

# AMERICAN SELF-DEFENSE SHOULDN'T BE TOO DISTRACTED BY INTERNATIONAL LAW

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## INTRODUCTION

Since the attacks of September 11, 2001, the United States government has pursued a series of energetic policies designed to protect America from the threat of Islamist terror networks.<sup>1</sup> Some of these policies are intensely controversial.<sup>2</sup> Critics in other countries protest that the United States has acted in defiance of international law. Some of this criticism has been embraced by domestic opponents of the Bush administration, particularly those in American law schools. Professor Jeremy Waldron, for example, offered a version of such criticism during the 2005 Federalist Society Student Symposium and in earlier writings, illustrating the larger pattern of criticism.

The purpose of this Article is not to mount a defense of any particular American policy of recent years. Instead, this Article challenges the critics' underlying premise that international law has the same sort of claim on our government as domestic law and that war measures abroad can accordingly be judged in the same terms as police abuses at home.

The arguments in this Article follow the three general kinds of arguments advanced by critics of international law. First, international law does not usually have the clarity and specificity of domestic law, particularly in most areas invoked by critics. International law in these areas is "law" by courtesy or aspiration more than it is a reliable guide to actual international conduct. Second, although some critics try to escape the obvious legal deficiencies of international law by appealing to the underlying values that treaties are supposed to embody, as

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1. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

2. *See* Nadine Strossen, *Safety and Freedom: Common Concerns for Conservatives, Libertarians, and Civil Libertarians*, 29 HARV. J.L. & PUB. POL'Y 73 (2005).

soon as one looks behind limited or ambiguous treaties to seek out the fundamental principles of those treaties, one must quickly reckon with *the* most fundamental principle: the right and obligation of self-defense. As the Founders saw it, that principle was paramount to any legal standard. Will such arguments leave international law without any moral force? Should nations not, as some critics suggest, hearken to international standards to preserve at least the possibility of a law-bound world? The last section of this Article addresses this argument, with this countering point: If international standards are to reflect enduring principles of justice, they must be flexible enough to accommodate new circumstances. It is not in America's interest—in the longer view, it is in no one's clear interest—to try to preserve dysfunctional international standards merely for the sake of showing devotion to the idea of standards.

#### I. INTERNATIONAL LAW IS LESS RELIABLE THAN DOMESTIC LAW

The idea that some legal standards transcend national boundaries—that otherwise independent nations are subject to a more general law of right conduct—is an old idea. According to Hugo Grotius, the seventeenth-century Dutch jurist, this idea was already well recognized among the ancient Greeks and Romans.<sup>3</sup> But Grotius, like his predecessors, still associated this more general law with *jus gentium* (“law of nations”).<sup>4</sup> This older term was used by Roman jurists and was then adapted by medieval commentators who gave it a somewhat different significance.<sup>5</sup> The term implies something broad, encompass-

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3. In the introduction (“Prolegomena”) to his treatise, Grotius explained that in setting out his explanations, he had “preferred ancient examples, Greek and Roman, to the rest” because “illustrations have greater weight in proportion as they are taken from better times and better people.” HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 26 (Francis W. Kelsey trans., Oceana Publications 1964) (1625). The great treatise of Grotius, *De Jure Belli ac Pacis* (“On the Law of War and Peace”), was so influential that Grotius came to be regarded by later generations as the “father of international law.” When serving as U.S. Secretary of State, James Madison offered his version of the conventional wisdom of his day, acknowledging Grotius as “not unjustly considered . . . the father of the modern code of nations.” 2 JAMES MADISON, *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 234 (1865). Yet this very honorific implies that later generations did not fully agree with the claim of Grotius that he was merely clarifying a set of legal standards that were already well established.

4. GROTIUS, *supra* note 3.

5. HENRY SUMNER MAINE, *INTERNATIONAL LAW* 26–30 (1888).

ing, and perhaps foundational—a law recognized by all nations. Hence, as Grotius indicated, it was a law closely related to the law of nature.<sup>6</sup> Later in the seventeenth century, the German jurist Samuel Pufendorf, often regarded as an intellectual heir to Grotius, published a treatise called *De Jure Naturae et Gentium* (“On The Law of Nature and Nations”) highlighting the close connection between the law of nature and law of nations.<sup>7</sup>

By contrast, the modern term “international law” sounds much more specialized and precise than the “law of nature.” Legal studies are divided into subjects like “labor law,” “tax law,” and “contract law.” International law is often referred to as if it were one more well-defined body of distinctive rules and procedures. There are specialized treatises and textbooks on international law similar to those in other subjects. Law schools do not, in the same way, provide first or second year law students with general courses or special case books on “the law of nature,” which seems too vague or speculative for the training of practicing lawyers.

The change in nomenclature appears to have been made quite deliberately. The new term, “international law,” was coined in 1789 by the English legal reformer Jeremy Bentham.<sup>8</sup> Bentham wanted to emphasize that international law had nothing to do with natural law or with principles common to legal systems in many different nations. He complained that the term “law of nations” might be taken “to refer to internal jurisprudence,” whereas the new term would clarify that it was only concerned with “mutual transactions between sover-

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6. For example, Grotius says “certain laws . . . originate as between all states, or a great many states . . . [having] in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature.” GROTIUS, *supra* note 3, at 15. In the opening chapter of the treatise, he explains that the law of nature can be identified “at least with every probability” from observing what “is believed to be such among all nations, or among all those that are more advanced in civilization.” *Id.* at 42. Only two pages later he explains that the “proof for the law of nations”—that a particular standard can be described as such—is “found in unbroken custom.” *Id.* at 44.

7. An English edition of the Latin original was published in 1934. 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM* (C.H. Oldfather & W.A. Oldfather eds., Oxford Univ. Press 1934) (1688). For a recent treatment, questioning the traditional view of Pufendorf as a close disciple of Grotius, see RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 140–65 (1999).

8. JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 426 n.1 (Wilfrid Harrison ed., Oxford Univ. Press 1948) (1823).

eigns.”<sup>9</sup> Having narrowed the subject in this way, Bentham then offered very little comment on the substance of this specialized law—presumably because he did not think there were many clear standards of obligation from one state to another.

Because “international law” has the same verbal form as “contract law” or “patent law,” it is easy to fall into the trap of assuming that it has the same clarity or reliability as other kinds of law. Until quite recently, however, international law had a very vulnerable and questionable status.<sup>10</sup> If one looks at actual treatises on international law in the nineteenth century and down to quite recent times, one almost always finds an initial discussion of an apologetic nature, trying to address doubts about whether international law should truly be considered real law.<sup>11</sup> Yet critics who protest that the Bush administration has “defied international law” in its war policies speak as though international law has now achieved a degree of clarity, precision, and reliability that it never used to have. How could that be so? There is still no international legislature to declare or elaborate international legal standards. There is still no reliable means of interpreting or enforcing most standards that do exist.

Skepticism toward international law did not begin with the Bush administration. It can be traced back through the entire history of American diplomacy. The American Founders did not have high expectations for international law.<sup>12</sup> The Constitution was drafted before the new term had come into use, so it still refers to the “law of nations.”<sup>13</sup> In context, the reference implies that the relevant “law” is too uncertain to be recognized by American courts without action by the American legislature. At

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9. *Id.*

10. International law has to operate without any of the basic organs that articulate and implement law within a state; by contrast, domestic laws are generally based on legislative enactments, reliably enforced by police agencies, and systematically interpreted and clarified by standing courts.

11. See, e.g., CHARLES FENWICK, INTERNATIONAL LAW 40 (1924) (“[S]cholars have long debated whether the term ‘law’ can justly be applied to international law.”); T.J. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 8–9 (4th ed., 1910) (“We have to consider whether international law is law at all. . . . The controversy [on this ‘first question’] is always with us.”).

12. Far from being a novelty of the current administration, highly guarded appraisals of international law were already sounded in the writings of the American Founders. See generally JEREMY RABKIN, LAW WITHOUT NATIONS? 62–66, 89–93, 98–107 (2005).

13. U.S. CONST. art. I, § 8, cl. 10 (giving Congress power to “define and punish . . . Offenses against the Law of Nations”).

the constitutional convention in Philadelphia, there was a direct challenge to this provision, on the ground that no one legislature could “define” for itself the content of “the law of nations.”<sup>14</sup> The challenge was met with the counter-argument that the relevant “law” here was too vague, in many areas, to provide reliable standards without such unilateral legislative clarifications.<sup>15</sup> The Constitution does include “treaties” within the “supreme Law of the Land,”<sup>16</sup> but it does not, in this connection, mention customary law or any other aspects of the general “law of nations.” Even the supremacy given to treaties does not place them on a higher plane than ordinary legislative enactments at the federal level. The implication, repeatedly embraced by the Supreme Court, is that an ordinary federal statute will supersede the most solemn treaty commitment if the statute is enacted after the ratification of the treaty.<sup>17</sup>

Turning from the text of the Constitution to what the Founders said in its defense, it is clear that the limited provision for “international law,” as it is now known, was not an oversight. For a number of reasons, the Founders cautioned against placing great trust or hope in international law.<sup>18</sup> *The Federalist* did not miss the implications for what is now called international law. In fact, *The Federalist* No. 15 begins by invoking the obvious failings of international treaty schemes to prove that the

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14. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614–15 (Max Farrand ed., rev. ed. Yale Univ. Press 1966).

15. *Id.*

16. U.S. CONST. art. VI, § 2, cl. 2.

17. See, e.g., *Moser v. United States*, 341 U.S. 41, 45 (1951); *Chinese Exclusion Cases*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 599 (1884).

18. To start with, the Founders were intensely skeptical of laws without sanctions, or at least quite skeptical that laws without reliable sanctions could do the work of properly-supported laws. Concern about effective laws, after all, was central to the argument for the Constitution. “It is essential to the idea of a law,” *The Federalist* No. 15 remarks, “that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws, will in fact amount to nothing more than advice or recommendation.” THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet, “there is, in the nature of sovereign power, an impatience of control” that resists “all external attempts to restrain or direct its operations.” *Id.* at 111. The “vices” of the Confederation could only be cured by establishing full governing powers in the federal government: “The majesty of the national authority must be manifested through the medium of the [national] courts of justice. The government of the Union . . . must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is [e]ntrusted.” THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

American states will not reliably cooperate unless placed under a common government with full governing powers. In Europe, “all the resources of negotiation were exhausted” in arranging elaborate treaty schemes for “establishing the equilibrium of power, and the peace of that part of the world,” but these schemes were “scarcely formed before they were broken . . . .”<sup>19</sup> *The Federalist* No. 15 cites this experience as “an instructive, but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith . . . .”<sup>20</sup> The same discussion concedes that there is “nothing absurd or impractical” in an “alliance between independent nations . . . for certain defined purposes precisely stated in a treaty; regulating all the details of time, place, circumstance, and quantity . . . .”<sup>21</sup> It cautions, however, that even more focused “compacts” of this kind, which “exist among all civilized nations,” are “subject to the usual vicissitudes of peace and war; of observance and non-observance, as the interests or passions of the contracting Powers dictate.”<sup>22</sup>

One might respond to this sober view by pointing out that the Founders lived in a different world. They wrote before the Hague Peace Conferences, the Geneva Conventions, the UN Charter, and UN-sponsored human rights conventions. Still, the “law” which has received so much attention in recent controversies about American policy remains “law” in a rather special sense, at least when it is international law. Do conditions of confinement of suspected terrorists at Guantanamo Bay violate the Geneva Convention? The Convention stipulates that it applies to uniformed (or at least, clearly marked) combatants, acting under military discipline, and observing the laws of war<sup>23</sup>—conditions that do not seem, in any way, to apply to terror operatives from Afghanistan. Do some interrogation methods at Guantanamo or elsewhere violate the UN Convention Against Torture? Its central prohibition—against “any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted”<sup>24</sup>—is remarkably vague. It might

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19. THE FEDERALIST NO. 15, *supra* note 18, at 109.

20. *Id.*

21. *Id.* at 83–84.

22. *Id.* at 84.

23. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

24. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pt. 1, art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988),

cover only the most excruciating torment or might cover everything on the far side of discourtesy, depending on how one interprets the crucial term “severe.” Meanwhile, by its terms, the Convention also prohibits the “return” of “a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture,”<sup>25</sup> which might well be read to prohibit the “return” of Guantanamo detainees to Afghanistan or Pakistan—or perhaps even to France.<sup>26</sup>

Treaties like the Third Geneva Convention and the Convention Against Torture are framed in very general terms, and there is no authoritative guide to their proper construction. Interpretations offered by UN committees or by “experts” of the International Red Cross have no more status than the ruminations of law professors. These treaties have almost never been interpreted by national courts, let alone systematically expounded by the International Court of Justice. In any case, interpretations by other jurisdictions would not be binding on U.S. courts, which have not treated these treaties as self-executing—that is, law capable of direct application by American courts.<sup>27</sup> Consequently, there is almost no case law from United States courts.

Therefore, it should not surprise anyone that there is disagreement over the interpretation of these international standards. In particular, it should not surprise anyone that the Bush administration has assumed or asserted interpretations that are questioned by human rights advocates and other critics. In domestic policy, almost every time a government policy is challenged in litigation, the challengers protest that the government is acting unlawfully or even “lawlessly.” Courts do not always endorse such claims. More often than not they reject them.

In some areas of international law, such as in disputes over trade agreements, provision for international arbitration can provide a good deal of clarification about what a disputed treaty term means. There has, however, been almost no international arbitration of treaties related to American anti-terror

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1465 U.N.T.S. 85, available at <http://www.ohchr.org/english/law/cat.htm> [hereinafter Convention Against Torture].

25. *Id.* art. 3, para. 1.

26. See, e.g., Kim Willsher & Nick Watt, *Report Attacks France's Human Rights Record*, THE GUARDIAN (London), Feb. 13, 2006, at 17.

27. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 515 (2004) (noting that the Fourth Circuit rejected the Geneva Convention claim by concluding that the convention is not self-executing).

policy. This is so, among other reasons, because practitioners of terror and torture do not consent to arbitration.<sup>28</sup>

In the midst of world-wide conflicts with terror forces, one would expect each government to interpret international standards in ways most favorable to its own aims, “subject,” as *The Federalist* put it, “to the usual vicissitudes of peace and war; of observance and non-observance, as the interests or passions of the contracting Powers dictate.”<sup>29</sup> Americans might argue about whether a particular interpretation advanced by the legal authorities of the United States government will actually serve American “interests.” But arguing about “interests” means that the discussion has already left the terrain of law, or in any case, the terrain of non-policy-oriented legal analysis.

On first inspection, then, the critics’ argument appears to be that the Bush administration has not followed the law because it has not followed what is, in the critics’ view, the correct interpretation of the relevant law. As soon as one notices that the law in question is extremely vague and uncertain, the critics’ argument seems in danger of collapsing into the assertion that the critics ought to be in charge of the Justice Department—and perhaps the State Department and the Defense Department—rather than the officials appointed by President Bush. This would seem to be an argument settled, at least for the time being, by the President’s re-election in 2004.

## II. HIGHER LAW IS NOT INDIFFERENT TO SECURITY

The debate does not usually end, however, once it is pointed out that relevant legal standards, particularly in international law, are often quite vague. Serious critics are well aware of this fact. The critics may sometimes denounce the Bush administration as “lawless,” in a tone implying that international standards, even those most pertinent to international security, are as well-developed and precise as the Internal Revenue Code. When pressed, however, critics will appeal to the spirit of the law or to some authority more imposing than disputable treaty language.

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28. The United States might bargain with enemy states over the meaning of reciprocal obligations in such treaties as the Geneva Convention, but terrorists do not care to engage in such bargaining; indeed, no enemies faced by the United States in major wars since the drafting of the Geneva Conventions in 1949 have demonstrated a desire to bargain over their treatment of U.S. prisoners, hostages, or victims of kidnapping and torture.

29. THE FEDERALIST No. 15, *supra* note 18, at 84.

Such appeals beyond the letter of the law are not mere debate tactics. Many critics do seem to feel genuine indignation over American policy, and they are not indignant over technicalities. These critics are rarely mollified by the showing that serious lawyers in the Bush administration can defend recent policies with plausible interpretations of international treaty commitments. The argument is not really (or, certainly not solely) about who scores more points in dueling legal briefs.

Members of the Federalist Society do not need to stand on the letter of the law as if positive law were the only law worth arguing about. The Founders became founders of a new nation by appealing to natural law and natural rights to justify a revolution when appeals to the established law of England failed them. They became Framers by side-stepping the legal technicalities that stood in the way of the new constitution, appealing from the most likely reading of the Articles of Confederation to the general spirit of the revolution or to more general human imperatives. The Founders were perfectly comfortable with appeals to higher principles. But it is doubtful that they would have followed critics of the Bush administration to where the latter have headed.

The critics would assert that beyond the actual text of various treaties there is, at least in some cases, a general moral purpose. According to the critics, one ought to focus on such higher aims rather than letting oneself be diverted by legalistic parsing of any particular provision in any one treaty. Professor Waldron illustrates this style of argument in a recent article.<sup>30</sup> He denounces the “narrow textualism” of Bush administration lawyers who read the Third Geneva Convention on prisoners of war as not applying to al-Qaeda and Taliban detainees.<sup>31</sup> Waldron concedes that there may be a category of detainees “that does not exactly fit the literal terms” required for coverage by the Constitution.<sup>32</sup> But he argues that it “might be reasonable to think that the earlier categories give us a sense of how to go on—how to apply the underlying rule—in new kinds of cases. That is how lawyers generally proceed.”<sup>33</sup> Similarly, he berates Bush administration lawyers for trying to clarify the meaning of the Convention Against Torture’s prohibi-

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30. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

31. *Id.* at 1694.

32. *Id.*

33. *Id.*

tion on inflicting "severe" pain. According to Professor Waldron, it should be obvious that a government official is "taking a huge risk in relying upon casuistry about 'severity' as a defense against allegations of torture."<sup>34</sup>

What is notable about this sort of argument is its impatience with actual legal distinctions. The text of the Geneva Convention itself suggests, by stipulating specific situations in which it applies and enumerating precise categories of covered personnel, that its prohibitions are not universal. Moreover, the International Committee of the Red Cross implicitly conceded that the original 1949 Convention had gaps and omissions in its coverage by sponsoring a conference in the mid-1970s to propose "Additional Protocols" to address such gaps.<sup>35</sup> The United States, by refusing to ratify the main Additional Protocol,<sup>36</sup> has indicated that it does not endorse the notion of wider coverage. The Convention Against Torture itself invites distinctions between "severe" pain and lesser penalties.<sup>37</sup> When the United States Senate ratified the treaty, it stated in an accompanying resolution of understanding that the United States would commit itself only to a carefully qualified prohibition on "cruel, inhuman or degrading treatment or punishment . . ."<sup>38</sup>

Appeals to the spirit of the law, if taken too far, always threaten to undermine one of the basic purposes of law: specification or clarity. There is little point in hiring lawyers to carefully formulate a contract if the parties will be bound not by the

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34. *Id.* at 1697–700.

35. George Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764 (1983).

36. Message from the President of the United States, Regarding Protocol II Additional to the 1949 Geneva Conventions (Dec. 13, 1986), reprinted in MARCO SASOLI & ANTOINE BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 603 (1999).

37. See Convention Against Torture, *supra* note 24, art. 1, para. 1 ("[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

38. 136 CONG. REC. S17, § I (1), at 491 (daily ed. Oct. 27, 1990). This ratifying resolution stipulates, among other things, that the United States limits the treaty's prohibition on "cruel, inhuman or degrading treatment or punishment" to treatment or punishment already "prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." *Id.* § I (1). The resolution further restricts "mental pain or suffering" to that which would result from threatened or actual "severe pain or suffering" or administration of "mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality"; or from "threat of imminent death"; or from threats of such actions against "another person." *Id.* § II (1) (a).

Under these provisions, it is not immediately apparent that such humiliating treatments as those shown in photographs from Abu Ghraib would constitute "torture," though they seem to have violated other provisions applicable under U.S. military law.

actual provisions of their agreement, but by an outsider's notion of what they should have been aiming to achieve. Similarly, there is no point in requiring the House, the Senate, and the President to agree on the specific statutory language of a bill before it becomes a law, if that law is later reduced to its principles or spirit. And finally, there is not much point in subjecting treaties to formal ratification—let alone to ratification with specific reservations or understandings—if a treaty is to be interpreted not by reference to the precise terms in its text but by what outsiders imagine the treaty was or might have been aiming to establish.

Professor Waldron tries to accommodate such obvious concerns by acknowledging that, in many cases, lawyers are quite justified in harping on the precise wording of legal instruments to get around challenges from wider principles. In particular, he concedes that a lawyer representing a private client would be entirely justified in interpreting every ambiguity of text or precedent to the client's benefit, as when a tax lawyer tries to claim as much for a client's allowable deductions as possible. In these cases, Professor Waldron acknowledges, the private client has, in a liberal state, an acknowledged right to insist on every advantage to which the law might entitle him—since liberty would not be secure if there were not a presumption against unauthorized constraints. But when the client is the state, Professor Waldron insists, the presumptions go the other way and the government lawyer must think about general principle more than immediate, tactical advantage.<sup>39</sup>

But it takes only brief reflection to realize that we do not always condemn government lawyers for seeking their client's advantage, even when the advantage derives from rather technical claims. "Men must turn square corners when they deal with the Government," Justice Holmes admonished.<sup>40</sup> What he meant was that, at least in some situations, government lawyers are well within their professional duty to insist on holding private claimants to dotted *i*'s and crossed *t*'s, as when interpreting the terms of government contracts.

Ultimately, Professor Waldron falls back on the more unusual claim that the prohibitions against torture comprise an "archetype" of the law, a kind of iconic standard that deserves broad deference whenever it might be invoked. Such "arche-

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39. Waldron, *supra* note 30, at 1699–701.

40. *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920).

types," he says, not only "operat[e] as rules or requirements" in particular areas but serve "as emblems or icons of whole areas of legal principle or policy."<sup>41</sup> The argument is not inherently absurd, but it is hardly the only way of construing what Professor Waldron calls the legal "background" in these disputes about torture.<sup>42</sup> If one wants to appeal from the letter of the law to higher principles, Professor Waldron's appeal to the "archetype"—perhaps something akin to the concept of the "super-duper precedent"<sup>43</sup>—has a somewhat post modern flavor. Like Ronald Dworkin's conception of judge-made law as a novel with serial authorship,<sup>44</sup> the notion of adherence to legal "archetypes" seems designed to facilitate appeals from positive law to some higher standard of rightness without entangling that higher standard in moral or political disputes about "natural law."<sup>45</sup> But if Professor Waldron wants to appeal to higher standards, he cannot ignore the fact that others have deeply held convictions about the source of legal norms, and these competing convictions hardly turn on anything so academic or intricate as an "archetype."

Ordinary Americans, lacking the benefits of exposure to the latest fashions in legal theorizing, will be more familiar with an older sort of appeal, that of drawing natural law directly from its original source, for example:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .<sup>46</sup>

If one still holds to this view—and surely we have not reached the point where a government lawyer must apologize for embracing one of the country's founding charters—then it follows that one cannot simply subordinate the rights of private citizens to the legal ambitions of "the state." Rather, a

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41. Waldron, *supra* note 30, at 1724.

42. *Id.* at 1683.

43. Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, § 4 (Week in Review), at 1 (discussing Senator Arlen Specter's effort to characterize *Roe v. Wade* as a special precedent, a "superprecedent" or a "super-duper precedent" beyond overruling).

44. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 158–64 (1985).

45. Waldron, *supra* note 30, at 1692, 1749.

46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

government exercising “just powers” acts with the consent of its citizens and on their behalf so that they can adequately “secure” their fundamental rights. Even the property rights of citizens, which include the rights of taxpayers, have a claim to be “secure.” That is sufficient reason to insist that government contractors learn to “turn square corners.” When the issue is not merely the size of the tax bill, but protection of life and limb from foreign enemies, the moral claims are much weightier.

Professor Waldron sometimes emphasizes that government is an artificial entity, whose claims derive from more fundamental—or natural?—human claims. But he then obscures the most obvious implications of this point by identifying the real or ultimate claimant as “humanity” rather than the particular people (or the particular political community) for which a particular government assumes responsibility.<sup>47</sup> When one appeals to higher claims in order to stray from the letter of the law, one should keep in mind that among the very highest claims is the claim of the people to security.

The claim to security, in fact, provides the underpinning for the central doctrine in the Declaration of Independence. When the threat is severe enough, ordinary legal obligations must give way to the imperatives of security:

But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right [that is, “the Right of the People”], it is their duty, to throw off such Government . . .<sup>48</sup>

What is notable about this right to supersede ordinary law is that, according to the Declaration, it can not only apply under the most extreme form of tyranny, “absolute despotism,” but can also be invoked against “abuses” that merely indicate a future danger. This indication may not be entirely conclusive; what “evinces a design” may not always amount to proof beyond a reasonable doubt. But the pertinent response, when the stakes are large enough, is not a criminal prosecution. The Declaration envisages a resort to force and acknowledges that to preserve security, people may act preemptively in their resort

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47. Waldron, *supra* note 30, at 1747 (arguing that government lawyers have a duty to international human rights law not to assert contrary United States constitutional claims).

48. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

to force, rather than risk waiting until it is too late to defend themselves at all.

The historical context of the argument set out in the Declaration indicates that it applies not only to domestic insurrection but also (and perhaps especially) to foreign war. The occasion for proclaiming the “self-evident” truths of the Declaration—war with Britain—was one of those moments “in the Course of human events” when “one people” finds it “necessary” to “dissolve the political bands which have connected them with another,” and to “hold them, as [with] the rest of mankind, Enemies in War, in Peace Friends.”<sup>49</sup> At some level, then, considerations of security may take precedence over nearly every other obligation.

The Founders did not appeal to such doctrines only as revolutionaries in the midst of an actual war. They also embraced the doctrine in calmer times as constitutionalists. The Articles of Confederation were unanimously adopted by the original thirteen states and styled as “articles of perpetual union.” How then could the Framers of the Constitution propose in Article VII to have a new constitution take effect when only nine states would have agreed to ratify it?<sup>50</sup> *The Federalist* No. 43 answers this question by appealing to the aforementioned principles of the Declaration of Independence:

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature, and of nature’s God, which declares that the safety and happiness of society, are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.<sup>51</sup>

Nor is the principle restricted to supreme moments of constitutional change. One can find the doctrine invoked to justify lesser acts of executive authority aimed at preserving the constitutional arrangements normally in force. Consider, for example, John Locke’s *Second Treatise of Government*, which, with its affirmation of fundamental natural rights and a right of revolution to preserve them, is often regarded as a principal

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49. *Id.* at paras. 1, 5.

50. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.”).

51. THE FEDERALIST NO. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961).

philosophic source for the Declaration of Independence.<sup>52</sup> Locke acknowledged the necessity, in some circumstances, of recognizing extra-legal powers in the executive:

[T]is fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government, *viz.* That as much as may be, *all* the Members of the Society are to be *preserved* . . . [There exists t]his Power to act according to discretion, for the publick [sic] good, without the prescription of the Law, and sometimes even against it, . . . because . . . it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick [sic] . . . therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.<sup>53</sup>

Thomas Jefferson, upon entering the presidency, also recognized that necessity must sometimes take precedence over constitutional proprieties. So, in a notable case, he acquiesced to the Louisiana Purchase despite constitutional doubts about its legality.<sup>54</sup> But it was one of Jefferson's successors who provided the most memorable public defense of this approach to law. Before he took office, Abraham Lincoln said that he "never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence."<sup>55</sup> Then, as President, Lincoln invoked the Declaration's doctrine of higher law when he claimed the right, during the supreme emergency of rebellion and civil war, to suspend in some areas the right of habeas corpus. It was not, Lincoln insisted to Congress, unlawful for the executive to detain plotters against the government without access to civil courts.<sup>56</sup>

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52. See, e.g., PAULINE MAIER, *AMERICAN SCRIPTURE: THE MAKING OF THE DECLARATION OF INDEPENDENCE* 87 (1997) ("By the late Eighteenth Century, 'Lockean' ideas on government and revolution were accepted everywhere in America.").

53. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 133 (2d ed., Cambridge Univ. Press 1967) (1690).

54. See Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in THOMAS JEFFERSON, *WRITINGS* 1139, 1139–41 (Merrill D. Peterson ed., 1984) (outlining Jefferson's concerns about acquiring the Louisiana territory without a constitutional amendment).

55. Abraham Lincoln, Speech at Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), in ABRAHAM LINCOLN, *SPEECHES AND WRITINGS, 1859–1865*, at 213 (Don E. Fehrenbacher ed., 1989) [hereinafter LINCOLN].

56. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in LINCOLN, *supra* note 55, at 252–53.

If prohibitions against torture are an “archetype” of the law, the protection of habeas corpus is surely even more so. Professor Waldron himself acknowledges that “habeas corpus statutes” are the “best example” of his concept of legal archetypes.<sup>57</sup> And, in fact, habeas corpus is expressly mentioned in the Constitution and discussed at some length in *The Federalist*, whereas the prohibition against torture appears nowhere in our founding documents.<sup>58</sup> Nonetheless, President Lincoln defended his unilateral revocation of the Great Writ:

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57. Waldron, *supra* note 30, at 1724 (acknowledging that the writ “is subject to suspension and may be limited in its application”). Still, he claims “[c]alling it an archetype is without prejudice to all of that: Archetypes stand for general principles or policies in the law, and principles or policies may differ in their weight.” *Id.* He does not explain why his archetypal prohibition on torture would not be “limited in its application” in some circumstances, or why lawyers might not “differ” regarding the “weight” to assign to the archetype in particular disputed situations.

58. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); THE FEDERALIST NO. 84, at 511-12 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that this guarantee of access to habeas corpus and others associated with it in Section 9 may well be “of equal importance with any which are to be found” in state constitutions, thus indicating that a separate bill of rights would not be necessary in the federal constitution). When this argument failed to persuade skeptics, proponents of the new constitution promised to add a separate bill of rights. As finally adopted, this set of guarantees included a prohibition against being “twice put in jeopardy of life or limb” for the same offense, which seems to imply that loss of a limb would be an acceptable penalty, so long as the sentence were handed down after conviction in the initial trial. U.S. CONST. amend. V.

In addition to the actual cutting off of hands and ears and feet, early American law imposed such penalties as whipping and placement in wooden stocks or in irons and chains, which severely constrained physical movement in ways that could be extremely painful, not to mention degrading to personal dignity. The subsequent prohibition on “cruel and unusual punishments,” U.S. CONST. amend. VIII, might be taken to imply disfavor of physical abuse, but in fact it seems to have been understood as a requirement for regularity rather than humanity (in the sense of withholding painful punishments). The Eighth Amendment’s association with torture was not articulated by the Supreme Court until the Twentieth Century, and then by distinguishing ordinary American punishments from the “cruelty” of Spanish penal practice in colonial Philippines. *See, e.g., Weems v. United States*, 217 U.S. 349, 377 (1910) (commenting, in striking down a Filipino punishment involving extended chaining of prisoners, that the punishment “has no fellow in American legislation” and distinguishing prior American cases upholding whipping as a punishment).

Waldron’s exposition of the Eighth Amendment prohibition disregards nearby language in the Fifth Amendment, gives no attention to actual practice at the time of the Founding, and mainly recites, as authority for its more edifying interpretation, dicta in Supreme Court rulings of recent decades. *See* Waldron, *supra* note 30, at 1730–31.

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, *but one*, to go unexecuted and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official [presidential] oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?<sup>59</sup>

Quite obviously, this kind of argument might be abused and, if invoked too often or too readily, end by swallowing up all protections of law. Even Lincoln, having presented this first argument, immediately fell back on a second, less controversial claim that the suspension of habeas corpus might well have been entirely lawful in the circumstances, rather than merely an exception to the normal law.<sup>60</sup> This second argument might avoid the alarm provoked by the first argument, but it also draws force from the threat to invoke the appeal to extraordinary powers if an accommodating legal interpretation is not accepted.

The contemporary application of this view is obvious enough. One has only to ask, is the threat since 9/11 minor? Might there be circumstances where the President would have to suspend ordinary law? As a government attorney, would it be more reasonable to strive to encompass necessary actions within a plausible reading of the law, when the alternative would be to acknowledge lawless action which the President, given his duty to preserve the Constitution for the future, might otherwise feel obliged to pursue? Of course, there is a danger that appeals to "necessity" will undermine the rule of law. There is also a danger, however, that appeals to "archetypes," to the imperatives of respecting some abstract rule of principle, will result in too little concern about security. On the one side, there is danger of falling into cynicism. But on the other, there is danger of fetishism.

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59. Lincoln, *supra* note 56, at 252–53.

60. *Id.*

In the first case, the danger of abuse arises from focusing excessively on one goal—for example, defeating terrorism—and overlooking other goals, such as retaining respect and cooperation from other nations or maintaining political and moral confidence in American policies domestically. Focusing too intently on one goal presents the danger of losing perspective in this way. However, such concerns ought not be overstated. Focusing on one goal offers some hope of perspective and even corrective calculation. If there are heavy costs to a certain policy, even incidental and unanticipated costs from effects on bystanders (or reactions of bystanders), such costs may eventually work their way into policymakers' calculations and influence them to make suitable adjustments. It appears, in fact, that early reports of abuse at Guantanamo Bay prompted the Defense Department to impose tighter controls and higher standards for U.S. interrogation methods there.<sup>61</sup>

Additionally, focusing on a narrow goal provides the opportunity to judge proposed policies by their contribution to the goal. For example, in the conflicts following the 9/11 attacks, the United States never attempted the kind of mass bombing of civilians so prominent in World War II strategy against Germany and Japan. In these new conflicts, there has been no reason to think that such unrestrained bombing would do much to influence Saddam Hussein, the Taliban, or the guerrilla forces that took up their banners. Focusing on a narrow goal does provide a discernable benchmark for judging the appropriateness of tactics.

In the second case, if one makes adherence to “the law”—or rather, adherence to “the principle” behind the law or to the mysterious “archetype” that the law is supposed to honor—an end in itself, one may be left with a limitless obligation. From this reverential perspective, context does not seem to matter any more than consequences. Moreover, that perspective offers no frame of reference for judging whether the “principle” (or the “archetype”) should apply in any particular setting.

Professor Waldron insists that it is wrong even to think about matters of degree. It is wrong, he says, for government lawyers to ask whether some degree of pain or discomfort is so “severe” as to constitute, in the proper legal sense of the word, “torture”: “There are some scales one really should not be

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61. See Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, N.Y. TIMES, Jan. 1, 2005, at A1.

on."<sup>62</sup> This stance is reminiscent of Justice Hugo Black's insistence that when the First Amendment demands "no law . . . abridging the freedom of speech,"<sup>63</sup> the admonition must be taken as absolute: "no law means no law."<sup>64</sup> More generally, it embodies Ronald Dworkin's argument that when thinking about "rights" and when "taking rights seriously," one must recognize that rights are moral claims that do not admit compromise, certainly not the sort of pragmatic adjustment that goes with mere "policy."<sup>65</sup>

Behind these appeals is the spirit of Kant: "*Fiat iustitia, pereat mundus*—'Let justice be done, even if the world should perish!'"<sup>66</sup> Some people find this sort of thing inspiring. Professor Waldron might be called a Kant scholar.<sup>67</sup> But such intransigent moralism would likely be more inspiring to those who do not actually expect the heavens to fall, or those who at least remain confident that calamitous consequences will fall only on others. That outlook is not one that Americans can accept in a commander-in-chief. The President has a sworn duty not to "law" in the abstract, much less to universal principles or "archetypes," but to "preserve, protect and defend the Constitution of the United States,"<sup>68</sup> that is, the particular constitutional structure of the particular nation so constituted. From the standpoint of a particular government with a particular responsibility, the sort of appeal launched by Professor Waldron looks unlimited, as it embraces principles which purport to be universal. As *The Federalist* noted, asserting such open-ended responsibility is, as a political matter, inherently unreasonable.<sup>69</sup>

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62. Waldron, *supra* note 30, at 1701 (emphasis removed).

63. U.S. CONST. amend. I.

64. *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (quoting Transcript of Oral Argument, *supra*, at 76 (No. 783)).

65. See DWORKIN, *supra* note 44, at 9–32. This might seem a noble stance, if one did not care at all about possible consequences, even the most terrible.

66. IMMANUEL KANT, *PERPETUAL PEACE AND OTHER ESSAYS* 133 (Ted Humphrey trans., 1983). Kant himself somewhat flinches from the implications of this motto, rendering it (in Humphrey's translation) "Let justice reign, even if all the rogues in the world should perish." But the righteous would perish with the rogues if "the world should perish."

67. See generally Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996) (discussing Kant's influence on legal philosophy).

68. U.S. CONST. art. II, § 1, cl. 8.

69. See THE FEDERALIST NO. 63, at 383 (James Madison) (Clinton Rossiter ed., 1961) ("Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party . . .").

## III. INTERNATIONAL TREATIES ARE NOT HIGHER LAW

If critics are not swayed by the above arguments, one reason may be that their protest is not ultimately about particular values or principles that might be set off against others in disputing particular legal claims. Rather, these critics seem distressed by the very idea that there may be trade-offs or conflicts between important principles because that inevitably means that there may be ongoing conflicts between different political communities.<sup>70</sup> It may be, therefore, that international law has featured so prominently in attacks on the Bush administration because international law seems to embody the hopes of a world where law, in the sense of universally agreed standards, really can prevail.

At the deepest level, the critics' concern does not seem to be that a certain policy is mistaken, but that the perspective of Bush administration lawyers has been systematically self-serving and threatens the possibility of an orderly, law-bound world. By allowing American policy to maneuver freely through international legal benchmarks, the United States places itself on a slippery slope. The United States will then find fewer and fewer obstacles on its downward slide, as Americans become more and more obsessed with the fear that others will gain some advantage on the United States by moving yet lower.

The critics, therefore, demand fidelity to international law, even when it works against the United States. To give force to

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70. One example is the influential appeal to cosmopolitan values in the writings of Martha Nussbaum. Noting that prominent academic voices had stressed "the centrality to democratic deliberation of certain values that bind all citizens together," she protested, "[b]ut why should these values, which instruct us to join hands across boundaries of ethnicity, class, gender, and race, lose steam when they get to the borders of the nation? By conceding that a *morally arbitrary boundary such as the boundary of the nation* has a deep and formative role in our deliberations, we seem to deprive ourselves of any principled way of persuading citizens that they should in fact join hands across these other barriers." MARTHA NUSSBAUM, *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 14 (1996) (emphasis added). If the "boundary" that demarcates citizenship is "morally arbitrary" it would seem to follow (or already to be presumed) that one citizen body has only a "morally arbitrary" claim to hold to a different policy than citizens of other nations—and only a "morally arbitrary" claim to defend its independence against others. From such premises, it is a short step to the claim that a nation's defense policies may not give preference to its own citizens over others—a seemingly absurd claim that does, in fact, seem to be advanced in recent writings (regarding the war on terror) by Ronald Dworkin and others. The absurdity might be reduced by recurring to the thought that conflict is inherently improper or inherently at odds with a true system of "law."

this hope, they demand that America embrace the tenets of international law, without mental reservation or purpose of evasion. Here is Professor Waldron's version:

The expressed willingness of one very powerful state to subject itself to legal restraint where its interests are most gravely at stake sends a message that international law is to be taken seriously. But the abandonment of the archetype by such a state sends a message too—that international law may be of no account if even the most powerful regime, the one that can most afford to sustain damage, is willing to dispense with legal restraint for the sake of a tactical advantage.<sup>71</sup>

Given the context of this debate, it might be uncharitable to dwell on the implications of that phrase, “afford to sustain damage,” with its apparent suggestion that a country as populous as the United States can afford a few more 9/11 attacks with thousands (or tens of thousands) more civilian casualties in its cities. We may dispose of this rather morbid algebraic analysis by glancing at the experience of a much smaller state which has already suffered far more terror casualties, proportionately, than the United States. Does Israel, with one-fiftieth the population of United States, therefore have fifty times the moral claim to disregard international legal standards? Advocates for international legal standards do not seem to have embraced this calculation.<sup>72</sup>

What force there is in such appeals—clinging to international law for the sake of retaining international law—seems to draw a great deal on domestic analogies. If the United States allowed domestic law to rest on the imperatives or policy advantages of the moment, it would soon find itself with no real law. Instead, the practice in America is to admonish citizens not to “take the law into their own hands.” There is an appeal to citizens to remember the needs of the larger community for orderly procedures. Practices like vigilante justice are condemned, even when the immediate victims may indeed have committed crimes deserving of punishment. Those who demand respect

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71. Waldron, *supra* note 30, at 1746.

72. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 I.L.M. 1009 (July 9, 2004) (condemning the construction of the security barrier, without disputing its success in reducing terror attacks on Israelis, because the barrier has imposed considerable hardships on Palestinians). Reducing the number of Israeli deaths from terror attacks seems to be an aim that carries very little weight with the justices of the International Court of Justice.

for international law in this way can acknowledge that international law is not so reliable as domestic law and turn the point around: since there is no reliable international enforcement mechanism in international law, *that is all the more reason* for powerful nations to set an example of dutiful devotion to international law without compulsion.

Those who hold to this view are not easily dissuaded. If one points out that the American Founders did not share such high hopes for international law, the response is likely to be that times are different now, and that America in those days could not so readily “afford” to make sacrifices for the higher good. For people attracted to the idea of an international duty that transcends national claims to self-defense—for people, that is, who are inspired by the thought that their own fellow citizens deserve no more consideration from “law” than humanity at large—the argument has drifted very far from anything the American Founders could recognize as a reasonable legal argument. But the argument is worth pursuing, because some version of it still seems to claim considerable respect, at least in contemporary legal scholarship. At the least, pursuing this argument may help to clarify why earlier generations of American statesmen did not share this outlook any more than legal advisers of the Bush administration today.

To start with, then, it is important to remember that even the obligation to obey the law at home was never thought to be absolute because obedience to law was not thought to be an end in itself (or, at least, not the most compelling end of civil life). There is, of course, a general obligation to respect the law and the rights of others. In general it is wrong to destroy the property of others, but in special circumstances it might be defensible to destroy the tea in the ships of the East India Company in Boston Harbor. In general it is wrong to resist the lawful commands of government, but in special circumstances it might be defensible to resist the confiscation of weapons and ammunition in the Concord armory. Locke’s treatise acknowledges a right to use deadly force against a robber on the highways, so long as no police are nearby.<sup>73</sup> With somewhat more caution, Blackstone’s *Commentaries* affirms a somewhat similar standard.<sup>74</sup> Histori-

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73. LOCKE, *supra* note 53, at 297–99.

74. See WILLIAM BLACKSTONE, 4 COMMENTARIES \*1, \*3 (“In these cases, if the party himself . . . be forcibly attacked in his person or property, it is lawful for him to repel force by force; and breach of the peace, which happens, is chargeable upon him only, who began the affray.” (emphasis added)); *id.* at \*176, \*183–84

cally, almost all American states recognized—and many states still acknowledge—a right to use deadly force against an intruder in one's own home.<sup>75</sup> Circumstances count for a great deal, even when it comes to the claims of law at home.

On the other hand, for all their skepticism about treaty guarantees, the Founders were quite prepared to acknowledge a law above and beyond the authority of any one state or nation. The Declaration of Independence appeals to precisely this sort of law. The opening sentence invokes the “Laws of Nature and of Nature’s God,” which “entitle” independent peoples to a “separate and equal station” with others.<sup>76</sup> The conclusion of the Declaration seems to appeal to this same understanding of international “entitlements” when it asserts that the new states of America “have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”<sup>77</sup>

The reference to war and alliances acknowledges that even if one thinks of this law as the law of nature, even if one thinks of it as reflecting the will of the Creator—or claiming, as the last line of the Declaration suggests, “the protection of divine Providence”<sup>78</sup>—the conclusions of this law may be disputed. Colonial Americans, for example, after claiming a right to independence, soon asserted their right to “contract [an] Alliance[]” with France. No one imagined that Britain, so long as it contested the American claim to independence, would accept French aid to America with equanimity.<sup>79</sup> As everyone had ex-

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(“Homicide, in *self-defence* . . . upon a sudden affray, is also excusable . . . .”); *id.* at \*184–85 (“For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant . . . .”).

75. See generally Annotation, *Homicide or Assault in Defense of Habitation or Property*, 25 A.L.R. 508 (1923) (supplemented by 32 A.L.R. 1541 (1924) and 34 A.L.R. 1488 (1925)) (discussing both common and statutory law approaches in the various states regarding the use of deadly force in defense of the home).

76. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

77. *Id.* at para. 6.

78. *Id.*

79. Furthermore, Vattel’s *Law of Nations*, the leading treatise at the time, admonished that “foreign Nations have no right to intrude themselves into the government of an independent state,” so a state “is justified in resisting such interference.” 3 EMER DE VATEL, *THE LAW OF NATIONS* 132 (Charles G. Fenwick trans., Carnegie Institution 1916) (photo. reprint 1995) (1758). “[A] sovereign has a right to treat as enemies those who undertake to interfere in its domestic affairs otherwise than by their good offices [that is, by offering to mediate a dispute, subject to the consent of the relevant sovereign].” *Id.* But Vattel does also acknowledge that:

pected, the French alliance with America provoked Britain into a new war with France. When other European nations accepted the invitation to establish trading relations with independent America—honoring its right to “establish Commerce” with other nations—the nations organized a naval force of “armed neutrality” to prevent British retaliation on their trade.<sup>80</sup>

The law of nations, at the time of the Founding, thus included a considerable body of customary understandings, in addition to natural law principles. Still, no one imagined that these standards would always be respected or that every nation that adhered to the standards would always interpret them in the same way. It was hoped that treatises on the law of nations would help to reduce disputes between nations or contain their destructiveness, but no one imagined that treatises or treaties would put an end to war. To the contrary, war was generally depicted as the ultimate recourse for a nation whose rights under the law of nations had been violated. Grotius, like many previous commentators, conceived war as an international counterpart of criminal law, so that at least some of the hardship (even some of the horror) of war might be seen, in some circumstances, as morally justified.<sup>81</sup>

The simple truth is that if the law of nations required precise agreement on all details to be considered true law, then no one could reasonably have spoken about the law of nations. So the authors of the great treatises on the subject had to be content with general principles, with tendencies rather than agreed standards, or with generally agreed standards coupled with acknowledged, but very imperfectly defined, exceptions.<sup>82</sup>

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[I]f a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid . . . [W]henver such dissension reaches the state of civil war, foreign Nations may assist that one of the two parties which seems to have justice on its side.

*Id.* at 131.

80. ROBERT H. FERRELL, *AMERICAN DIPLOMACY* 44–45 (rev. ed. 1969).

81. See GROTIUS, *supra* note 3, at 462–521 (discussing, among other things, permissible grounds for punitive war).

82. Vattel, for example, admonishes that “an injury alone is a just ground of war” and “to be lawful, it must be the only means of obtaining just satisfaction, which implies a reasonable assurance as to the future. . . . [I]t is [also] clear that the injured party alone has the right to punish independent persons [through war].” VATTEL, *supra* note 79, at 247.

But only a bit further along in the same exposition, he acknowledges that if there is a state with such overweening power that its neighbors feel threatened and “if this formidable sovereign should betray unjust and ambitious dispositions

Even when international conferences tried to establish more precise standards for such generally agreed objects as limitations on the ferocity of warfare, they conceded that the standards would depend on context and circumstances.

The Hague Convention on the laws of war, initially negotiated in 1899, then slightly revised in 1907, attempted to codify customary standards in this area.<sup>83</sup> Its Preamble proclaims the “desire to diminish the evils of war, *as far as military requirements permit . . .*”<sup>84</sup> The Preamble goes on to acknowledge that it had not “been found possible at present to concert Regulations covering all the circumstances which arise in practice,” so many matters must still be left to “the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”<sup>85</sup>

Article Two then clarifies the broad range of cases left to these generalities, by stipulating that the precise standards of the Convention (more than 50 separate articles in all) will only “apply . . . between Contracting Powers [i.e., parties to the Convention], and then only if all the belligerents are parties to the Convention.”<sup>86</sup> The governments that negotiated this well-meaning convention were not even prepared to commit themselves to adhere to it if one among several nations at war defected from it, lest the nations allied to the scofflaw state derive advantage from its derelictions.

So, even while embracing “humanity” and “conscience” and “civilized” standards, the drafters of the Hague Convention acknowledged the competing claims of “military requirements.”<sup>87</sup> They acknowledged that sustaining legal standards in war would be a difficult and complicated challenge, not something that could reasonably be settled with unqualified prohibitions.

When did it become easier to settle proper standards in war? After World War II, when it became clear how horrible unlim-

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by doing the smallest wrong to another State, all Nations may profit by the opportunity, and together join forces with the injured State in order to put down the ambitious Prince and disable him from so easily oppressing his neighbors, or from giving them constant cause for fear.” *Id.* at 250.

83. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Convention].

84. *Id.* para. 6 (emphasis added).

85. *Id.* paras. 7, 9.

86. *Id.* art. II.

87. *Id.* para 6.

ited war could be? But that war also showed how horrible it is to fall victim to an enemy that respects no limits. In the ensuing Cold War, each superpower threatened to annihilate the major population centers of its opponent. It is hard to see much room left for any “civilized” standards or claims of “conscience” amidst threats of “mutually assured destruction.” And yet, when U.S. Catholic bishops were contemplating a denunciation of this defense posture in the 1980s, Pope John Paul II overruled them, on the ground that terrible threats might be necessary to avert terrible dangers.<sup>88</sup>

Since September 11, 2001, America has had to contemplate the danger that weapons of mass destruction may fall into the hands of terrorist networks, which do not even have a clear national base against which to threaten retaliation. Things are—to say the least—still complicated. There remain, of course, many serious arguments for observing restraints in military operations and for taking into account what others view as the relevant requirements of international law. But surely it is not enough to say that because some law professors have parsed language in a treaty, *therefore* the United States must be bound by their interpretation of these words.

Legalism—adhering to settled law just because it has been settled as law—makes much more sense in a domestic setting than in international affairs. Even in a domestic setting, in a sufficiently pressing emergency, the law might rightly give way to security imperatives. But if this is not contemplated very often in the domestic setting, it is because—normally, at least—Americans take for granted a wide range of continuing protections in domestic affairs. It makes far less sense to yield this trust to foreigners, particularly those associated with hostile powers or hostile terror networks, and particularly in wartime or in times of special vulnerability to attack. Americans have more reason to trust fellow Americans than to trust foreigners. Moreover, the fear that deviations from legality will undermine respect for law is far more worrisome at home than in international affairs because our own fully elaborated legal system must mean more to Americans than the very thin and loose threads of international treaties.

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88. TIMOTHY A. BYRNES, CATHOLIC BISHOPS IN AMERICAN POLITICS 101 (1991) (“In current conditions “deterrence” based on balance, certainly not as an end in itself but as a step on the way to progressive disarmament, may still be judged morally acceptable.” (quoting Pope John Paul II, Message of His Holiness Pope John Paul II to the General Assembly of the United Nations (June 7, 1982))).

To get around this difficulty, critics of the Bush administration tend to entangle claims about domestic and international law, as if they were of comparable authority or comparable importance. But if that were truly so, it would be impossible to know what law to apply in the event of a conflict between U.S. law and international law. There is no ambiguity, however, about which prevails in U.S. courts (and therefore, what must prevail on all who are subject to challenge in U.S. courts) because the Supreme Court has repeatedly insisted that American law takes priority.<sup>89</sup>

If American law did not take priority, even Congress would be constrained from enacting laws contrary to an existing treaty. Ratifying a treaty would then have an effect comparable to ratifying a constitutional amendment. In a way, a ratified treaty would impose even more constraint because a constitutional amendment can be undone by a subsequent amendment. If the United States were bound by treaties, as by constitutional amendments, it could only escape from a treaty by persuading all other parties to renounce the treaty or to agree to American withdrawal from it.

American statesmen have never embraced this understanding of international obligations. It does not make sense in a world that has no means of securing universal respect for treaty commitments, much less assuring reliable compliance with common interpretations of treaties. It is not by historical accident, of course, that the world now finds itself with no such binding legal supremacy for treaties. Rather, most nations do not wish to subject themselves to international institutions with the strength of domestic government—a government over governments.

Of course, America has entered into many treaties, and these treaties differ in significance. Some treaties deal solely with technical matters, like mutual reduction of tariffs and other commercial concessions. These treaties have varied over time and are repeatedly renegotiated. Treaties on issues like the treatment of war prisoners or the prohibition of torture might seem to be of a different category, as treaties that embody moral claims might seem to command more respect.

The intuition here is almost certainly misleading, however. All great works on natural law have agreed that natural law

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89. See *supra* note 17.

needs to be clarified or made effective in positive law.<sup>90</sup> On this point, at least, there is complete agreement between major natural law theorists who looked to Aristotle and Thomas Aquinas, stressing the human urge to participate in political community, and those Enlightenment thinkers who stressed the natural rights of individuals. All important natural law theories acknowledged some need for human beings to live in political communities with something like a legislative authority.<sup>91</sup> The whole point of talking about natural law at all is to distinguish fundamental moral principles from the transitory enactments of positive law which, with greater or less efficacy or fidelity, may embody particular principles. It is not easy to see why any one treaty should have the prestige or the guiding authority of the underlying principle that it may (or may not) embody.<sup>92</sup>

Even those who first sought to codify laws of war did not have such exalted expectations for their efforts. The Preamble to the Hague Convention refers to “ever progressive needs of civilization”<sup>93</sup>—a sentiment which, although possibly reflecting questionable optimism about moral progress, certainly acknowledges that new circumstances will require new standards. Only eight years after the first effort to codify restraints in war, a second Peace Conference was convened at the Hague in 1907. It not only negotiated conventions on new subjects but agreed to revisions of the 1899 convention on the laws of land warfare. The general expectation was that such rules would be periodically revisited in new conferences, every few years.

By contrast, the 1949 Geneva Convention, about which so much has been heard in debates over Guantanamo Bay, was

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90. See, e.g., HEINRICH ROMMEN, *THE NATURAL LAW* 230 (Thomas R. Hanley trans., Liberty Fund 1998) (1936) (“[O]nly the eternal structural laws of the social life of man as such are of natural law, not the concrete architectural form . . . . The natural law calls, then, for the positive law.”).

91. The priority of communal (or “national”) legislative authority, even for such natural rights theorists as John Locke, is well explained in JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999). For a discussion of Locke, see *id.* at 63–91.

92. The Nineteenth Century view was stated in Henry Wheaton’s *Elements of International Law*: “[O]ne or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point.” HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 21 (George Grafton Wilson ed., Clarendon Press 1936) (photo. reprint 1995) (1866). By this standard, one would doubt the authority of any one treaty, even a multilateral treaty.

93. Hague Convention, *supra* note 83, para. 3.

drafted more than five decades ago. That is a long time in the history of warfare. It is, for example, more time than elapsed between the bayonet charges at Gettysburg and the tank offensive at Cambrai in World War I. It is more time than elapsed between the cavalry charge of the Rough Riders at San Juan Hill and the dropping of atomic bombs on Hiroshima and Nagasaki. Why would anyone expect rules of a quite different era to have such authoritative force so many decades later? Did the drafters of the Geneva Conventions consider the scale of threat now posed by Islamist terror networks seeking weapons of mass destruction? Did law professors in the 1960s demand that the Supreme Court follow the constitutional doctrines of the 1920s on such matters as the scope of congressional power to regulate interstate commerce?

If there has ever been a serious thinker who argued in unqualified terms for such rigid adherence to an international standard, it was perhaps Immanuel Kant. Kant dismissed the great treatises on international law; treatises that acknowledged a country's right to resort to war in self-defense in terms that were bound to be disputed in particular cases (with both sides claiming to be in the right).<sup>94</sup> Kant argued instead that all states must submit themselves, unconditionally, to the rules of restraint embodied in an international peace federation.<sup>95</sup> Kant argued that no one could know for sure that such a federation would be incapable of protecting its members by establishing perpetual peace, so all governments had the moral obligation to act as if it could do so and submit to the authority of such a structure.<sup>96</sup> As the inscription on the building that houses Harvard's Center for European Studies has it, "Du kannst, denn du sollst" (you can, so you ought).

Few statesmen have found the argument very compelling because, among other things, it appeals to an abstract possibil-

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94. KANT, *supra* note 66, at 116 ("Hugo Grotius, Pufendorf, Vattel and others whose philosophically and diplomatically formulated codes do not and cannot have the slightest legal force . . . are always piously cited . . . [but] no example can be given of a nation having foregone its intention [of going to war] based on the arguments provided by such important men.").

95. *Id.* at 116–17 ("But without a contract among nations peace can be neither inaugurated nor guaranteed. A league of a special sort must therefore be established, one which we can call a *league of peace* . . . which will be distinguished from a *treaty of peace* . . . because the latter seeks merely to stop *one* war, while the former seeks to end *all* wars forever.").

96. *See id.* at 89 ("For my own part, I place my trust in the theory about what the relation among men and nations *ought to be* . . . and thus to assume that it is possible . . . that it *can exist*.").

ity above ordinary probabilities. In practice, peace at any cost can be extremely costly. It certainly offers a free pass to tyrants, as the American Founders well recognized. A peace federation, James Madison warned (regarding Rousseau's similar proposal), would likely be "as preposterous as it was impotent"; still, to the extent that it did succeed in suppressing resort to force, it would have "the tendency . . . to perpetuate arbitrary power wherever it existed."<sup>97</sup> The American Founders were well aware that they owed their independence to the willingness of an outside power to risk international conflict to aid their struggle.

A far stronger America still faces risks and choices in its foreign policy. The issue is not simply whether or not to seek peace, but peace at what price? Theodore Roosevelt, who presided over American participation in the second Hague Peace Conference and subsequently won the Nobel Peace Prize for his mediation effort in the Russo-Japanese War, has some claims to be heard on the question of devotion to peace:

The worst infamies of modern times—such affairs as the massacres of the Armenians by the Turks, for instance—have been perpetrated in a time of nominally profound international peace, when there has been a concert of big Powers to prevent the breaking of this peace, although only by breaking it could the outrages be stopped. Be it remembered that the peoples who suffered by these hideous massacres, who saw their women violated and their children tortured, were actually enjoying all the benefits of "disarmament." Otherwise they would not have been massacred . . . .

Yet amiable but fatuous persons, with all these facts before their eyes, pass resolutions demanding universal arbitration for everything, and the disarmament of the free civilized powers and their abandonment of their armed forces . . . . They go wrong at the outset, for they lay all the emphasis on peace and none at all on righteousness. . . . As Americans their folly is peculiarly scandalous, because if the principles they now uphold are right, it means that it would have been better that Americans should never have achieved their independence, and better that, in 1861, they should have peacefully submitted to seeing their country split into half a dozen jangling confederacies and slavery made perpetual.<sup>98</sup>

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97. JAMES MADISON: WRITINGS 505 (Library of America ed., 1999).

98. THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 549–50 (1913).

Professor Waldron wants to elevate a particular international standard—the vaguely worded prohibition in the convention against torture—into an “archetype” of legal reasoning. He wants to claim an authority for this “archetype” that will preempt any normal consideration of means and ends, cause and effect, an authority that will command obedience even if coercive interrogation practices—which, by his lights or some other, might violate this standard—would contribute greatly to the fight against terrorism.<sup>99</sup> Governments owe this extreme deference, he thinks, to some claim of legal conscience that supersedes other considerations because this claim has now become an “archetype” of international law.

What does it really take to become an international “archetype”? The old way of thinking about international standards was to look not at what diplomats say but at what governments actually do.<sup>100</sup> Otherwise, the pious and trusting would be prey to the hypocrisy or deceits of the devious. It is mildly interesting that most governments have signed a convention that purports to outlaw torture. But based on what governments actually do, it is clear that restraining torture has not been much of a priority. Reports of torture in China or Russia, in Saudi Arabia or indeed in Saddam Hussein’s Iraq, evoked almost no consequences in the actual foreign policy of actual nations.<sup>101</sup>

If one wants to think about international “archetypes”—those with real reverberations—there are surely better ones. Perhaps the most consequential of the past century concerns the disregard of international norms. The norms in question concerned claims about neutrality and neutral trading rights, which were, in fact, far more central to the law of nations for several centuries than more recent (and generally more frivolous) talk about supposed international human rights norms.<sup>102</sup> Relying on this ac-

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99. See Waldron, *supra* note 30, at 1711 (calling for a way to “make sense—without resorting to religious ideas—of . . . a noncontingent prohibition, a prohibition so deeply embedded that it cannot be modified or truncated . . .”).

100. For critical scrutiny of changing notions about how customary law is determined, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law*, 110 HARV. L. REV. 815 (1997).

101. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935, 1976–79 (2002) (showing that “noncompliance [with human rights treaties] seem[s] to be rampant” and “countries with poor human rights ratings are sometimes *more* likely to have ratified the relevant treaties than are countries with better ratings”).

102. A glance at any textbook or treatise on international law published in the nineteenth century or down to the middle of the twentieth century will confirm

cumulated body of legal understandings, the Netherlands and other neutral states protested the British war policy which sought to impose a strict blockade of Nazi Germany at the outset of World War II. Winston Churchill insisted that Britain must reject “interpretations of neutrality which give all the advantages to the aggressor and inflict all the disadvantages upon the defenders of freedom . . . .”<sup>103</sup> In other words, he appealed from the established rules to the higher cause.

As former neutrals were overrun by German tanks, some of these issues were mooted. But the United States, while still officially neutral, disregarded more and more traditional legal restraints on neutral powers in order to provide Britain with “all aid short of war” and to pressure Japan into abandoning its Asian conquests. Rather than neutrality, the Roosevelt administration claimed the status of “non-belligerency”—a status entirely unknown in the established standards of international law.<sup>104</sup> The result was that Japan was goaded into attacking the United States, and Germany was goaded into joining Japan with its own declaration of war. Thereafter, Britain and America mobilized vast forces that ultimately brought freedom to all the nations of Western Europe, to much of Asia, and even to Germany and Japan after their unconditional surrender. By disregarding technical rules of international legality concerning neutrality, Churchill and Roosevelt saved half of the world from monstrous tyrannies.

The lesson of this “archetype” of international action is not that any end justifies any means or that lawyers have no role to play in formulating foreign and defense policies. The lesson is that in times of crisis, no great power can be guided by legalism, or by moralism, or by some combination of the two, inflated into a new theory of law.

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that neutrality and neutral trading rates were a central theme, whereas human rights—in the sense of duties owed by governments to their own citizens—were scarcely treated at all. In the most recent times, it is true, textbooks devote space to international human rights. However, their discussion is about treaties rather than actual episodes in which states are held to account for compliance with these treaties—since such episodes do not happen in the real world. By contrast, disputes about neutrality were quite serious, because states routinely invoked neutral claims against other states. It is up to the reader’s whimsy to know what Professor Waldron means by “the human rights tradition.” Waldron, *supra* note 30, at 1715.

103. Winston S. Churchill, *A Hideous State of Alarm and Menace* (Mar. 30, 1940), in 6 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 6199, 6200 (Robert Rhodes James ed., 1974).

104. See Edwin Borhard, *War, Neutrality and Non-Belligerency*, 35 AM. J. INT’L L. 618, 621 (1941).

Americans may hope that, in the end, the “course of human events” will vindicate certain broad notions of natural law on which the nation was founded. But international law must remain answerable to the security concerns of nations. International law must be read in the light of broad and enduring principles rather than lawyerly debating points. A “doctrinaire logic,” as Justice Jackson observed, may “convert the constitutional Bill of Rights into a suicide pact.”<sup>105</sup> In today’s world, “doctrinaire logic” risks reducing international law to an academic symposium, which is safer, so long as everyone understands that it is altogether unserious.

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105. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).