Carlyle Group, took over and expanded the training program as part of a $64.5 million dollar no-bid contract it had secured. Initially rejected by Iraqi authorities, the various ERUs began to work as a functioning counter-insurgency force in direct connection with US Special Forces in Iraq (Chatterjee 2007).

During that summer, Steele helped to advise and work together with an additional counter-insurgency group known as the Iraqi Special Police Commandos. Unlike the ERUs, this group explicitly drew on Baathist veterans of Hussein's special forces and Republican Guard, a strategy that Steele's friend Wolfowitz had argued for originally as part of US war strategy. The Special Commandos as a counter-insurgency force and Steele's supervision of them became more publically recognized through the appearance of Peter Maas's essay, "The Salvadoranization of Iraq?" in the *New York Times Magazine* in May 2005. This was the second public identification of Steele as a former US Special Forces soldier who had been stationed in El Salvador during the war and the first one that linked his presence in Iraq with the repetition of a model of "successful" counter-insurgency warfare derived from El Salvador

With these various news reports, a simple chronology was being put into place that made it appear as if the US state was a rational actor: The anti-US

insurgency in Iraq was unexpected (pure chance) but there existed a viable response that now (2005) could be chosen. This option was in fact a fully formed model of counter-insurgency derived from the success story of US involvement in El Salvador during the 1980s. This so-called success, as US officials liked to note, had yielded the defeat of a popular (and anti-US) insurgency and the establishment of a US-allied government in El Salvador, completely open to neoliberal restructuring.

Behind this appearance of rational decision-making in the face of an unexpected challenge, the training of special teams by US forces – the hard side of the El Salvador Option – actually was a path that already had been actively pursued since the beginning of the war by Wolfowitz and Steele. To call on the option in the face of the insurgency was to falsely gesture toward an action as if it were an untried choice – something known but new. What was new, as has become clear, was simply that Wolfowitz and Steele's project became augmented and expanded. On the surface, however, public figures and the media had jointly co-authored a tale of rational choice, of choosing an option according to propositional logic in the face of the unexpected.

Rather than a complete facade to be discarded, however, this appearance of "the option" had real effects. At the least, it helped set the ground for public and US Congressional approval of the subsequent "surge," as if the US military had new kinds of more effective and yet untried tools at its disposal. In reality it seems that counter-insurgency was a consistent part of strategy from the beginning of the war, though largely hidden from view as it was enacted. James Steele's presence in both El Salvador and Iraq signaled one simple connection (Grandin 2006). But behind his name was another less visible story of continuity. The guiding model for US counterinsurgency warfare had been abstracted from the 1980s Salvadoran war and it similarly purported to be a success story. Yet like the public image of the "El Salvador Option" as a rational choice for the US state, this counterinsurgency model hid its formative historical conditions that actually were largely the opposite of the model's promises.

"Made in El Salvador"

James Steele, a veteran of the Vietnam War, had gone to El Salvador in 1984 as part of a major increase in the US role in the Salvadoran war. Colonel Steele's mandate as commander of the US Military Group (USMILGP) was to build up the Salvadoran armed forces' capacity to defeat the FMLN. One part of this project involved establishing strategically located training centers within the country. Under the rubric of advising, US Special Forces and their Salvadoran counterparts could train and undertake military missions in specific parts of the country deemed important in the conflict. The training centers were meant to help organize small-scale forces that could effectively "decapitate" the FMLN insurgency, weakening its leadership and civilian support structure while also gaining valuable intelligence information.

The first of these strategic training centers was established near the port city of La Unión. Known as CEMFA (*Centro de Entrenamiento Militar de la Fuerza Armada)*, the facility was constructed under US supervision and could hold up to 2,000 soldiers and as many as 100 trainers, with the potential to graduate 7,500 soldiers annually (Childress 1995). When the Honduran government ordered that the US stop training Salvadoran soldiers at the US Regional Military Training Center (CREMS) built in 1983 at Puerto Castillo, Honduras, CEMFA became the main US training base in El Salvador, especially for "counter-insurgency" warfare.

Greg Walker, a US special forces soldier who served in El Salvador, recounted an early episode in the creation of CEMFA, offering his perspective of wartime southeastern El Salvador:

> A fifteen-man advisor element in La Unión discovered itself tasked to establish a regional training camp (CEMFA) for the Salvadoran Military. Deep in Indian country, the trainers were dismayed at the lack of perimeter defenses and a competent security force for the badly needed project. Within one week they were on alert, a sizable force of guerrillas reported to be preparing to storm the ragged *quartel.*
>
> (Walker 1994: 98)

The US advisory team did establish a 25 kilometer defensive zone around the site of the base as a "training area." On this dual purpose of the zone, Walker quotes one member of the 15-man US team: "Our primary concern was to be able to fight from inside the *cuartel* if attacked. But we had our people out in the bush conducting training both day and night. We went on patrols, during one of which a suspected guerilla was captured spying on the base from a tree" (Walker 1994: 98–99).

FMLN forces in the region took great interest in the new training center and were specifically concerned with the techniques of counter-insurgency warfare that US trainers would be imparting to new Salvadoran recruits. According to one former guerilla (an intelligence expert) with whom I spoke in 1993, "We learned the most about the US forces and how they would advise the Salvadoran military by talking with the (North) Vietnamese. Those old generals knew how the US fought and they told us what to expect."[3]

On October 10, 1985, the FMLN launched a coordinated assault with at least 300 soldiers on the newly constructed center. This was among the largest operations undertaken by the FMLN in this period of the war. Their explicit goal was to capture or kill the US advisors at the base and curtail the training operations. Five US "Green Beret" soldiers were stationed at the base and, according to Walker, "fought back against the advancing guerillas, rallying ESAF (El Salvador Armed Forces) security forces deep within the confines of the base and leading a valiant counterattack" (Walker 1994: 99). The US embassy officially denied that US forces had actively participated in repelling the attack. The US soldiers survived, but 40 Salvadoran soldiers were killed and more than 60 were wounded in the fighting. The FMLN also reported a high number of casualties.

According to most accounts of the war, the new US training strategy was effective. FMLN guerilla forces appeared to change their tactics in response, reducing the scale of their active operations and standing troop levels. Nevertheless, they did maintain the capacity to rapidly move in and out of regions, destroying infrastructure and military resources, while keeping a high level of popular support throughout the country. Despite the training plan at CEMFA overseen by Steele, US officials, not unlike their counterparts in Iraq two decades later, acknowledged that they were bogged down in a difficult and unconventional insurgency. Some went so far as to call it a stalemate by 1986–7.

Models as purposeful tools

During this time of stalemate in El Salvador, the US Army signed a contract with a private company called BDM International for the firm to produce a new analytic model of counter-insurgency warfare that could be used to defeat the FMLN.[4] In 1987, as the Salvadoran war became regarded as a stalemate by US forces, the US army undertook a large-scale research project in the country with the goal of completely revising and also radically invigorating counter-insurgency doctrine and practice. What emerged was an elaboration of principles, placing "legitimacy" and "actionable intelligence" at the top of the list. At the strategic level, the most important figures in the project were Edwin Corr, the Ambassador to El Salvador between 1985–8 and Dr. Max Manwaring, the leader of the research project that has yielded what now is widely known in strategy circles as the Manwaring Paradigm. With a sense of paternal respect, some special warfare experts refer to the framework as the "Max Factors."

Despite the new doctrine and efforts, the Salvadoran war did not end on the US or Salvadoran military's terms. The UN brokered its end in 1992. The popular guerilla forces, the FMLN, became a legitimate political party and the historic authority of the Salvadoran military was significantly curtailed in Salvadoran society. By the terms of the US counter-insurgency doctrine the war was, in fact, a defeat. Indeed, years later in 2009, the FMLN candidate Mauricio Funes became the popularly elected President of El Salvador.

The "El Salvador Option" as a success story to be duplicated in Iraq was a kind of social conjuring act. The Manwaring Paradigm that partially undergirded the option is a set of principles greatly abstracted from real events. It is not an actual account of a particular victory or a history of actual events, but a future-oriented proscriptive model derived through quantitative inference. In its invocation for Iraq, it hides its own lack of being carried out successfully in El Salvador, as well as the 1986–7 stalemate that immediately led to its production.

Modeling the model

During the same decade that the US supported the Salvadoran military with money, arms and training at places like CEMFA, including the sophisticated

model building associated with the BDM report, the US government also dramatically expanded its efforts at anti-narcotics policing and law enforcement worldwide. By the end of the Salvadoran war, the total US budget oriented toward enforcing drug laws was $8.2 billion dollars, divided among about 40 different federal agencies and programs. The majority of these were administered by officials in the Departments of Justice, Treasury and Defense, although what some scholars have dubbed the "Narco-Enforcement Complex" also included the Department of the Interior, Transportation, Agriculture and Forest Service as well as the federal, state and local court systems (Bertram *et al.* 1996). In the late 1980s, the George H.W. Bush Administration had created several military "Joint Task Forces" to coordinate military–civilian cooperation in the "War on Drugs" (Kraska and Kappeler 1997). Among the most well-known has been Joint Task Force Six (JTF-6) of Fort Bliss, Texas, founded in November 1989. Much like the US advisory teams in El Salvador, JTF6 has been responsible for providing operational, training and intelligence support for any requesting law enforcement agency within the continental USA, including the US-Mexico border regions in California, Arizona, New Mexico and Texas.

According to an innovative survey conducted by Peter Kraska and Victor Kappeler, more than 40 percent of police officers interviewed mentioned direct experience with US special forces and counter-insurgency training. One of these respondents reflected on police force members and their counter-insurgency background, likely in El Salvador – perhaps even working at CEMFA, though La Unión is a port city, not a dense tropical forest or swamp:

> We've had [U.S.] Special Forces folks who have come right out of the jungles of Central and South America. These guys get into real shit. All branches of military service are involved in providing training to law enforcement. U.S. Marshalls act as liaisons between police and military to set up the training – our go-between. They have an arrangement with the military through JTF-6 [Joint Task Force 6] … I just received a piece of paper from a four-star general who tells us he's concerned about the type of training we're getting. We've had teams of Navy SEALs and Army Rangers come here and teach us everything. We just have to use our judgment and exclude information like: "at this point we bring in the mortars and blow the place up".
>
> (Kraska and Kappeler 1997: 15)

In 2004, US Major General Alfred Valenzuela co-authored (with Col. Victor Rosello) an essay in the well-known military affairs journal *Military Review*.[5] He explicitly mentioned "The El Salvador Model" and argued: "If the United States is serious about countering terrorism and drug trafficking in Columbia, it might be worthwhile to dust off the El Salvador archives and examine the model used there to create the necessary organization and structure with which to respond." Though Valenzuela did not mention the Manwaring Paradigm he did cite the exemplary US training provided under the overall leadership of Colonel

Jim Steele after 1984, mentioning CEMFA as evidence of the model's success. Manwaring also has published important extensions of the model, arguing explicitly that it is applicable to the "small wars" of anti-narcotics policing worldwide and also for the reinvigoration of US state sovereignty against the threats of "gangs and other illicit transnational criminal organizations" (Manwaring 2007). In this way, despite its initial 1980s wartime formulation, it continues to undergird US political-military relations with El Salvador as anti-gang and anti-narcotic policing have become the central area of cooperation in the aftermath of the war. Besides the connection to James Steele, Edwin Corr, the former US Ambassador to El Salvador during the time of the Manwaring-led research project, remains a close friend and colleague of General Petreus, who, during the Iraq war, similarly worked to completely revamp US military doctrine, placing counter-insurgency at the center.

Conclusion

After the Vietnam War counter-insurgency warfare was stricken from the books of the US military. US special forces who served in SE Asia received desk jobs, effectively ending their career paths in the military. A small group of counter-insurgency advocates and experts survived this figurative purge and by the early 1980s, as US President Reagan made the wars in Central America a US priority, got a second lease on life in the region. In their published papers and articles, the continuity with Vietnam is explicit. Central America, especially the war in El Salvador between 1980–92 provided the perfect chance to erase the ghosts of that defeat. In the available record, it is clear that US involvement was motivated in part by the US military's desire to show that it could, in fact, win a counter-insurgency war overseas, build a nation and leave behind a pro-US government with electoral democracy and a US oriented market and productive sector. In 2007, in the face of a similarly frustrating insurgency war and apparent stalemate in Iraq, US officials conjured up the Salvadoran war and peace settlement as a successful model that could be applied in Iraq as part of the so-called US "surge." With Petreus, a military general currently Director of the CIA, the paradigm has arrived. There now is a model and a large group of advocates and practitioners with political power who share a history of counter-insurgency across Vietnam, El Salvador, Iraq and Afghanistan. This is the larger legacy of 9/11.

"Legacy" necessarily carries with it the action of bequeathing. Indeed, the two processes really are difficult to separate in a formal sense, each blurring into the other across any spatio-temporal scale. In basic terms, causes are also effects and effects are also causes – often in a highly multiplex fashion. Gershon Shafir and Cindy Schairer have set the task of this book by marking a crucial causal moment, defined as "the manifold and far-reaching response of the Bush–Cheney Administration to the Al Qaeda terrorist attacks of 9/11 – articulated under the novel doctrine of a "global war on terror" (GWOT). This chapter contributes to the project by examining how a key feature of this doctrinal shift actually has required conjuring up a novel version of the past that preceded it, so that

it could move forward and bring about its objectives. Logically, in order to become a possible cause of certain effects, "it" had to cause the effect that it had been a cause of similar earlier effects. As this chapter proceeds, we see that this whole process was itself the effect of other causes.

More concretely, the chapter has been about the congealing of a newly dominant model of US counterinsurgency warfare that has guided US policies in Iraq since the invasion and continues to organize US involvement in Afghanistan and many other small-scale operations currently underway in locations throughout Asia, Africa, Latin America and the Middle East. This model came into being crucially by invoking its origins in an earlier conflict, the Salvadoran civil war (1980–92) in which the US government was directly involved. In 2007, "the El Salvador Model" made its appearance as a successful example of proper US counter-insurgency prosecution.

Notes

1 Allies in this project with respect to Iraq also included those who sought to solidify control of Middle East oil production by setting up a new allied government in Iraq and gaining relatively unregulated access to its noted petroleum reserves (Klare 2004).
2 In 2009, at the end of his presidency, Bush admitted that "Clearly, putting 'Mission Accomplished' on an aircraft carrier was a mistake."
3 Confidential interview, San Miguel, July 1993. See also Spencer 1996: 1–15.
4 Like USIS, the private US military contracting agency in Iraq, BDM also was owned for a period by the Carlyle Group, whose director, Frank Carlucci, had been Donald Rumsfeld's roommate and wrestling teammate at Princeton University.
5 *Military Review* is printed bimonthly in English, Spanish and Portuguese and is distributed to readers in more than 100 countries. It is also printed in Arabic on a quarterly basis.

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Conclusion

8 The politics of moral panics

Norms and national insecurity

Alison Brysk

> We have nothing to fear but fear itself.
>
> Franklin Roosevelt

This book has shown how we all lost the "war on terror," because real external security threats were reconstructed by a political moral panic into a dysfunctional miasma of national insecurity. Our goal was to extend the reach of moral panic theory from the study of social deviance amplified by mass media to the analysis of politics that revolve around moral and symbolic battles, connect it with political institutions and dynamics, and examine the circumstances in which it is likely to emerge and persist in a global era. Our analysis shows that the politics of fear systematically distorts a rational and proportionate policy response to security threat, and that policies driven by moral panic inevitably entail human, institutional, and geo-political "collateral damage." Thus, once moral panic is unleashed, the "war on terror" becomes a cure worse than the disease.

In a previous volume of case studies that compared the United States response to 9/11 to other developed democracies that faced a similar terrorist threat, we found three factors that shaped the likelihood a democracy would craft a rational and effective security policy based in the rule of law. The first factor is national institutional legacies and safeguards, based on the response of underlying political and legal regimes to the lessons of prior threats. The second is the international context for security policy, as human rights practices respond to various global dynamics of hegemony, isolationism, multilateralism, diffusion, and the filtering role of regional institutions between the national and the global. The final factor, and the one most subject to political construction, is social learning – especially perception of the nature and source of threat, security, and the legitimacy of authority by both political elites and mass publics. We concluded that the United States' sub-optimal response to human rights abuse at home and abroad in the name of national security was predicted on all counts: an executive-heavy system lacking prior experience coping with threat, a hegemonic international role subject to alternating bouts of isolationism and bilateral intervention, and a mass political culture unusually vulnerable to the politics of fear (Brysk and Shafir 2007).

The analysis of U.S. counter-terror policy as moral panic attempts to deepen our understanding of how the politics of fear is mobilized, internalized, and institutionalized. In this case, moral panic is not just a mass social psychological response to overwhelming threat and change, typified in witch burnings in societies suffering a modernization crisis, which may be manipulated by civic or religious authorities. Rather, moral panic in contemporary security policy is a political strategy by political and security elites to foster counter-revolution. The strategy includes secrecy and the manipulation of information to foster a climate of national insecurity that disables rational risk analysis. Real threats are amplified, framed globally, and falsely linked to uninvolved forms of social difference or dissidence. As a political strategy, the purveyors of moral panic attack the separation of powers in modern democracies and create extra-institutional "grey zones" to destroy legal safeguards. The new national security apparatus, including foreign policy, surveillance, immigration, and civil liberties regimes, is institutionalized to endure beyond the immediate threat – a war without end.

It is important to remember that while moral panics are manipulated, our underlying capacity for fear serves a purpose: to defend identity against existential threat. The norms promoted by the politics of fear disclose the content of the threatened identity, and associated roles, strategies, and perceived interests. Moral panic operates within a "social imaginary" of nationalism, security, and authority relations that point to the purpose of counter-revolution. Moreover, moral panics tap into pre-existing cultural prejudices and definitions of self and society by contrast to threatening outsiders. Moral panic attempts to defend a world of American dominance, neo-liberal globalization, secular modernization, and delegated authoritarian management of the hinterlands. Such social imaginaries are constructed at multiple levels and in multiple directions, from micro-level protests against the mosque of the imagined Islamic invader to heightened policing of national borders to hegemonic diffusion of a global counter-insurgency ideology to defend the current order.

Our case studies have shown the roots, dynamics, and impact of a U.S. national security policy of moral panic. In each case, we see the hallmarks of moral panic: (1) the exaggeration of a threat posed by a person or group – the "insurgent" and the "master terrorist," neither of whom had any connection to 9/11 or the wars in Iraq and Afghanistan; (2) the overbroad definition of the social group, including undocumented migrants, domestic dissidents in Africa, as well as Muslim Americans, all construed as enemies to civilization; (3) a disproportionate response to the exaggerated threat – from massive investment in "the El Salvador model" of counter-insurgency to the Horn of Africa theater of operations through war in Iraq; and (4) legally enshrined institutional changes that attempt to make the moral panic enduring – a whole new model for recruiting and training security personnel, structural shifts in foreign aid, immigration law, and the effort to establish a series of proxy regimes in East Africa.

Moral panic begins at the water's edge, as it did during World War II's Japanese internments, and Cold War McCarthyism. El Salvador provides the baseline for counter-revolutionary proxy war, and a training ground for the

counter-insurgency model later revived in the Mideast wars of the twenty-first century. In East Africa, we see the other side of the equation: the export of the war on terror to far-flung "ungoverned spaces," with the paradoxical effect of fomenting new threats in the conflict spiral of counter-insurgency.

U.S. immigration policy, by contrast, has long been characterized by waves of moral panic and securitization of transnational flows. From the nineteenth-century Yellow Peril to the current castigation of Mexican migrants, the border-crosser is labeled as an existential threat, not merely an economic challenge. Domestic Islamophobia, as witnessed in the mobilizations against the construction of mosques and the imaginary domestication of sharia law, is a similar case of turning difference into threat, culture into war, and war into culture. This case reveals clearly the strategic manipulation of political elites and "political entrepreneurs" seeking power through mobilizing new constituencies, and the media as enablers of the politics of fear.

Human rights are by definition universal and inalienable; the 1993 Vienna Conference announced an international consensus that rights are "universal, indivisible, and interdependent." The element of human rights that is most vulnerable to suspension in times of national insecurity is their inalienability. Inalienability means that universal rights are not contingent on citizenship, nor revocable on the basis of behavior or suspicion of crime. The treatment of refugees described by Meade violates the universal standards of international law. The perverse logic of moral panic not only denies universal rights to non-citizens, but attempts to deflate the rights already inherent in citizenship rights on the basis of profiling or accusation; for example, subjecting U.S. citizens to military tribunals or systematic surveillance. William J. Aceves' paper shows how moral panic unravels the enabling rights guaranteed by the U.S. Constitution: the right to remedy and the right to representation.

Our analysis shows that a political moral panic requires political solutions: promotion of rational risk assessment, revival of the rule of law, and social learning. These solutions are interdependent, as freedom of information suspended in panic is necessary for rational debate, rule of law is necessary to protect challengers, and the strengthening of legal channels to process threat and produce security is a precursor to social learning. From a sociological perspective, the good news is that while political elites may be motivated to sow fear, academics, journalists, and legal professionals are invested in due process and the power of the pen.

However, a major implication of the moral panic analysis of national insecurity is that rational appeals to rights and the rule of law will rarely succeed on their own, without deconstructing the politics of fear. The struggle for human rights is never a simple matter of norm promotion, but a dialectical frame contest. Both policy elites and mass publics are pulled between appeals to universal rights and more particular norms of national insecurity, nationalism, and institutional self-interest. Moreover, the targets of moral panic are "pre-stigmatized," which facilitates both conscious scape-goating and unconscious framing based on fear. The channels for this norm contest include education,

media, history, and cultural rituals and spectacles – especially struggles over the use of public space.

This means that part of the value of a project such as this one is to unpack moral panic, and reconstruct a rational assessment of threat, normative commitment to the rule of law, and global social imaginary. This means querying the source and ambit of national security: Security by whom? For whom? And from what? It means recovering the true spirit of the liberal social contract, that government exists to protect the rights of its citizens. It also means rethinking the role of rhetoric in human rights campaigns and the cultural wars that accompany moral panic.

How do moral panics dissipate? Aristotle, the father of political rhetoric, reminds us that political persuasion requires truth, trust, and emotional appeals; logos, ethos, and pathos. From the 9/11 report to Wikileaks, information politics can increase transparency, accountability for decision-making, and rational risk assessment. The ethos of democracy, and its great strength in protecting national security, is that trust resides in predictable and bounded institutions of authority. But rhetorics of truth and trust can be swamped by pathos.

Aristotle identifies the most powerful political emotions as anger, fear, and pity. Thousands of years later, cognitive science confirms the power of pathos in political decision-making. Some decisions follow a direct emotional pathway with somatic markers for primal emotions like anger, fear, surprise, and joy – as in George W. Bush's self-reported "gut" that launched two wars. But even those thought processes that reach higher cognitive centers operate through "framed reasoning," following neural pathways activated by language and metaphor. "Motivated reasoning" shapes public opinion, in which values and dispositions frame incoming information to conform to beliefs. While such findings appear to leave little room for social learning, the same science shows that hope and empathy are also powerful brain states (Castells 2009: 144, 153, 149). They suggest that what Aristotle would call pity will have its day; what we might call an ethic of care, compassion, or altruism.

The question, then, for further research and praxis, is how we counterpoise empathy to fear, and promote social learning of a more rational, humane repertoire of security decision-making. It is striking, and sobering, that Obama triumphed over Bush precisely by promoting "hope and change" over fear – yet maintained many features of the institutionalized War on Terror, including abuses of surveillance, military tribunals, police powers, and targeted killings overseas. While American policy and public opinion have conditionally eschewed the systematic use of torture, grey zones of extra-legality like Guantanamo and the option of renditions continue. Clearly, deeper rethinking of the politics of national insecurity is needed.

The cure for moral panic is the mirror, when we come to see how the politics of fear have violated the identity we seek to defend. The turning points in American revulsion against torture were the moments when we saw that we had become the terrorist: the photos from Abu Ghraib, torture survivor John McCain's testimony, and the dissident prosecutors and interrogators from

Guantanamo. What is needed now is a combination of historical deconstruction such as this project, institutional recovery of the rule of law, and a reawakening of the conscience of democratic citizenship. We have seen the enemy, and it is us. We have also seen the solution, and it is also us.

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