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The Paradox of Riskless Warfare

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The War on Terrorism and the End of Human Rights

In response to the crimes of September 11, the U.S. has declared a War on Terrorism. By selectively combining elements of law with elements of war, Washington is able to maximize its ability to mobilize lethal force against terrorists and combat the risks they pose. But the new hybrid of war and law eliminates most traditional rights of military adversaries and those of innocents as well. It raises the troubling question of whether international human rights will be a casualty of the War on Terrorism.

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Reconceiving the Political: Notes toward a New Pluralism

Within the U.S. constitutional context, issues over the control of civil association are often debated in terms such as free exercise of religion, freedom of association, or the individual liberty guarantees of the 14th Amendment. These constitutional debates have not gone deep enough. It is necessary to reconsider the understanding of politics that pervades much contemporary discussion, an understanding that views public institutions as plenipotentiary and civil society as a political construction possessing only those liberties that the polity chooses to grant and modify or revoke at will.

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The Paradox of Riskless Warfare

Paul W. Kahn

The fundamental moral fact about war is that the innocent are appropriate targets of physical violence—not, of course, *all* of the morally innocent. The morality of the battlefield distinguishes not between the innocent and the guilty, but between the *combatant* and the *noncombatant*. Combatants, however, cannot be equated with the morally guilty, since opposing combatants are likely to have equally valid claims to moral innocence. Neither has wronged the other, or anyone else. But each is licensed, legally and morally, to try to injure or kill the other. Each possesses this license because each acts in self-defense vis-à-vis the other. The reciprocal imposition of risk creates the space that allows injury to the morally innocent. Yet, every military force also has a compelling ethical obligation to minimize the risk of injury to its own forces. Each strives to create an asymmetrical situation in which the enemy suffers the risk of injury while its own forces remain safe. The paradox of riskless warfare arises when the pursuit of asymmetry undermines reciprocity. Without reciprocal imposition of risk, what is the moral basis for injuring the morally innocent?

In this essay, I argue that riskless warfare, which increasingly characterizes U.S. military policy, pushes up against the limits of the traditional moral justification of combat. If it passes those limits, as it arguably

combat will likely result in increasing attacks on our own civilian population.

The Moral Character of Combatants

1. Lack of autonomy. War in the modern age has been fought largely by conscript armies. Conscript makes vivid the contemporary ethical context of soldiering: combatants typically take up the military burden because they have to. That compulsion is likely to rest on physical, political, and legal considerations. The soldier's ethos uses the language of political patriotism, of doing one's duty, of obeying the law, and—most importantly—of confronting uncontrollable circumstance. The combatant's primary concern is the survival of himself and his friends. An ethical demand of independent choice is placed on soldiers only when they have some control: they are not personally to commit war crimes.

Combatants are constrained by forces and circumstances that determine what they “must” do. They tend to be young, with little opportunity to develop an educated opinion. Belief in the justice of their cause is likely to be shaped by propaganda, not deliberation. In some cases—certainly in the case of child soldiers—the combatant is yet another victim of the regime in power, rather than a participant in that regime. Combatants are placed in a situation of mortal danger by political decisions over which they have little, if any, control and which they may not even understand. The only alternative to a combatant's own injury or death may be the successful injuring of another—one who is equally likely to be morally innocent. The morality of contemporary combat emphasizes the mutual moral degradation of combatants: they are not free agents. The role-morality of the combatant begins from a recognition of the suspension of the individual's free choice.

2. The separation of political ends from the morality of combat. Since combatants cannot ordinarily remove themselves from combat because of a moral disagreement with the ends for which they are deployed, their moral status is not the same as that of the political leadership. A combatant who complies with the rules of warfare has not done anything for

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did in Kosovo, *warfare* must become *policing*. Policing is the application of force to the morally guilty. The moral difference between policing and warfare requires not just different rules of engagement but also different institutions to control the decision to use force. A national army is not, and cannot be, an international police force. Effective international policing requires a credible separation of the application of force from national political interests. A failure to adjust military institutions to the moral grounds of

which he deserves punishment, regardless of which side he fights on. Thus, we didn't think that every German soldier committed a moral wrong for which he deserved to be punished at the end of World War II, even though we thought criminal punishment appropriate for the leadership. We didn't think that the soldiers of the Soviet Union shared in the moral guilt we attributed to much of the political leadership. This is a kind of implicit bargain the state strikes with the individual.

The terms "guilt" and "innocence" don't lose all sense on the battlefield. Rather, they refer to a separate moral code that specifies war crimes. After all, the fundamental reality of the battlefield is a kind of license to kill. That which is prohibited in ordinary life is the point from which moral deliberation begins on the battlefield. Nevertheless, the separation of the political ends of warfare from the morality of combat is always tenuous. The more we believe to be at stake in the outcome of a war, the less willing we are to maintain this distinction. If we thought, for example, that loss of the war would mean the slaughter of all the society's males, and the selling off of the women and children into slavery—the consequences of loss in classical times—we would not be willing to respect the distinction of *jus ad bellum* (principles concerning the just resort to war) from *jus in bello* (principles of just conduct in war). Moderation in political ends is a necessary condition of maintaining the distinct morality of the battlefield.

3. The requirement of reciprocity. The right of combatants to injure and kill each other is founded neither on judgments of their own moral guilt nor on judgments of the moral evil of the end for the sake of which their force is deployed. Rather, combatants are allowed to injure each other just as long as they stand in a relationship of mutual risk. The soldier who takes himself out of combat is no longer a legitimate target. The morality of the battlefield, accordingly, is a variation on the morality of individual self-defense. Injury beyond the point required for self-defense is disproportionate and, therefore, prohibited. Defending him-

self, the combatant advances the political objective for which force is deployed.

The soldier's privilege of self-defense is subject to a condition of reciprocity. Soldiers cannot defend themselves by threatening to injure noncombatants; they are not permitted civilian reprisals. Combatants cannot threaten the family of an enemy soldier, even if the threat would effectively induce surrender, and thus reduce the overall injuries caused by combat.

These limits do not distinguish the morally guilty from the morally innocent. All may be morally innocent; all are in a tragic and dangerous situation. Nor do such limits necessarily minimize the overall suffering in a war. On efficiency grounds alone, we can never dispose of the claim that ruthlessness in the pursuit of war is the most humane method of fighting, for it brings combat to a swift end. Surely we cannot look at the battlefields of the twentieth century and conclude that the morality of *jus in bello*—just conduct in war—has made wars less costly or more humane.

The rule of reciprocal self-defense cannot be justified by appeal to any of our ordinary moral intuitions: it fails the test of utility, and it also fails the test of deontological rules, since it does not support the moral autonomy and dignity of the individual. Rather, *the rule of reciprocal self-defense stands as its own first principle within a circumscribed context in which individuals act in politically compelled roles.*

If the fundamental principle of the morality of warfare is a right to exercise self-defense within

the conditions of mutual imposition of risk, then the emergence of asymmetrical warfare represents a deep challenge. A regime capable of targeting and destroying others with the push of a button, with no human intervention but only the operation of the ultimate high tech weapon, propels us well beyond the ethics of warfare. Such a deployment of force might be morally justified—it might be used to promote morally appropriate ends—but we cannot appeal to the morality of warfare to justify this mode of combat.

It would be a mistake to believe that we remain sufficiently far from this high-tech image that the problem



From: *Men: A Pictorial Archive from Nineteenth-Century Sources*, selected by Jim Herter (Dover Publications, 1980).

does not press upon us practically. Riskless warfare can be a product of technological innovation, but it is also a function of political decisions. In Kosovo, Western forces were reported to be operating under a policy that missions were not to be undertaken if there was a serious risk of casualties. The situation in Afghanistan is less clear. While the losses are few, an

If the fundamental principle of the morality of warfare is a right to exercise self-defense within the conditions of mutual imposition of risk, then the emergence of asymmetrical warfare represents a deep challenge.

outsider at least has the impression of reciprocal risk. The political leadership took a different position from that in Kosovo, warning the public that in this case there would be casualties, that sacrifice would be required. There are, however, likely to be more, not fewer, Kosovos in our future.

Asymmetrical Warfare as Police Action

In a previous essay, I identified a number of problems with riskless warfare. It is an image of warfare without the possibility of chivalry. In situations of humanitarian intervention, it expresses a disturbing inequality in the calculus by which we value different lives. It may take the destructive power of war outside of the boundaries of democratic legitimacy, because we are far more willing to delegate the power to use force without risk to the president than we are a power to commit the nation to the sacrifice of its citizens. It is likely to create international accusations of hypocrisy as we choose to intervene in some conflicts and not others, when all are equally a matter of money spent, not lives lost.

All of these are real practical and political problems, but they do not get to the heart of the moral conundrum. At the heart is a violation of the fundamental principle that establishes the internal morality of warfare: self-defense within conditions of reciprocal imposition of risk. Without the imposition of mutual risk, warfare is not war at all. What is it then? It most resembles police enforcement. The moral condition of policing, however, is that only the morally guilty should suffer physical injury. There may be exceptions to this rule, but there is no wholesale license to target the morally innocent.

The ethos of international policing is the same as that of ordinary criminal law enforcement. Individuals are the targets of police actions because of what they have done, not because of who they are. It is no longer

enough to know that someone wears a military uniform to make him an appropriate target. Wearing a uniform is not the same as participation in a criminal conspiracy. It is no longer enough to act within the limits of proportionality; we need to protect the morally innocent. We can no longer speak of acceptable collateral damage; we need to obtain a strict correspondence between injury and guilt. If our high tech weapons, imagined or real, are not limited in their use to the destruction of the morally guilty, then asymmetrical applications of force may satisfy neither the conditions of warfare nor those of policing.

While one can demand of the police that they assume risks in order to protect the morally innocent, there is no moral demand upon the police of symmetrical risk: policing is better to the degree that the police can accomplish their ends without risk to themselves. A perfect technology of justice would achieve a perfect asymmetry: the morally guilty should suffer all the risk and all the injury. This would simultaneously be the ideal technology of policing and the end of warfare.

The motivation to convert traditional political conflicts into matters of law enforcement has not been driven only by the revolution in military technology. The introduction of juridical elements into international

Without the imposition of mutual risk, warfare is not war at all. . . . It most resembles police enforcement.

relations is one of the great movements of the late twentieth century, ranging across the new activism of the International Court of Justice, the ad hoc tribunals for the former Yugoslavia and Rwanda, and the emerging International Criminal Court. The more we think of international politics under the paradigm of criminal law, the more likely we are to think of the use of force under the paradigm of policing, including its preference for asymmetry. In this sense, asymmetrical warfare represents a sort of moral category confusion.

I don't mean to suggest that there is anything wrong with the movement from warfare to policing. Morally, this can only be seen as progress. The problem is the confusion of the traditional morality of the battlefield with the appropriate morality for contemporary, international policing. If the military is engaged in policing, then it needs to rethink its rules of engagement. When a criminal seizes a hostage, we don't destroy the house in which both are occupants. At least, we don't do so unless we believe there is a virtual certainty that the criminal will injure or kill others if we fail to act imme-

diately. Even then, we demand that every effort be made to protect the innocent hostage. But in many nations, conscripts are little more than hostages—morally speaking—of criminal regimes. We can fight them if we must, but we do not have a license to injure them because of someone else's (or some regime's) wrongdoing. If we cannot adequately discriminate between the morally guilty and the innocent, we may not be able to use force at all. To be sure, many other options remain open: e.g., sanctions, political and financial support of various interests, boycotts, and the pressure of world opinion.

Asymmetry and the Distinction between Combatants and Noncombatants

So far I have argued that, absent the reciprocal imposition of risk, there is no warrant for attacking the morally innocent. To make this argument, I explored the source of the soldier's license to kill, but one can reach this same conclusion by beginning the inquiry from the perspective of the victim. What makes the enemy combatant a morally appropriate *target* for the application of force?

In situations of extreme asymmetry, the distinction between combatants and noncombatants loses its value for moral discrimination. This distinction is central to the ethics of warfare not because it separates the morally guilty from the innocent but because it delineates a domain of threat. If combatants are no longer a threat, however, then they are no more appropriate targets than noncombatants. Both may be the victims of a repressive regime. To identify combatants as appropriate targets under these circumstances is not morally different from identifying the winners of a macabre lottery as the appropriate targets.

To see this point more clearly, suppose that the United States decides that Saddam Hussein's regime is an appropriate target for the use of force. If American forces confront Iraqi forces on a battlefield, then the Iraqi forces are appropriate targets as long as they threaten injury. But if the American forces never show up, what makes these Iraqis appropriate targets? They pose no risk to the United States, and many, if not most, have not done anything wrong. To answer that they provide internal support for the regime does not distinguish Hussein's military forces from many other groups he needs to maintain power. Why not target his bankers or his oil resources? To insist that his army remains an appropriate target, one cannot rely on the ethics of warfare. We need a different set of moral principles that delineates the appropriate targets for what we might, in classic fashion, call uses of force "short of war."

There are three possible responses to this argument. First, combatants are appropriate targets because ulti-

Liberal Pluralism

The Implications of Value Pluralism for Political Theory and Practice

William A. Galston

Isaiah Berlin first advanced the moral theory of value pluralism in the 1950s and it subsequently was developed by a number of distinguished scholars, including Galston. In *Liberal Pluralism*, Galston defends a version of value pluralism for political theory and practice. Against the contentions of John Gray and others, Galston argues that value pluralism undergirds a kind of liberal politics that gives great weight to the ability of individuals and groups to live their lives in accordance with their deepest beliefs about what gives meaning and purpose to life. This account of liberal pluralism is shown to have important implications for political deliberation and decision-making, for the design of public institutions, and for the division of legitimate authority among government, religious institutions, civil society, parents and families, and individuals.

Liberal pluralism leads to a vision of a good society in which political institutions are active in a limited sphere and in which, within broad limits, families and civil associations may organize and conduct themselves in ways that are not congruent with the principles that govern the public sphere.

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mately *they have consented* to their position, which is one of threatening to use force in support of the regime. Second, although there may not be moral grounds for distinguishing combatants from others, *prudential arguments* support the distinction. Third, although combatants may not threaten an asymmetrically powerful intervener, they nevertheless *threaten others* whom we are entitled to use force to protect. I will treat these arguments in turn.

1. Are combatants appropriate targets because they have consented to their position? As many narratives from Afghanistan are beginning to reveal, it is unrealistic to believe that a morally robust idea of consent operates within authoritarian societies. These are stories of men rounded up and sent to the front, often with little training and rarely with any choice. More important, to rely on consent to identify the legitimate targets for harm is an unjustifiable attempt to extend the moral guilt of the political leadership to the ordinary combatant. If consent is the ground for distinguishing legitimate from illegitimate targets, it is because consent represents a kind of active support of, or participation in, the regime's moral guilt. The regime's active supporters and beneficiaries, however, are not likely to correspond to the traditional category of combatants.

Of course, destroying a regime's army may be a way of destabilizing a regime, but so is destroying elements

In situations of extreme asymmetry, the distinction between combatants and non-combatants loses its value for moral discrimination.

of its civilian infrastructure or any other significant group of its population. It is no longer the ethics of warfare that legitimates the choice of these targets but the moral value of the end in view.

2. Are these prudential grounds for maintaining the distinction between combatants and others? My arguments so far have proceeded from first principles. For both individuals and nations, however, prudence may sometimes require less principled behavior. Nevertheless, much the same conclusion can be reached from an argument that explores the practical consequences of the application of riskless force.

One consequence of an asymmetrical capacity to apply force can be a self-imposed effort strictly to adhere to the legal limits on targets. Those limits can function as a source of self-constraint. They can also offer an invitation to escalation in the face of frustration, as we saw with the steady expansion of targets in the Kosovo campaign. The list of legal targets can be

very long. Scrupulous adherence to lawful targets by an asymmetric power is unlikely to support a perception of legitimacy. In the absence of reciprocal risk, what had traditionally been seen as fair is likely to be seen as morally arbitrary and, if arbitrary, then an act of victimization of the powerless.

Further, conditions of asymmetry are unstable because they compel innovation by the disadvantaged side. Military tactics can be changed in hopes of neutralizing the advantage; for example, guerrilla warfare is one response to technological advantage. Equally possible is the infliction of reciprocal injury on a morally innocent, civilian population. Asymmetry may become an invitation to popular resistance and to terrorism. It is no accident that Saddam Hussein has been developing weapons of mass destruction since his defeat in the Gulf War. His strategy is to create symmetrical risk. If he cannot do this on the battlefield, he will do it elsewhere. The same motivations are powering

One consequence of an asymmetrical capacity to apply force can be a self-imposed effort strictly to adhere to the legal limits on targets.

the Intifada. If the Palestinians cannot hope realistically to create a reciprocal risk for the Israeli military, they will direct the risk of injury at civilians. And, of course, the character of the attack on September 11 was itself a response to the asymmetry in conventional forces. For the asymmetrically powerful to insist on the maintenance of the combatant/noncombatant distinction has the appearance of self-serving moralizing.

Just as it is practically intolerable to suffer an asymmetrical use of force, it is intolerable to suffer an asymmetrical risk to a civilian population. There is likely to be a cycle of escalation, as each side responds to the other's infliction of risk upon noncombatants. The bombing of London was followed by the bombing of Berlin. If it became clear, for example, that Iraq was responsible for the release of anthrax in this country, would the American response respect the line separating combatants from noncombatants? The Israelis allegedly threatened Iraq with just such a retaliation when they perceived a threat of attack by chemical weapons during the Gulf War. It is hard to believe that any country would act differently.

This means that the asymmetrical capacities of Western—and particularly U.S. forces—themselves create the conditions for increasing use of terrorism. This, in turn, creates a cycle of destruction outside of the boundaries of the battlefield, with its reliance on the distinction of combatants from noncombatants.

There is no easy, practical answer to this problem. Military forces cannot be asked to assume unnecessary risks. Every army wants to fight in such a way as to impose a maximum threat to the enemy and a minimum threat to itself. Indeed, it would be immoral for the military leadership not to try to minimize the risk of injury to its own forces. That the moral grounds of warfare may shift at the point at which this ideal approaches reality is not an obvious matter of concern for the internal process of military deliberation. Breaking the cycle requires a transition from combat to policing. There must be a general perception that force is used only against the morally guilty and there must be agreement on who are the morally guilty. This is why contemporary deployments of force tend to end with public, criminal trials.

In both its classical and colonialist forms, asymmetrical power has brought with it an ambition for empire. The capacity to realize ends through the application of force without suffering the risk of reciprocal injury is

Conditions of asymmetry are unstable because they compel innovation by the disadvantaged side.

simultaneously a tactical prize and an intolerable political situation. No state will trust other states with this power. Equally, no people should trust their political leadership with this power. The pursuit of national interests through military means is restrained by the expectation of loss. If that expectation disappears, what are the sources of constraint? Even when legitimate objectives are pursued, the fact that they are the political project of a hegemonic power delegitimizes the application of force in the eyes of both those who suffer the intervention and those who are not directly involved. Riskless warfare may be a prescription for short-term success and long-term disaster.

Riskless warfare will be perceived as hegemonic interference unless it is perceived as legitimate policing. But the latter perception depends on institutional developments. Good intentions are not enough. Human rights claims will be seen as only a form of neocolonialism if advanced through a national military with the capacity risklessly to deploy force. Yet we are only just beginning to develop institutions of international law that could imaginably have a power of policing. Until we do so, we are likely to remain in this paradoxical situation in which the military's capacity for riskless application of force makes our own lives substantially riskier.

3. Does the combatants' threat to others distinguish them from noncombatants? While the United States

may be able to use force without risk, others—on the ground—are likely to suffer injuries from the combatants against whom we are intervening. Future uses of force are likely to look like interventions in situations of gross violations of human rights. Those violations constitute the moral ground of the combatants' traditional right to deploy force.

This argument suggests that the moral issue here is not different in kind from traditional arguments of "collective self-defense" when one party aids another in a military conflict. It is morally appropriate for one state to come to the aid of another that has suffered an armed attack. Morally, and increasingly legally, the same rule applies when a people has been attacked by its own government. Typically, interventions in the past have involved supply of material resources—particularly weapons. The deployment of asymmetrical force is simply another variation on this sort of aid. Intervention is morally justifiable so long as the side on whose behalf one intervenes faces a reciprocal risk from the target. The recipient of aid is the principal; the state that intervenes is only the agent.

This argument, while powerful, suggests real limits on intervention. First, the asymmetrical application of force morally depends on a prior and continuing symmetrical application of force. To target the morally innocent requires an argument of self-defense by those with whom the asymmetric power chooses to ally itself. Second, the conflict that grounds the intervention must have its own integrity. It cannot simply be a situation constructed by Western interests—or even by local parties—to create subsequent grounds for an asymmetrical intervention. Third, asymmetric intervention places

The capacity to realize ends through the application of force without suffering the risk of reciprocal injury is simultaneously a tactical prize and an intolerable political situation.

considerable pressure on arguments concerning the just resort to war because the moral grounds for intervention receive no support from any internal dynamic of combatant self-defense.

When the United States chooses intervention, it assumes the moral obligation to make the right choice. "Right," here, means more than "supportive of our own political interests." Why and when does the United States have a right to decide the outcome of other peoples' wars? In situations of genuine political dispute, a potential intervener has no such right.

While riskless intervention in support of the victims of gross violations of fundamental human rights is permissible as a form of collective self-defense, this

argument is not independent of the sorts of claims considered in the last section. There remains the problem of external perception: why should the rest of the world see intervention by U.S. forces as anything other than a political decision to dictate who will be the winner in a local conflict? Intervention is perceived as neocolonialism in support of that group most likely to advance Western interests. Such perceptions extend the risk to our own civilian population. Internationalization of decisions to use force, within increasingly juridified institutions, is the only possible response to this perception.

Conclusion

My argument can be represented with a highly simplified example. Imagine a confrontation between a champion heavyweight and an untrained lightweight. Suppose the heavyweight proposes that the way to solve their disagreements is to have a fight within the traditional rules of the ring. Because of the asymmetry, most people would find this proposal self-serving rather than fair. Now suppose that the lightweight challenges another lightweight. To this, the heavyweight responds by demanding cessation of the challenge, and he backs that demand with a threat of his own intervention. We would not necessarily object to this form of intervention, but we would ask whether the heavyweight is intervening on the *right* side. If the dispute between the two lightweights is genuine, why should the side against whom intervention is threatened agree that this is an appropriate way to end the dispute? From his point of view, we are just back at the first situation of asymmetrical force.

This example suggests that a shift in moral concern occurs in the two situations. In the first case, we question the *asymmetry itself*, while in the second, we question the *uses for which* force is being deployed. Our intuitions about a "fair fight" carry weight independently of our intuitions about the purpose for which force is deployed. But the stylized account also suggests that these two perspectives cannot remain separate: asymmetry places a particular burden on any decision to use force. As the asymmetry increases, so does our need to find the grounds for a common belief in the legitimacy of the deployment.

Viewed abstractly, this example is precisely the Hobbesian story of the origin of the state: there is a need to concede a monopoly on the legitimate use of force to a single heavyweight, who then retains the responsibility, as well as the capacity, to resolve private disputes. In the international arenas, the United States increasingly finds itself with monopoly power. The problem of practical ethics lies in the difference between these two situations: the United States is the heavyweight, but it does not have the legitimacy of the sovereign.

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Sources: At the end of World War II, only twenty-two high-level Nazi officials were indicted at Nuremberg for planning a war of aggression, crimes against humanity and war crimes. Outside of Nuremberg, about 5,000 German soldiers were charged with particular war crimes. Readers interested in the content of the combatants' moral obligations under contemporary humanitarian law should refer to the Statute of the International Criminal Court, Art. 6–8. Concerning the point that the soldier who removes himself from combat is no longer a legitimate target, see Hague Convention IV (1907), Annex of Regulations, Art. 23.; Statute of the International Criminal Court, Art. 8, sec. 2(b)(vi). My earlier discussion of some problems of riskless warfare can be found in Paul W. Kahn, "War and Sacrifice in Kosovo," *Report from the Institute for Philosophy and Public Policy*, vol. 19, no. 2/3 (Spring/Summer 1999). On the expansion of the target list during the air war in Kosovo, see Michael Ignatieff, *Virtual War: Kosovo and Beyond* (Chatto & Windus, 2001). That we might have reason to worry about the moral integrity of an intervention in Iraq is suggested by recent talk of "creating" a Northern-Alliance type operation in Iraq as a predicate to U.S. action. See, e.g., Inter Press Service, Dec. 2, 2001, "Iraq Veers Back into Washington's Crosshairs," by Jim Lobe, *The Independent* (London), April 8, 2002, (quoting Tony Blair).

The War on Terrorism and the End of Human Rights

David Luban

In the immediate aftermath of September 11, President Bush stated that the perpetrators of the deed would be brought to justice. Soon afterwards, the President announced that the United States would engage in a war on terrorism. The first of these statements adopts the familiar language of criminal law and criminal justice. It treats the September 11 attacks as horrific crimes—mass murders—and the government's mission as apprehending and punishing the surviving planners and conspirators for their roles in the crimes. The War on Terrorism is a different proposition, however, and a different model of governmental action—not law but war. Most obviously, it dramatically broadens the scope of action, because now terrorists who knew nothing about September 11 have been earmarked as enemies. But that is only the beginning.

The Hybrid War-Law Approach

The model of war offers much freer rein than that of law, and therein lies its appeal in the wake of 9/11. First, in war but not in law it is permissible to use

Given Washington's mandate to eliminate the danger of future 9/11s, the model of war offers important advantages over the model of law.

lethal force on enemy troops regardless of their degree of personal involvement with the adversary. The conscripted cook is as legitimate a target as the enemy general. Second, in war but not in law "collateral damage," that is, foreseen but unintended killing of non-combatants, is permissible. (Police cannot blow up an apartment building full of people because a murderer is inside, but an air force can bomb the building if it contains a military target.) Third, the requirements of evidence and proof are drastically weaker in war than in criminal justice. Soldiers do not need proof beyond a reasonable doubt, or even proof by a preponderance of evidence, that someone is an enemy soldier before fir-

ing on him or capturing and imprisoning him. They don't need proof at all, merely plausible intelligence. Thus, the U.S. military remains regretful but unapologetic about its January 2002 attack on the Afghani town of Uruzgan, in which 21 innocent civilians were killed, based on faulty intelligence that they were al Qaeda fighters. Fourth, in war one can attack an enemy without concern over whether he has done anything. Legitimate targets are those who in the course of combat *might* harm us, not those who *have* harmed us. No doubt there are other significant differences as well. But the basic point should be clear: given Washington's mandate to eliminate the danger of future 9/11s, so far as humanly possible, the model of war offers important advantages over the model of law.

There are disadvantages as well. Most obviously, in war but not in law, fighting back is a *legitimate* response of the enemy. Second, when nations fight a war, other nations may opt for neutrality. Third, because fighting back is legitimate, in war the enemy soldier deserves special regard once he is rendered harmless through injury or surrender. It is impermissible to punish him for his role in fighting the war. Nor can he be harshly interrogated after he is captured. The

By selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of a military adversary. . . .

Third Geneva Convention provides: "Prisoners of war who refuse to answer [questions] may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." And, when the war concludes, the enemy soldier must be repatriated.

Here, however, Washington has different ideas, designed to eliminate these tactical disadvantages in the traditional war model. Washington regards international terrorism not only as a military adversary, but

Genetics and Criminal Behavior

David Wasserman and Robert Wachbroit, Editors

This volume brings together a group of essays by leading philosophers of science, ethicists, and legal scholars, commissioned for an important and controversial conference on genetics and crime. The essays address basic conceptual, methodological, and ethical issues raised by genetic research on criminal behavior but largely ignored in the public debate. They explore the complexities in tracing any genetic influence on criminal, violent, or antisocial behavior, the varieties of interpretation to which evidence of such influences is subject, and the relevance of such influences to the moral and legal appraisal of criminal conduct. The volume provides a critical overview of the assumptions, methods, and findings of recent behavioral genetics.

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also as a criminal activity and criminal conspiracy. In the law model, criminals don't get to shoot back, and their acts of violence subject them to legitimate punishment. That is what we see in Washington's prosecution of the War on Terrorism. Captured terrorists may be tried before military or civilian tribunals, and shooting back at Americans, including American troops, is a federal crime (for a statute under which John Walker Lindh was indicted criminalizes anyone regardless of nationality, who "outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States" or "engages in physical violence with intent to cause serious bodily injury to a national of the United States; or with the result that serious bodily injury is caused to a national of the United States"). Furthermore, the U.S. may rightly demand that other countries not be neutral about murder and terrorism. Unlike the war model, a nation may insist that those who are not with us in fighting murder and terror are against us, because by not joining our operations they are providing a safe haven for terrorists or their bank accounts. By selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of innocent bystanders caught in the crossfire.

A Limbo of Rightlessness

The legal status of al Qaeda suspects imprisoned at the Guantanamo Bay Naval Base in Cuba is emblematic of this hybrid war-law approach to the threat of terrorism. In line with the war model, they lack the usual rights of criminal suspects—the presumption of innocence, the right to a hearing to determine guilt, the opportunity to prove that the authorities have grabbed the wrong man. But, in line with the law model, they are considered *unlawful* combatants. Because they are not uniformed forces, they lack the rights of prisoners of war and are liable to criminal punishment. Initially, the American government declared that the Guantanamo Bay prisoners have no rights under the Geneva Conventions. In the face of international protests, Washington quickly backpedaled and announced that the Guantanamo Bay prisoners would indeed be treated as decently as POWs—but it also made clear that the prisoners have no right to such treatment. Neither criminal suspects nor POWs, neither fish nor fowl, they inhabit a limbo of rightlessness. Secretary of Defense Rumsfeld's assertion that the U.S. may continue to detain them even if they are acquitted by a military tribunal dramatizes the point.

To understand how extraordinary their status is, consider an analogy. Suppose that Washington declares a War on Organized Crime. Troops are dis-

patched to Sicily, and a number of Mafiosi are seized, brought to Guantanamo Bay, and imprisoned without a hearing for the indefinite future, maybe the rest of their lives. They are accused of no crimes, because their capture is based not on what they have done but on what they might do. After all, to become “made” they took oaths of obedience to the bad guys. Seizing them accords with the war model: they are enemy foot soldiers. But they are foot soldiers out of uniform; they lack a “fixed distinctive emblem,” in the words of The Hague Convention. That makes them unlawful combatants, so they lack the rights of POWs. They may object that it is only a unilateral declaration by the American President that has turned them into combatants in the first place—he called it a war, they didn’t—and that, since they do not regard themselves as literal foot soldiers it never occurred to them to wear a fixed distinctive emblem. They have a point. It seems too easy for the President to divest anyone in the world of rights and liberty simply by announcing that the U.S. is at war with them and then declaring them unlawful combatants if they resist. But, in the hybrid war-law model, they protest in vain.

Consider another example. In January 2002, U.S. forces in Bosnia seized five Algerians and a Yemeni suspected of al Qaeda connections and took them to Guantanamo Bay. The six had been jailed in Bosnia, but a Bosnian court released them for lack of evidence,

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and the Bosnian Human Rights Chamber issued an injunction that four of them be allowed to remain in the country pending further legal proceedings. The Human Rights Chamber, ironically, was created under U.S. auspices in the Dayton peace accords, and it was designed specifically to protect against treatment like this. Ruth Wedgwood, a well-known international law scholar at Yale and a member of the Council on Foreign Relations, defended the Bosnian seizure in war-model terms. “I think we would simply argue this was a matter of self-defense. One of the fundamental rules of military law is that you have a right ultimately to act in self-defense. And if these folks were actively plotting to blow up the U.S. embassy, they should be considered combatants and captured as combatants in a war.” Notice that Professor Wedgwood argues in terms of what the men seized in Bosnia were *planning to do*, not what they *did*; notice as well that the decision

of the Bosnian court that there was insufficient evidence does not matter. These are characteristics of the war model.

More recently, two American citizens alleged to be al Qaeda operatives (Jose Padilla, a.k.a. Abdullah al Muhajir, and Yasser Esam Hamdi) have been held in American military prisons, with no crimes charged, no opportunity to consult counsel, and no hearing. The President described Padilla as “a bad man” who aimed to build a nuclear “dirty” bomb and use it against America; and the Justice Department has classified both men as “enemy combatants” who may be held indefinitely. Yet, as military law expert Gary Solis points out, “Until now, as used by the attorney general, the term ‘enemy combatant’ appeared nowhere in U.S. criminal law, international law or in the law of war.” The phrase comes from the 1942 Supreme Court case *Ex parte Quirin*, but all the Court says there is that “an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property” would “not . . . be entitled to the status of prisoner of war, but . . . [they

Under circumstances of such dire menace, it is appropriate to treat terrorists as though they embody the most dangerous aspects of both warriors and criminals.

would] be offenders against the law of war subject to trial and punishment by military tribunals.” For the Court, in other words, the status of a person as a non-uniformed enemy combatant makes him a criminal rather than a warrior, and determines *where* he is tried (in a military, rather than a civilian, tribunal) but not *whether* he is tried. Far from authorizing open-ended confinement, *Ex parte Quirin* presupposes that criminals are entitled to hearings: without a hearing how can suspects prove that the government made a mistake? *Quirin* embeds the concept of “enemy combatant” firmly in the law model. In the war model, by contrast, POWs may be detained without a hearing until hostilities are over. But POWs were captured in uniform, and only their undoubted identity as enemy soldiers justifies such open-ended custody. Apparently, Hamdi and Padilla will get the worst of both models—open-ended custody with no trial, like POWs, but no certainty beyond the U.S. government’s say-so that they really are “bad men.” This is the hybrid war-law model. It combines the *Quirin* category of “enemy combatant without uniform,” used in the law model to justify a military trial, with the war model’s practice of indefinite confinement with no trial at all.

The Case for the Hybrid Approach

Is there any justification for the hybrid war-law model, which so drastically diminishes the rights of the enemy? An argument can be offered along the following lines. In ordinary cases of war among states, enemy soldiers may well be morally and politically innocent. Many of them are conscripts, and those who aren't do not necessarily endorse the state policies they are fighting to defend. But enemy soldiers in the War on Terrorism are, by definition, those who have embarked on a path of terrorism. They are neither morally nor politically innocent. Their sworn aim—"Death to America!"—is to create more 9/11s. In this respect, they are much more akin to criminal conspirators than to conscript soldiers. Terrorists will fight as soldiers when they must, and metamorphose into mass murderers when they can.

Furthermore, suicide terrorists pose a special, unique danger. Ordinary criminals do not target innocent bystanders. They may be willing to kill them if necessary, but bystanders enjoy at least some measure of security because they are not primary targets. Not so with terrorists, who aim to kill as many innocent people as possible. Likewise, innocent bystanders are protected from ordinary criminals by whatever deterrent force the threat of punishment and the risk of getting killed in the act of committing a crime offer. For a suicide bomber, neither of these threats is a deterrent at all—after all, for the suicide bomber one of the hallmarks of a *successful* operation is that he winds up dead at day's end. Given the unique and heightened danger that suicide terrorists pose, a stronger response that grants potential terrorists fewer rights may be justified. Add to this the danger that terrorists may come to possess weapons of mass destruction, including nuclear devices in suitcases. Under circumstances of such dire menace, it is appropriate to treat terrorists as though they embody the most dangerous aspects of both warriors and criminals. That is the basis of the hybrid war-law model.

The Case against Expediency

The argument against the hybrid war-law model is equally clear. The U.S. has simply chosen the bits of the law model and the bits of the war model that are most convenient for American interests, and ignored the rest. The model abolishes the rights of potential enemies (and their innocent shields) by fiat—not for reasons of moral or legal principle, but solely because the U.S. does not want them to have rights. The more rights they have, the more risk they pose. But Americans' urgent desire to minimize our risks doesn't make other people's rights disappear. Calling our policy a War on Terrorism obscures this point.

The theoretical basis of the objection is that the law model and the war model each comes as a package, with a kind of intellectual integrity. The law model grows out of relationships within states, while the war model arises from relationships between states. The law model imputes a ground-level community of values to those subject to the law—paradigmatically, citizens of a state, but also visitors and foreigners who choose to engage in conduct that affects a state. Only because law imputes shared basic values to the community can a state condemn the conduct of criminals and inflict punishment on them. Criminals deserve condemnation and punishment because their conduct violates norms that we are entitled to count on their sharing. But, for the same reason—the imputed community of values—those subject to the law ordinarily enjoy a presumption of innocence and an expectation of safety. The government cannot simply grab them and confine them without making sure they have bro-

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ken the law, nor can it condemn them without due process for ensuring that it has the right person, nor can it knowingly place bystanders in mortal peril in the course of fighting crime. They are our fellows, and the community should protect them just as it protects us. The same imputed community of values that justifies condemnation and punishment creates rights to due care and due process.

War is different. War is the ultimate acknowledgment that human beings do not live in a single community with shared norms. If their norms conflict enough, communities pose a physical danger to each other, and nothing can safeguard a community against its enemies except force of arms. That makes enemy soldiers legitimate targets; but it makes our soldiers legitimate targets as well, and, once the enemy no longer poses a danger, he should be immune from punishment, because if he has fought cleanly he has violated no norms that we are entitled to presume he honors. Our norms are, after all, *our* norms, not his.

Because the law model and war model come as conceptual packages, it is unprincipled to wrench them apart and recombine them simply because it is in America's interest to do so. To declare that Americans can fight enemies with the latitude of warriors, but if the enemies fight back they are not warriors but criminals, amounts to a kind of heads-I-win-tails-you-lose international morality in which whatever it takes to

reduce American risk, no matter what the cost to others, turns out to be justified. This, in brief, is the criticism of the hybrid war-law model.

To be sure, the law model could be made to incorporate the war model merely by rewriting a handful of statutes. Congress could enact laws permitting imprisonment or execution of persons who pose a significant threat of terrorism whether or not they have already done anything wrong. The standard of evidence could be set low and the requirement of a hearing eliminated. Finally, Congress could authorize the use of lethal force against terrorists regardless of the danger to innocent bystanders, and it could immunize officials from lawsuits or prosecution by victims of collateral damage. Such statutes would violate the Constitution, but the Constitution could be amended to incorporate anti-terrorist exceptions to the Fourth, Fifth, and Sixth Amendments. In the end, we would have a system of law that includes all the essential features of the war model.

It would, however, be a system that imprisons people for their intentions rather than their actions, and that offers the innocent few protections against mistaken detention or inadvertent death through collateral damage. Gone are the principles that people should never be punished for their thoughts, only for their deeds, and that innocent people must be protected rather than injured by their own government. In that sense, at any rate, repackaging war as law seems merely cosmetic, because it replaces the ideal of law as a protector of rights with the more problematic goal of protecting some innocent people by sacrificing others. The hypothetical legislation incorporates war into law only by making law as partisan and ruthless as war. It no longer resembles law as Americans generally understand it.

The Threat to International Human Rights

In the War on Terrorism, what becomes of international human rights? It seems beyond dispute that the war model poses a threat to international human rights, because honoring human rights is neither practically possible nor theoretically required during war. Combatants are legitimate targets; non-combatants maimed by accident or mistake are regarded as collateral damage rather than victims of atrocities; cases of mistaken identity get killed or confined without a hearing because combat conditions preclude due process. To be sure, the laws of war specify minimum human rights, but these are far less robust than rights in peacetime—and the hybrid war-law model reduces this schedule of rights even further by classifying the enemy as unlawful combatants.

One striking example of the erosion of human rights is tolerance of torture. It should be recalled that a 1995

al Qaeda plot to bomb eleven U.S. airliners was thwarted by information tortured out of a Pakistani suspect by the Philippine police—an eerie real-life version of the familiar philosophical thought-experiment. The *Washington Post* reports that since September 11 the U.S. has engaged in the summary transfer of dozens of terrorism suspects to countries where they will be interrogated under torture. But it isn't just the United States that has proven willing to tolerate torture for security reasons. Last December, the Swedish government snatched a suspected Islamic extremist to whom it had previously granted political asylum, and the same day had him transferred to Egypt, where Amnesty International reports that he has been tortured to the point where he walks only with difficulty. Sweden is not, to say the least, a traditionally hard-line nation on human rights issues. None of this international transportation is lawful—indeed, it violates international treaty obligations under the Convention against Torture that in the U.S. have constitutional status as “supreme Law of the Land”—but that may not matter under the war model, in which even constitutional rights may be abrogated.

It is natural to suggest that this suspension of human rights is an exceptional emergency measure to deal with an unprecedented threat. This raises the question of how long human rights will remain suspended. When will the war be over?

Here, the chief problem is that the War on Terrorism is not like any other kind of war. The enemy, Terrorism, is not a territorial state or nation or government. There is no opposite number to negotiate with. There is no one on the other side to call a truce or declare a ceasefire, no one among the enemy authorized to surrender. In traditional wars among states, the war aim is, as Clausewitz argued, to impose one state's political will on another's. The *aim* of the war is not to kill the enemy—killing the enemy is the *means* used to achieve the real end, which is to force capitulation. In the War on Terrorism, no capitulation is possible. That means that the real aim of the war is, quite simply, to kill or capture all of the terrorists—to keep on killing and killing, capturing and capturing, until they are all gone.

Of course, no one expects that terrorism will ever disappear completely. Everyone understands that new anti-American extremists, new terrorists, will always arise and always be available for recruitment and deployment. Everyone understands that even if al Qaeda is destroyed or decapitated, other groups, with other leaders, will arise in its place. It follows, then, that the War on Terrorism will be a war that can only be abandoned, never concluded. The War has no natural resting point, no moment of victory or finality. It requires a mission of killing and capturing, in territories all over the globe, that will go on in perpetuity. It

follows as well that the suspension of human rights implicit in the hybrid war-law model is not temporary but permanent.

Perhaps with this fear in mind, Congressional authorization of President Bush's military campaign limits its scope to those responsible for September 11 and their sponsors. But the War on Terrorism has taken on a life of its own that makes the Congressional authorization little more than a technicality. Because of the threat of nuclear terror, the American leadership actively debates a war on Iraq regardless of whether Iraq was implicated in September 11; and the President's yoking of Iraq, Iran, and North Korea into a single axis of evil because they back terror suggests that the War on Terrorism might eventually encompass all these nations. If the U.S. ever unearths tangible evidence that any of these countries is harboring or abetting terrorists with weapons of mass destruction, there can be little doubt that Congress will support military action. So too, Russia invokes the American War on Terrorism to justify its attacks on Chechen rebels, China uses it to deflect criticisms of its campaign against Uighur separatists, and Israeli Prime Minister Sharon explicitly links military actions against Palestinian insurgents to the American War on Terrorism. No doubt there is political opportunism at work in some or all of these efforts to piggy-back onto America's campaign, but the opportunity would not exist if "War on Terrorism" were merely the code-name of a discrete, neatly-boxed American operation. Instead, the War on Terrorism has become a model of politics, a world-view with its own distinctive premises and consequences. As I have argued, it includes a new model of state action, the hybrid war-law model, which depresses human rights from their peace-time standard to the war-time standard, and indeed even further. So long as it continues, the War on Terrorism means the end of human rights, at least for those near enough to be touched by the fire of battle.

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Geneva Convention, see: Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3317, signed on August 12, 1949, at Geneva, Article 17. Although the U.S. has not ratified the Geneva Convention, it has become part of customary international law, and certainly belongs to the war model. Count One of the Lindh indictment charges him with violating 18 U.S.C. 2332(b), "Whoever outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States" may be sentenced to 20 years (for attempts) or life imprisonment (for conspiracies). Subsection (c) likewise criminalizes "engag[ing] in physical violence with intent to cause serious bodily injury to a national of the United States; or with the result that serious bodily injury is caused to a national of the United States." Lawful combatants are defined in the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, 1 Bevans 631, signed on October 18, 1907, at The Hague, Article 1. The definition requires that combatants "have a fixed distinctive emblem recognizable at a distance." Protocol I Additional to the Geneva Conventions of 1949, 1125 U.N.T.S. 3, adopted on June 8, 1977, at Geneva, Article 44 (3) makes an important change in the Hague Convention, expanding the definition of combatants to include non-uniformed irregulars. However, the United States has not agreed to Protocol I. The source of Ruth Wedgwood's remarks: Interview with Melissa Block, National Public Radio program, "All Things Considered" (January 18, 2002); Gary Solis, "Even a 'Bad Man' Has Rights," *Washington Post* (June 25, 2002); *Ex parte Quirin*, 317 U.S. 1, 31 (1942). On the torture of the Pakistani militant by Philippine police: Doug Struck et al., "Borderless Network Of Terror; Bin Laden Followers Reach Across Globe," *Washington Post* (September 23, 2001): "For weeks, agents hit him with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts," wrote journalists Marites Vitug and Glenda Gloria in 'Under the Crescent Moon,' an acclaimed book on Abu Sayyaf. 'His ribs were almost totally broken and his captors were surprised he survived.'" On U.S. and Swedish transfers of Islamic militants to countries employing torture: Rajiv Chandrasakaran & Peter Finn, "U.S. Behind Secret Transfer of Terror Suspects," *Washington Post* (March 11, 2002); Peter Finn, "Europeans Tossing Terror Suspects Out the Door," *Washington Post* (January 29, 2002); Anthony Shadid, "Fighting Terror/ Atmosphere in Europe, Military Campaign /Asylum Bids; in Shift, Sweden Extradites Militants to Egypt," *Boston Globe* (December 31, 2001). Article 3(1) of the Convention against Torture provides that "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." Article 2(2) cautions that "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." But no parallel caution is incorporated into Article 3(1)'s non-refoulement rule, and a lawyer might well argue that its absence implies that the rule may be abrogated during war or similar public emergency. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85. Ratified by the United States, Oct. 2, 1994. Entered into force for the United States, Nov. 20, 1994. (Article VI of the U.S. Constitution provides that treaties are the "supreme Law of the Land.")

Reconceiving the Political: Notes toward a New Pluralism

William A. Galston

Introduction: Liberal Democracy and Limits on State Power

A liberal democracy is (among other things) an invitation to struggle over the control of civil associations. State/society debates have recurred over the past century of U.S. history, frequently generating landmark Supreme Court cases. While the specific issues vary, the general form is the same. On one side are general public principles that the state seeks to enforce; on the other are specific beliefs and practices that the association seeks to protect. *Boy Scouts of America v. Dale*—the much-publicized case concerning that organization's interest in barring homosexual Scout leaders—is but the latest chapter in what will no doubt prove to be a continuing saga.

Within the U.S. constitutional context, these issues are often debated in terms such as free exercise of religion, freedom of association, or the individual liberty broadly protected under the 14th Amendment. Having pondered these matters for much of the past decade, I

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have concluded that this constitutional debate, though rich and illuminating, does not go deep enough. It is necessary, I have come to believe, to reconsider the understanding of politics that pervades much contemporary discussion, especially among political theorists, an understanding that tacitly views public institutions as plenipotentiary and civil society as a political construction possessing only those liberties that the polity chooses to grant and modify or revoke at will. This understanding of politics makes it all but impossible to give serious weight to the “liberal” dimension of lib-

eral democracy.

The most useful point of departure for the reconsideration of politics I'm urging is found in the writings of the British political pluralists and pluralist thinkers working in the Calvinist tradition. This pluralist movement began to take shape in the nineteenth century as a reaction to the growing tendency to see state institutions as plenipotentiary. This tendency took various practical forms in different countries: French anticlerical republicanism; British parliamentary supremacy; the drive for national unification in Germany and Italy against subordinate political and social powers. Following political theorist Stephen Macedo (though disagreeing with him in other respects), I shall call this idea of the plenipotentiary state “civic totalism.”

Historically, one can discern at least three distinct secular-theoretical arguments for civic totalism. (Theological arguments, which raise a different set of issues, are beyond the scope of these comments.)

The first is the idea, traced back to Aristotle, that politics enjoys general authority over subordinate activities and institutions because it aims at the highest and most comprehensive good for human beings. The *Politics* virtually begins with the proposition that “all partnerships aim at some good, and . . . the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. That is what is called . . . the political partnership.” (For present purposes, whether this statement is an adequate representation of Aristotle's full view is a matter we may set aside.)

Seventeenth-century political philosopher Thomas Hobbes offered a second kind of justification for civic totalism: any less robust form of politics would in practice countenance divided sovereignty—the dreaded *imperium in imperio*, an open invitation to civic conflict and war. Sovereignty cannot be divided, even between civil and spiritual authorities. In Hobbes' view, undivided sovereign authority has unlimited power to decide whether, and under what conditions, individuals and associations would enjoy liberty of action. No entity, individual or collective, can assert

rights against the public authority. Indeed, civil law may rightfully prohibit even the teaching of truth, if it is contrary to the requirements of civil peace.

A third argument for civic totalism was inspired by the eighteenth-century French philosopher Jean Jacques Rousseau: civic health and morality cannot be achieved without citizens' wholehearted devotion to the common good. Loyalties divided between the republic and other ties, whether to civil associations or to revealed religious truth, are bound to dilute civic spirit. And the liberal appeal to private life as against public life will only legitimate selfishness at the expense of the spirit of contribution and sacrifice without which the polity cannot endure. Representing this tradition, Emile Combes, a turn-of-the-century premier in the French Third Republic, declared that "There are, there can be no rights except the right of the State, and there [is], and there can be no other authority than the authority of the Republic."

I do not wish to suggest that these three traditions converge on precisely the same account of civic totalism. A chasm divides Hobbes and Rousseau from

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Aristotle. To oversimplify drastically: Greek religion was civil, offering support for the institutions of the polis. The post-classical rise of revealed religion—especially Christianity—ruptured the unity of the political order. Much Renaissance and early modern theory sought to overcome this diremption and restore the unity of public authority. Hobbes and Rousseau wrote in this "theological-political" tradition and tried in different ways to subordinate religious claims to the sovereignty of politics.

For this reason, among others, Hobbes and Rousseau were less willing than was Aristotle to acknowledge the independent and legitimate existence of intermediate associations. They were drawn instead to a doctrine, originating in Roman law and transmitted to modernity through the Renaissance social and political philosopher Jean Bodin, among others, according to which intermediate associations existed solely as revocable "concessions" of power from the sovereign political authority. Individuals possessed no inherent right of association, and associations enjoyed no rights other than those politically defined and granted. In short, intermediate associations were political constructions,

to be tolerated only to the extent that they served the interests of the state. This Roman-law stance may be contrasted to the view of early Calvinists that a civil association required no special fiat from the state for its existence. As historian of theology Frederick Carney puts it, "Its own purposes, both natural and volitional, constitute its *raison d'être*, not its convenience to the state."

These three traditions may seem far removed from the mainstream of contemporary views. Doesn't the liberal strand of "liberal democracy" qualify and limit the legitimate power of the state? Isn't this the entering wedge for a set of fundamental freedoms that can stand against the claims of state power?

The standard history of liberalism lends support to this view. The rise of revealed religion created a diremption of authority and challenged the comprehensive primacy of politics. The early modern wars of religion sparked new understandings of the relation between religion and politics, between individual conscience and public order, between unity and diversity. As politics came to be understood as limited rather than total, the possibility emerged that the principles constituting individual lives and civil associations might not be congruent with the principles constituting public institutions. The point of liberal constitutionalism, and of liberal statesmanship, was not to abolish these differences but rather, so far as possible, to help them serve the cause of ordered liberty.

The Totalist Temptation

Despite this history, many contemporary theorists, including those who think of themselves as working squarely within the liberal tradition, embrace propositions that draw them away from the idea of limited

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government and toward civic totalism, perhaps against their intention. Some come close to arguing that if state power is exercised properly—that is democratically—it need not be limited by any considerations other than those required by democratic processes.

The philosopher and social theorist Jürgen Habermas offers the clearest example of this tendency. He insists that once obsolete metaphysical doctrines are set aside, "there is no longer any fixed point outside the democratic procedure itself." But this is no

cause for worry or regret: whatever is normatively defensible in liberal rights is contained in the discourse-rights of "sovereign [democratic] citizens." The residual rights not so contained constitute, not bulwarks against oppression, but rather the illegitimate insulation of "private" practices from public scrutiny.

An eminent American democratic theorist, Robert Dahl, is tempted by Habermas's stance. He characterizes as "reasonable" and "attractive" the view that members of political communities have no fundamental interests, rights, or claims other than those integral to the democratic process or needed for its preservation. The only limits to the legitimate scope of democratic power are the requisities of democracy itself. Put simply: a demos that observes the norms of democratic decision-making may do what it wants.

Unlike Habermas, Dahl is not entirely comfortable with restricting the domain of rights to the conditions of democracy. He concedes that this proposal raises a "disturbing" question: what about interests, rights, and claims that cannot be adequately understood as aspects of the democratic process but which nonetheless seem important and defensible? What about fair trials, or freedom of religion and conscience? Without definitively answering this question, Dahl examines the various ways in which the defense of rights may be institutionalized, concluding that those who would temper democratic majorities with "guardian" structures such as courts bear a heavy burden of proof that they rarely if ever discharge successfully. The most reliable cure for the ills of democracy is more democracy; the resort to non-majoritarian protections risks undermining the people's capacity to govern itself.

For another example of the totalist temptation, consider the argument Stephen Macedo lays out in his most recent book, *Diversity and Distrust*. Throughout this book, Macedo stresses the "positive ambitions" of liberal constitutionalism and the "transformative project" required to realize them. Liberals, he insists, must hold fast to the "full measure of our civic ambitions." For example, liberalism's transformative project requires public policy to "shape or constitute all forms of diversity so that people are *satisfied* leading lives of bounded freedom [and to] mold *people* in a manner that ensures that liberal freedom is what they want." The health of our regime, he believes, depends on its "ability to turn people's deepest convictions—including their religious beliefs—in directions that are congruent with the ways of a liberal republic."

Macedo's repeated use of the term "regime" is instructive. In the Greek conception of the regime, to which he tacitly appeals, politics is architectonic, and other aspects of human existence—economic, social, aesthetic—are subordinate. Even religion is understood as civil rather than autonomous, let alone as a source of reservations against state authority. This is

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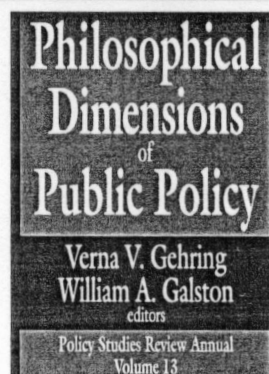
Verna V. Gehring and William A. Galston, editors

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more than a question of power. For a regime to be healthy, runs the argument, it must be a unity, and its political principles must therefore ramify through the rest of its citizens' lives. All matters are potentially public matters.

While acknowledging that the lives of liberal citizens are "in a [formal] sense" divided between public and private, Macedo insists that this division is "superficial" because liberal institutions and practices legitimately shape all of our deepest commitments so as to make them supportive of the liberal regime. Faith-based commitments are not exempt; he unflinchingly asserts that "we have a shared account of basic civic values that impose limits on what can be true in the religious sphere."

Macedo is aware that his approach, undertaken in the name of liberalism, may seem "deeply illiberal." His elaboration of his view does little to dispel this impression. Consider the following claim: Liberal citizens should be "alert to the possibility that religious imperatives, or even inherited notions of what it means to be a good parent, spouse, or lover, might in fact run afoul of guarantees of equal freedom." Confronted with such conflicts, liberal citizens should be "committed to honoring the public demands of liberal justice in all departments of their lives." The reason is the primacy of the political: "A liberal democratic polity [rests] on shared political commitments weighty enough to override competing values."

The difficulty is to explain why, within the structure of Rawls's theory, the principles regulating the basic structure of society should not be applied directly to institutions such as churches and the family.

Even when we acknowledge the diverse spheres of human and the diversity of legitimate values at work within them, he concludes, "Nothing about reasonable pluralism should shake our confidence in the overriding weight of shared public principles."

Let me now turn to the most complex case. In agreement with what I've been calling the totalist temptation, political philosopher John Rawls asserts that "the values of the special domain of the political . . . normally outweigh whatever values may conflict with them." Why is this the case? Rawls offers two reasons. First, political values are very important; they determine social life and make fair cooperation possible. Second, conflict between political and nonpolitical values can usually be avoided, so long as political values are appropriately understood.

Rawls famously maintains that justice is the preeminent political value, the "first virtue of social institu-

tions" and that "laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust." Nonetheless, he asserts, consistent with the liberal tradition, that the principles of justice do not directly regulate institutions and associations—such as churches and families—within society. (Principles of justice do affect these institutions indirectly, via the influence of just background institutions.)

The difficulty is to explain why, within the structure of Rawls's theory, the principles regulating the basic structure of society should not be applied directly to institutions such as churches and the family. Taken lit-

Why can't nonpolitical associations be seen as limiting the scope of politics at the same time that the basic structure of politics constrains associations?

erally, many of these background principles would seem to warrant such interventions. For example, imbalances in parenting responsibilities can affect women's "fair equality of opportunity." Does this mean, as Rawls seems to suggest, that "special provisions of family law" should prevent or rectify this imbalance? If the family is part of the basic structure of society, as Rawls now claims, why does he judge it "hardly sensible" that parents be required to treat their children in accordance with the principles directly governing the basic structure?

The ambiguous status of the family reflects a deeper structural problem in Rawls's account. At one point he offers a formulation that seems promising: We distinguish between the point of view of citizens and of members of associations. As citizens, we endorse the constraints of principles of justice; as association members, we want to limit those constraints so that the inner life of associations can flourish. This generates a "division of labor" that treats the basic structure and civil association as being, so to speak, on a par with one another.

But on closer inspection, it turns out that there's a hierarchical relation after all, with the principles of justice serving as trumps. Otherwise put, the basic structure constitutes the end, and the various associations are in part means to that end. So, for example, "the treatment of children must be such as to support the family's role in upholding a constitutional regime." But what if (say) religious free exercise includes teachings and practices that don't do this? (Imagine a religious group that has no intention of altering the public structure of equal political rights for women but teaches its own members that women shouldn't participate in public life.)

Rawls is certain (quite sensibly in my view) that “We wouldn’t want political principles of justice to apply directly to the internal life of the family.” The reasoning appears to be that various associations have inner lives that differ qualitatively from that of the political realm, so that political principles would be “out of place.” This then raises a question: why aren’t political, nonpolitical associations understood as related horizontally rather than vertically? Why can’t nonpolitical associations be seen as limiting the scope of politics at the same time that the basic structure of politics constrains associations?

Rawls’s apparent answer runs as follows: the sphere or domain of the nonpolitical has no independent existence or definition but is simply the result (or residuum) of how the principles of justice are applied directly and indirectly. In particular, the principle of equal citizenship applies everywhere.

In one sense, this is clearly true. If an association uses coercion to prevent some of its members from exercising their equal political rights, the state must step in to enforce them. But the more usual case is that the association organizes itself according to norms (of membership or activity) that are inconsistent with principles of equal citizenship. What is the state’s legitimate power in the face of these dissenting practices?

Is it so obvious that the legitimate activities of nonpolitical associations should be defined relative, not to the inner life of those associations, but rather to the principles of the public sphere? Can’t we say something important about the distinctive natures of individual conscience, friendship, families, communities of faith or inquiry, and shouldn’t those primary features of our social life have an effect on the scope of political principles, not just vice versa? Even if justice is the “first virtue” of public institutions and enjoys lexical priority over other goods of the public realm (a debatable proposition), does it follow that the public realm enjoys comprehensive lexical priority over the other forms of human activity and association?

The Pluralist Alternative

It is in the context of questions such as these that political pluralism emerges as an alternative to all forms of civic totalism. Political pluralism, to begin, rejects efforts to understand individuals, families, and associations simply as parts within and of a political whole. Relatedly, pluralism rejects the instrumental/teleological argument that individuals, families, and associations are adequately understood as “for the sake of” some political purpose. For example, religion is not (only) civil and in some circumstances may be in tension with civil requirements. This is *not* to say that political communities must be understood as without common purposes. The political order is not

simply a framework within which individuals, families, and associations may pursue their own purposes. But civic purposes are not comprehensive and do not necessarily trump the purposes of individuals and groups.

Political pluralism understands human life as consisting in multiplicity of spheres, some overlapping, with distinct natures and/or inner norms. Each sphere enjoys a limited but real autonomy. It rejects any account of political community that creates a unidimensional hierarchical ordering among these spheres of life. Rather, different forms of association and activity are complexly interrelated. There may be local or partial hierarchies among subsets of spheres in specific context, but there are no comprehensive lexical orderings among categories of human life.

For these reasons, among others, political pluralism does not seek to overcome, but rather endorses, the post-pagan diremption of human loyalty and political authority created by the rise of revealed religion. That this creates problems of practical governance cannot be denied. But pluralists refuse to resolve these problems by allowing public authorities to determine the substance and scope of allowable belief (Hobbes) or by

Political pluralism understands human life as consisting in multiplicity of spheres, some overlapping, with distinct natures and/or inner norms.

reducing faith to civil religion and elevating devotion to the common civic good as the highest human value (Rousseau). Fundamental tensions rooted in the deep structure of human existence cannot be abolished in a stroke but must rather be acknowledged, negotiated, and adjudicated with due regard to the contours of specific cases and controversies.

Pluralist politics is a politics of recognition rather than of construction. It respects the diverse spheres of human activity; it does not understand itself as creating or constituting those activities. Families are shaped by public law, but that does not mean that they are “socially constructed.” There are complex relations of mutual impact between public law and faith communities, but it is preposterous to claim that the public sphere creates these communities. Do environmental laws create air and water? Many types of human association possess an existence that is not derived from the state. Accordingly, pluralist politics does not presume that the inner structure and principles of every sphere must (for either instrumental or moral reasons) mirror the structure and principles of basic political institutions.

A pluralist politics is, however, responsible for coordinating other spheres of activity, and especially for adjudicating the inevitable overlaps and disputes among them. This form of politics evidently requires the mutual limitation of some freedoms, individual and associational. It monopolizes the legitimate use of force, except in cases of self-defense when the polity cannot or does not protect us. It understands that group tyranny is possible and therefore protects individuals against some associational abuses. But pluralist politics presumes that the enforcement of basic rights of citizenship and of exit rights, suitably understood, will usually suffice. Associational integrity requires a broad though not unlimited right of groups to define their own membership, to exclude as well as include, and a pluralist polity will respect that right.

A pluralist polity is not a neutral framework (assuming such a thing is even possible) but rather pursues a distinctive ensemble of public purposes. As David Nicholls, a leading scholar of political pluralism, argues, it presupposes a limited body of shared belief: in civil peace, in toleration for different ways of life, in some machinery for resolving disputes, and (notably) in the ongoing right of individuals and groups to resist conscientiously any exercise of public power they regard as illegitimate. So understood, political pluralism serves as a barrier against the greatest preventable evils of human life, but it pursues at most a partial rather than comprehensive good. As Nicholls puts it,

[B]y limiting power we limit the ability to do good, but we also limit the chance of doing evil. Pluralists would, on the whole, have concentrated on avoiding the worst in politics rather than trying to achieve the best. They [reject] the Hobbist notion that anarchy is the only great threat to society, and that absolute power must be put into the hands of the rulers, in order to avert this danger; the preservation of life at any cost was not for them the sole end of politics.

Conclusion: The Philosophical Status of Political Pluralism

Let me conclude these notes with a Rawlsian question: is political pluralism along the lines I've just sketched a "comprehensive" account of these matters or rather a "political" account that can be assessed independent of controversial moral or metaphysical doctrine? I believe that Nicholls is on the right track when he argues that political pluralism is not a fully freestanding doctrine: "Political pluralism may well be compatible with many ethical theories, but it is surely the case that it is incompatible with some ethical theories." He goes on to observe, plausibly enough that "It is likely that a monist in [moral or metaphysical] philosophy would reject political pluralism and would hope that the unity which is characteristic of the whole universe might become concrete in institutional form."

Let me turn this around and put it affirmatively: I

believe that political pluralism and the kind of moral pluralism articulated by Isaiah Berlin fit together in theory and in practice. Taken together, they offer the firmest basis for an account of liberal democracy that does justice to its "liberal" dimension, to its understanding of legitimate public power as important but inherently limited, and to the specific judgments (legal, legislative, and socio-cultural) that those thinking and acting in a liberal spirit are wont to reach. Those wishing to explore the arguments behind these beliefs are invited consult my newest work, *Liberal Pluralism*.

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Sources: *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); for the British tradition, see *The Pluralist Theory of the State: Selected Writings of G. D. H. Cole, J. N. Figgis, and H. J. Laski*, edited by Paul Q. Hirst (Routledge, 1989); for the Calvinist tradition, see *Political Order and the Plural Structure of Society*, edited by James W. Skillen and Rockne M. McCarthy (Scholars Press, 1991); for the full account of our agreement and (mainly) disagreement, see my review of Stephen Macedo's latest book, *Diversity and Distrust: Civic Education in a Multicultural Society* (Harvard University Press, 2000), recently published in *Ethics*, vol. 112 (January 2002), pp. 386–391; Thomas Hobbes, *Leviathan*, edited by C.B. McPherson (Penguin, 1977), the quote by Emile Combes is found in the Hirst volume, p. 112; Frederick Carney, "Associational Thought in Early Calvinism," in *Voluntary Associations: A Study of Groups in Free Societies*, edited by D. B. Robertson (John Knox Press, 1966); Jürgen Habermas is quoted and discussed in John Rawls, *Political Liberalism* (Columbia University Press, 1996); Robert Dahl, *Democracy and Its Critics* (Yale University Press, 1989); Rawls's famous claim that justice is the preeminent political value is found in John Rawls, *A Theory of Justice* (Harvard University Press, 1971). For Rawls's assertion that the principles of justice do not directly regulate institutions and associations, see John Rawls, *Justice as Fairness: A Restatement*, edited by Erin Kelly (Harvard University Press, 2001). This work also contains the ambiguous discussion of the status of the family. To complicate matters further, on one and the same page (10), Rawls seems to characterize the family both as part of the basic structure of society and as an institution within the basic structure. I don't see how it can be both, and it makes a huge difference which it is. David Nicholls, *The Pluralist State* (Macmillan, 1975); William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge University Press, 2002).



Do Hackers Provide a Public Service?

Verna V. Gehring

I am sort of a gadfly . . . and the state is like a great and noble steed who is tardy in his motions owing to his very size, and requires to be stirred to life.

—Plato, *Apology*

These days hardly anyone is surprised to receive a high priority e-mail message from the office information technology specialist warning that a computer virus is loose in the network. The risk of computer viruses, which hijack e-mail address books and erase drives, is now a routine part of work life. Most of us respond to office alerts with a sigh; we might turn on a quarantine protocol and perhaps mutter an oath about “hackers” before resuming our workday. Typically, news reports soon detail the extent of the damage caused by the virus, and we might later hear that a suspect has been arrested—somewhere in the world.

Media reports commonly refer to “hackers” as responsible for these exploits. After discussing some recent cases of cybercriminal behavior and legal responses, I will briefly describe the history of hackers and draw distinctions among several kinds of contemporary computer enthusiasts. After arguing that the term ‘hacker’ is used imprecisely and too broadly, I contend that hackers possess ethical scruples that both guide their lives and also serve the public interest.

Recent Exploits of Computer Vandals

News stories abound concerning those who illegally gain access to credit card information and go on to charge thousands of dollars, or who commit corporate

The losses caused by identity theft can be enormous, but the costs incurred by computer criminals who compromise network systems on a large—even global—scale are far more difficult to calculate.

espionage by computer and cost millions in lost profits. The losses caused by identity theft can be enormous, but the costs incurred by computer criminals who compromise network systems on a large—even global—scale are far more difficult to calculate. Malicious software programs are now routinely hid-

den in attachments to e-mail messages with subject headings—such as “The Info. You Requested” or “Hi:Check This!”—that encourage recipients to believe that the e-mails come from friends or trusted colleagues, or are worded in ways that pique the recipients’ curiosity. Typically, opening the attachment enables a secret program, or “worm” to send itself to everyone in the victim’s e-mail address book, spreading the virus—sometimes worldwide—and bringing network traffic to a halt. Following his arrest in December 1999, David Smith pled guilty to charges in connection with his creation of the “Melissa” virus, and he acknowledged that his program caused \$80 million in damage, an estimate that reflects the time spent by systems administrators to clear the virus from affected computers.

Perhaps inspired by “Melissa,” in early 2000 the “Love Bug” virus—which one computer security expert described as “‘Melissa’ on steroids”—spread globally via a similar but more comprehensive e-mail piggyback system. Because the virus replaced media files with copies of itself, the damage was far more extensive—according to some estimates, in excess of U.S. \$1 billion. The virus seems to have been unleashed from the Philippines, raising questions about whether the program’s creator must answer only to Philippine law—which lacks a well defined area of computer jurisprudence—or whether he can be held legally accountable in other countries. Finally, computer security specialists have remarked at how few, and relatively unsophisticated, programming skills were needed for the virus to immobilize communication worldwide. The notoriety of the “I Love You” virus has encouraged copycats (such as “Joke,” and “Anna Kournikova”—which entice recipients to open what they believe is a humorous attachment, or a photo of the famous tennis star), and it is unclear whether creators of one type of virus might be legally responsible for at least some of the damage caused by subsequent copycat programs.

Legal Responses

Legal responses to computer information tampering or theft are still under development. In the U.S., the FBI’s National Infrastructure Protection Center is

responsible for tracking denial-of-service problems and defacement of Web sites. Both tampering and theft crimes fall under Title 18 of the United States Code, which covers damage to a computer "used in interstate or foreign commerce." The maximum penalty under the law is ten years in prison and twice the gross monetary loss to victims. Software theft and piracy are considered copyright infringement, a part of Federal law, and carry as little as \$2,500 in fines or as much as three years' probation and \$40,000 in fines.

To date, the person who has served the most prison time for computer meddling is Kevin Mitnick, who spent nearly five years in Federal prison for admitting to access device, wire, and computer fraud, and for intercepting electronic communications and copying confidential materials. As part of his plea bargain, Mitnick accepted the government's accusation that he caused in excess of five million dollars in damage; yet his fine was slightly above \$4,000.

Congress, vexed by the imaginative activity of cybercriminals, is considering enacting new laws or changing existing ones to better protect computer technology. One proposal, for instance, would double prison sentences, allowing ten years' jail time for a first offense and twenty years for subsequent convictions. Another proposal would ease wiretap laws so that officials could more easily examine data traffic and spot illegal activity. The USA Patriot Act, a sweeping resolution passed by Congress shortly after the events of September 11 and intended to streamline detection and obstruction of terrorist activity, may increase surveillance of cybercriminal activity as well. And late in 2001, the FBI announced formation of a Cybercrime Division to investigate intellectual property, high-tech, and computer crimes. Although its organizational structure is not yet clear, this division may be part of the National Infrastructure Protection Center (an interagency group that tracks cybercrime), and primarily concerns counterterrorism measures.

A Brief History of Hackers, Crackers, Phreaks, and Others

Although media reports of computer vandalism commonly blame "hackers," this use is imprecise. To understand why, one must look to the history of computer enthusiasts and the lexicon they have developed to detail their pursuits.

The first computer programmers did not call themselves "hackers," which derives from the seventeenth-century 'hacker,' a "lusty laborer" who harvested fields by dogged and rough swings of his hoe. Many

of these early programming enthusiasts came from engineering or physics backgrounds, and were amateur radio or model train hobbyists. But from about 1945 onward (and especially during the creation of the first ENIAC computer) some programmers realized that their expertise in computer software and technology had evolved not just into a profession, but into a *passion*. Not until the 1960s did these extraordinarily devoted and talented programmers describe themselves as "hackers," their term of self-identification capturing the tenacious and methodical nature of inquiry considered essential to technological innovation.

One such group became the heart of the

MIT Artificial Intelligence Laboratory, and its influence spread to ARPAnet, created by the Department of Defense in 1969 and precursor of the first transcontinental, high-speed computer network. Stanford University's Artificial Intelligence Laboratory (SAIL) and Carnegie-Mellon University (CMU) also became thriving centers of computer science, artificial intelligence, and ultimately gave rise to the Internet, the Unix and Linux systems, and the World Wide Web, among other accomplishments.

These early programmers also recognized a burgeoning hacker culture, typified by a resentment of bureaucratic hurdles—such as restricted access to computer mainframes and telephone systems—that frustrated their efforts to explore fully the technological



"In your computer files you refer to me as a snoop."

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systems that so intrigued them. Richard Stallman is today best known for such innovative programs as the text-editor program Emacs, and GNU (which, together with Linux, forms an open source operating system rivaling that offered by Microsoft). Stallman offers a colorful description of the nascent “hacker attitude” at the time he joined the MIT Artificial Intelligence laboratory in 1971:

Bureaucracy should not be allowed to get in the way of doing anything useful. Rules did not matter – results mattered. Rules, in the form of computer security or locks on doors, were held in total, absolute disrespect. We would be proud of how quickly we would sweep away whatever little piece of bureaucracy was getting in the way, how little time it forced you to waste. Anyone who dared to lock a terminal in his office, say because he was professor and thought he was more important than other people, would likely find his door left open the next morning. I would just climb over the ceiling or under the floor, move the terminal out, or leave the door open with a note saying what a big inconvenience it is to go under the floor, ‘so please do not inconvenience people by locking the door any longer.’ Even now, there is a big wrench at the AI lab entitled, ‘the seventh-floor master key,’ to be used in case anyone dares to lock up one of the more fancy terminals.

The fundamental characteristic of hackers can be distilled into one simple criterion: a hacker is one who enjoys the intellectual challenge of creatively overcoming and circumventing limitations of programming systems and who tries to extend their capabilities. Just as important, hackers insist that ‘hacker’ is a term of respect, which can be conferred only by other hackers on those whose creative skills entitle them to membership in a wider community of proficient enthusiasts.

With this brief history in mind, one can easily see why many hackers insist that their term of self-description has been applied too broadly—commonly referring to *anyone* who seeks to extend or circumvent technological limits. The malicious meddler looking to discover sensitive information by “poking around” is not properly called a hacker since, for one thing, sensitive information is often uncovered not by skill but simply by stumbling upon it. “Crackers” are, according to the hackers who disdain them, no more than unskilled stumblers, petty thieves and vandals who rely on luck. Further, not all *skilled* enthusiasts are hackers, either. One sort of skilled cracker, a “phreak” (or “phone phreak”), breaks into telephone networks or security systems in order to make free calls or commandeer services. Another kind of cracker, sometimes referred to as “warez” or “warez d00dz,” tries to obtain copies of copyrighted software, break the protection on the software, and then globally distribute the pirate program. Ideally, a warez d00d tries to release “0-day warez,” copies of commercial software copied, cracked, and re-released on the first day the software is available for retail sale.

While crackers are gatecrashers—for them breaking in, perhaps copying, stealing, or commandeering are

ends in themselves—hackers are driven by curiosity and a desire for proficiency, even elegance, in their endeavors. They are typically libertarian in their insistence on access—Stallman refused to allow “fancy terminals” in the A.I. lab to remain locked up—but they tend not to be cavalier about the law. Further, as evidenced by the various codes of ethics hackers have formulated for themselves, hackers have attempted to

A hacker is one who enjoys the intellectual challenge of creatively overcoming and circumventing limitations of programming systems and who tries to extend their capabilities.

convey the normative character of their work and the importance of a personal philosophy to develop their intellectual and moral strength and guide their actions.

The Development of Hacker “Manifestos”

The first thorough discussion of an ethical code for hackers appears in Steven Levy’s 1984 work, *Hacker: Heroes of the Computer Revolution*. Levy formulates six criteria that summarize hacker behavior and, to some extent, disclose their general attitude. Although this “code” has been reprinted widely, because it reflects attitudes and technical concerns dating from the 1970s, the first two criteria in particular have seen refinement:

- Access to computers—and anything that might teach you something about the way the world works—should be unlimited and total.
- All information should be free.
- Mistrust authority—promote decentralization.
- Hackers should be judged by their hacking, not bogus criteria such as degrees, age, race, or position.
- You can create art and beauty on a computer.
- Computers can change your life for the better.

At about the same time (in 1986) *Phrack*, the “official” hacker newsletter, published “The Manifesto” (see inset on page 24), intended both as a statement of the hacker attitude as well as a work of art created by computer technology. Finally, in that same year, 1986, “Doctor Crash” summarized the hacker attitude in three principles:

- Hackers reject the notion that “businesses” are the only groups entitled to access and use of modern technology.
- Hacking is a weapon in the fight against encroaching computer technology.
- The high cost of equipment is beyond the means of most hackers, and therefore hacking and phreaking are the only recourse to spreading computer literacy.

The following was written shortly after my arrest . . .

The Conscience of a Hacker
by
The Mentor

Written on January 8, 1986

Another one got caught today, it's all over the papers. "Teenager Arrested on Computer Crime Scandal," "Hacker Arrested after Bank Tampering. . ."

Damn kids. They're all alike.

But did you, in your three-piece psychology and 1950's technobrain, ever take a look behind the eyes of the hacker? Did you ever wonder what made him tick, what forces shaped him, what may have molded him?

I am a hacker, enter my world. . .

Mine is a world that begins with school . . . I'm smarter than most of the other kids, this crap they teach us bores me. . .

Damn underachiever. They're all alike.

I'm in junior high or high school. I've listened to teachers explain for the fifteenth time how to reduce a fraction. I understand it. "No, Ms. Smith, I didn't show my work. I did it in my head. . ."

Damn kid. Probably copied it. They're all alike.

I made a discovery today. I found a computer. Wait a second, this is cool. It does what I want it to. If it makes a mistake, it's because I screwed up.

Not because it doesn't like me. . .

Or feels threatened by me. . .

Or thinks I'm a smart ass. . .

Or doesn't like teaching and shouldn't be here. . .

Damn kid. All he does is play games. They're all alike.

And then it happened. . . a door opened to a world. . . rushing through the phone line like heroin through an addict's veins, an electronic pulse is sent out, a refuge from the day-to-day incompetencies is sought. . . a board is found.

"This is it . . . this is where I belong. . ."

I know everyone here. . . even if I've never met them, never talked to them, may never hear from them again. . . I know you all. . .

Damn kid. Tying up the phone line again. They're all alike. . .

You bet your ass we're all alike. . . we've been spoon-fed baby food at school when we hungered for steak. . . the bits of meat that you did let slip through were pre-chewed and tasteless. We've been dominated by sadists, or ignored by the apathetic. The few that had something to teach found us willing pupils, but those few are like drops of water in the desert.

This is our world now. . . the world of the electron and the switch, the beauty of the baud. We make use of a service already existing without paying for what could be dirt-cheap if it wasn't run by profiteering gluttons, and you call us criminals. We explore. . . and you call us criminals. We exist without skin color, without nationality, without religious bias. . . and you call us criminals. You build atomic bombs, you wage wars, you murder, cheat, and lie to us and try to make us believe it's for our own good, yet we're the criminals.

Yes, I'm a criminal. My crime is that of curiosity. My crime is that of judging people by what they say and think, not what they look like. My crime is that of outsmarting you, something that you will never forgive me for.

I am a hacker, and this is my manifesto. You may stop this individual, but you can't stop us all. . . after all, we're all alike.

Phrack

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Though all of the criteria have been interpreted variously, Levy's first two criteria (and all three of Dr. Crash) have raised contentious discussion about what is meant by "total" and "free" access to computers and information. Particularly in the 1970s and 1980s, and into the 1990s, some argued that free access should be understood literally—computers and software should be cost free and available to anyone—and, consequently, one is justified in lifting restrictions to access and need feel no twinges of guilt about theft.

Few make this argument any longer, and "free" has come to be understood in a more specialized sense. Richard Stallman, for instance, distributes his Emacs program free of charge with a novel agreement requiring its users to share and improve on the software and then pass along source code "when you distribute any version of Emacs or a related program, and give the recipients the same freedom that you enjoyed." Other programs, such as GNU-Linux, also rely on this notion of "open source" software—that is, a program's software code is made available for anyone to modify or improve upon. Further, one can sell the "free" software—incorporating modifications that make the software easier to use, offering customization, or even simply supplying the software accompanied by directions for its use. (Again, in selling any open source software, the code must be available for the buyer to modify, perhaps to offer for resale.)

In addition to discussion of what constitutes "free access," among other ethical issues debated by hackers are what it is to cause "damage" or "harm" by one's work, the role of intention—whether someone should be morally responsible for harm caused accidentally (as when one inadvertently erases data), and whether a hacker is responsible for the effects of his or her ignorance or lack of skill. Debates also continue

over the ethical appropriateness of covering one's tracks, which may require erasures and alterations of data. Privacy is another important ethical issue discussed by hackers; for instance, they disagree about the circumstances that make access to confidential information permissible and they disagree about whether the standards for ethical access to confidential information are today lower because private information about most U.S. citizens is contained in huge databases and is routinely available for purchase.

Samurai

Hackers also debate the possibility that some of their number, while elite in their programming skills, have decided that one should not, need not, or in some circumstances are absolved from, working in service of the good. Some hackers insist that such "dark-side hackers"—although they work with criminal or malicious intent—are not crackers. ("Dark-side hacker" derives from George Lucas' character Darth Vader, who is "seduced by the dark side of the Force.")

Without resolving the issue of whether hackers are ethically justified in working in the service of a "dark side," hackers tend to agree that one can ethically use the *techniques* of the "dark-side hacker" and the "cracker" to achieve *good* ends. A number of self-professed "good" hackers call themselves "samurai" and model themselves after the historical samurai of Japan (and the "net cowboys" of William Gibson's cyberpunk novels). Samurai are hackers who hire themselves out for legal "electronic locksmith work." A samurai might take part in corporate espionage, aid lawyers pursuing privacy-rights and First Amendment cases, or help track down a cracker. Some samurai profess loyalty to their employers, and disdain vandalism, theft, and any extra-legal means of obtaining information. (Two other groups, "sneakers" and "tiger teams," are paid professionals who use cracking techniques to test security.) The evolution of informal but enforced norms (combined with, perhaps, respect for the law—or *most* laws) has led samurai to reject acting as a law unto themselves.

Falling into this class also is, one might reasonably suggest, the work of the steganographer. Steganography (which derives from the Greek for hidden writing or drawing) allows one to embed, inject, or substitute hidden material in an existing computer text, graphic, or music file. Unlike cryptography, in which an encoded message is in plain sight and one needs a decoder ring, say, to interpret the message, in steganography anyone—other than the informed recipient—who looks at, reads, or listens to an encoded file will be unaware of its hidden material. Public interest in steganography has burgeoned since September 11, with renewed questions about the FBI's Internet

monitoring program, Carnivore (which, according to public information about the system, is of limited use in finding such encrypted material) and the National Security Agency's efforts (including, possibly, Echelon, which can capture all telecommunications signals). Hackers might justify their work on samurai grounds—in this case, patriotic loyalty motivates the search for hidden information and the imperatives of national security broaden what is considered lawful.

Hacking as a Public Service

Hackers possess qualities that serve the public and help citizens discern the difference between the splashy, headline-grabbing exploits of the cracker, and the usually more quiet and certainly more useful work of the hacker. The remainder of this article articulates several of the qualities hackers display in their work that also serve the public interest.

Curiosity and a Healthy Skepticism. Hackers find fascinating problems, tackle them with skill, determi-

Hackers enjoin others to apply their curiosity to the truly novel and noteworthy.

nation, and discipline, and they admire those who work to develop those same qualities. One also encounters frequent reminders to employ the "hand's-on imperative" and warnings against "reinventing the wheel." That is, hackers enjoin others to apply their curiosity to the truly novel and noteworthy. Anything that inhibits one from recognizing problems or their possible solutions—out of ignorance, vanity, or lack of access to information that would raise a question or reveal a view as merely conventional—is curiosity misapplied, and a life lived less well than its potential. Furthermore, hackers approach large or authoritative structures with mistrust. But their skepticism is not paranoia—hackers are driven to find out for themselves and to verify conventional truths.

In this hackers are solidly in line with the traditional ethical tenets of the Western philosophical tradition. Many have echoed the belief of Plato and Aristotle that the life of inquiry—a life that requires self-discipline, and often the rejection of accepted tradition—leads not just to knowledge, and being a good person, but to becoming a good citizen as well. These philosophers, as their successors, also insisted that one must remain mindful of the crippling effects of ignorance and vanity. In response to the teachers of his time (and ours) who quizzed their students with rhetorical questions,

thereby stifling inquiry, the Renaissance thinker, Michel de Montaigne would frequently ask, “What *do* I know?”—reminding himself that knowledge begins with the recognition of one’s own ignorance and acceptance of mere convention. Only then can one find the roots of true knowledge.

Autonomy and Responsibility. Related to the ethical injunction to ground our knowledge is the imperative that we must exercise our autonomy and shape our lives according to our own ends. One interpretation of the hacker’s command to “hate boredom,” for instance, is that hackers accept that self-actualization is one’s own responsibility. Any condition of life that one finds unsatisfactory—as Jean-Paul Sartre or a number of existentialists are well known for insisting—one should not endure, and one certainly should not simply hope that someone else will bring relief. The source of dissatisfaction should be eliminated immediately, and by oneself. Boredom and apathy are symptoms of one’s ceasing to ask the right questions and proposing alternative solutions; instead, one has abandoned the responsibility for self-reliance.

Although hackers tend to have a libertarian streak, the insistence on autonomy and responsibility does not mean that we may ignore obligations to others and our wider community. Instead, the hacker attitude that directs energy to finding new problems and novel solutions also accepts that dissatisfaction with the status quo and with one’s own efforts at effecting change signal the lack of effort, or misapplied efforts, which are one’s personal responsibility to correct.

Mutual Aide and Public Involvement. Although debate continues about “free access” in the sense of what ought to be free of cost, the hacker attitude of “free access” also suggests the notion that one ought not hoard what one learns. Just as curiosity often leads to utility, giving—as many classic morality tales conclude—often leads to getting. Hackers tend to share what they know and to help others, learning and being helped in return.

When we share and help, we tend to work in transparency—everyone can see what we are doing, which can have mixed consequences. One good result of transparency is that, since the term “hacker” is a compliment within the community of hackers, if one has the skills, competence, and—as I argue—the ethics of a hacker—one’s peers recognize one for those attributes.

But another consequence of transparency tends not to be celebratory. When hackers work openly, their results are for all to see. When those results embarrass others—revealing their incompetence, laziness, pridefulness, or ignorance, for instance—the natural human response tends to be an attempt to silence the source of the disclosure. In his defense against charges that he was a traitor to Athens, Socrates famously made just that claim, suggesting that by revealing the proud and

wrongheaded views of his peers—many of whom also held political power—he guaranteed personal attack. Although Socrates crafted his role as the “gadfly” of Athens, biting and pricking the minds of his fellow citizens, the tendency to respond defensively to embarrassment remains.

The success of both types of technology enthusiasts—both dark-side hackers and crackers, as well as the self-professed “good” hackers of various types—at times rely on the ignorance of others. For instance, dark-side hackers (and crackers) exploit human weakness and gullibility to gain access to sensitive information. They might trick others into revealing their bank account passwords (by, for instance, telephoning an intended victim and posing as a field service representative with an urgent access problem). The success of samurais and other “good” hackers also depends as much on human gullibility, ignorance, and laziness as

When hackers work openly, their results are for all to see. When those results embarrass others . . . the natural human response tends to be an attempt to silence the source of the disclosure.

on their own skill. For instance, the samurai who reads the deleted e-mail messages of those employees who work on sensitive areas and unwittingly divulge useful information—would see vulnerabilities within the organization better than the employees themselves. In short, weaknesses in “wetware”—in thinking—rather than in software aid the work of both the good and the bad. The “I Love You” virus illustrates perfectly what some call “social engineering”—that is, vulnerabilities in human psychology. The “I Love You” virus relied on human weakness—in this case vanity—for its successful dissemination. Most who receive such a message would not be able to resist opening the file in hopes of learning the identity of their admirer.

Knowledge transforms and can elevate, but not all knowledge is knowledge of the good. Although knowledge can be put to bad use, however, the Western philosophical tradition has also insisted that full knowledge requires full understanding of its application—both its good and bad uses. When Renaissance thinker and master political strategist Niccolo Machiavelli called on a ruler to be both a fox and a lion, he suggested that it was inadequate to have knowledge of only the noble and good. One also had to know the ways of the fox, in order to both complete one’s knowledge and eliminate the possibility that one could be fooled by another fox. And to *know* good and bad but *choose* the good gives real moral worth to one’s actions.

These elements go a long way in explaining the reputation of hackers. In using the term too broadly, we confuse hackers with crackers. And even in their proper role, since gadflies sometimes act as foxes, we are irritated and at the same time fooled by them.

An Aesthetic Life. A final characteristic, one difficult to describe, concerns the hacker attitude toward life. Some hackers express this attitude as the belief that “computers change life for the better,” and that one can “create art and beauty on a computer.”

Though hackers believe that computers are a necessary part of the search for the good life—they typically urge proficiency in specific programs (html is a must, according to many accounts), insist that one write open-source software and help test and debug the software of others, and encourage the dissemination of useful information—the *spirit* of their advice is to strive to know and to share one’s knowledge. One hacker, who wrote an on-line primer on hacking (thereby following the dictum that one publish useful information) also suggests ways to develop one’s style and approach to being a hacker. Eric Raymond (who is the author of, among other works, the *Jargon File*, an encyclopedic work about hacking and programming) advises reading widely, studying philosophy (especially the Eastern traditions), developing an appreciation for music, and seeking to refine one’s ear for word play and puns. Above all, Raymond enjoins, a hacker must write well in order to clarify his or her thoughts and communicate them effectively. Raymond also follows his additional advice to not use silly or grandiose user identification names; he simply uses his own name.

Clearly, this is good advice for anyone. Thinking about these attributes, one sees a fundamental difference between hackers—who build—and everyone else, such as crackers, who destroy and trespass for its own sake, or people like me—novice users of the computer who use but make no contribution. It’s not always easy to see an act as one of destruction or creation. Did Socrates create or destroy? Knowledge of the full consequences of one’s actions is a tall order.

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Sources: For just one example of illegal credit access, see usdoj.gov/criminal/cybercrime/diekman4.htm; and for information concerning corporate espionage involving computer access, see “‘Netspionage’ Costs Firms Millions,” msnbc.com/new, posted 11 September 2001; for information about the David Smith case, see “Smith Pleads Guilty to Melissa Virus Charges,” by Erich Luening, news.cnet.com; for one account of the “Love Bug” virus and its connection to the Philippines, see “Computer Virus Hits Businesses, Governments Around the World,” by K.S. O’Donoghue,

www.foxnews.com); on Federal law concerning software theft, see for instance, 17 U.S.C. §301(a)). Among the numerous sites devoted to Kevin Mitnick, see www.takedown.com; *2600-The Hacker’s Quarterly*, and the “official” Kevin Mitnick site at kevin-mitnick.com. The USA Patriot Act was introduced as H.R. 3162, and was passed October 24, 2001. On the source of the word “hacker,” see the *Oxford English Dictionary*, 1971 edition (volume 1), page 1237. As part of the history of hackers, some have distinguished among pre-hacker “Real Programmers,” and first-, second-, and now third-generation hackers; for discussions on these various subgroups, see “A Brief History of Hackerdom,” which can be found among the writings of Eric Raymond at www.tuxedo.org; also Steve Mizrach, “Is there a Hacker Ethics for 90s Hackers?” copyright 1997 and posted on www.infowar.com; also Steven Levy, *Hackers: Heroes of the Computer Revolution* (Delta, 1984). Richard Stallman describes his life and work at www.stallman.org; his description of the atmosphere at MIT is quoted from project.cyberpunk.ru/-idb/hacker_ethics.html. Some have argued that one can be a hacker in a variety of areas, not just computer and information technology. For an example of this argument, see Pekka Himanen, *The Hacker Ethic and the Spirit of the Information Age*, (Random House, 2001). For a useful discussion of hackers, and distinctions among types of computer enthusiasts, see Eric S. Raymond’s (esr@snark.thyrus.com) work at, among other places, www.tuxedo.org; also a variety of hacker terminology can be found in the *Jargon File*, created by Eric Raymond and maintained at www.jargon.org. The *Jargon File* relied on in this article is *Jargon File 4.2.0*, dated January 31, 2000; for hacker codes, see Steven Levy’s, *Hacker, Dr. Crash*, Volume One, Issue Six, Phile 3 of 13, “The Techno-Revolution,” www.phrack.org. Dr. Crash goes on to insist that every hacker must also be a phone phreak, “because it is necessary to utilize the technology of the phone company to access computers far from where they live. The phone company is another example of technology abused and kept from people with high prices.” For excerpts from a number of hacker codes of ethics, see Mizrach article. The copy available was last modified on June 7, 2000. Although numerous versions of hacker ethics abound, most restate Levy, and make additions or revisions. For instance, a 1998 version of the hacker ethics, which identifies itself as the code of the MIT community, adds that, in addition to causing no damage, hacker’s work should “be funny, at least to most of the people who experience it.” See hacks.mit.edu/Hacks/misc/-ethics.html, (March 28, 1998 version). On Richard Stallman’s novel agreement regarding open source software, see: www.gnu.ai.mit.edu/copyleft. Some might claim that a special case of samurai is the “hactivist” whose aims are ideological. Hactivists typically justify computer sabotage as necessary to promote political ends. The Pakistan Hackerz Club, for instance, advocates an India-free Kashmir, and has made regular attacks on American and Indian Internet sites (such as Lackland Air Force Base, in Texas), inserting a “Save Kashmir” message. Another common technique is “pinging,” that is, one computer repeatedly calls another, shutting down its connections. As one might imagine, as tension between China and Taiwan has grown, programmers on both sides of the Taiwan Strait have plagued the sites of the other, tying up networks and displaying messages in support of one or the other regime. For a useful discussion of recent “hactivist” activities, see “School for Hackers,” Adam Cohen, *Time*, (May 22, 2000). Plato’s quote concerning Socrates as gadfly of the state is found in the *Apology*: “I am sort of a gadfly . . . and the state is like a great and noble steed who is tardy in his motions owing to his very size, and requires to be stirred to life.” Machiavelli’s discussion of the importance of knowledge and cunning is found in the *Prince*, Chapter 18.

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