

BEWARE THE TRUMPETS OF WAR: A RESPONSE TO KENNETH ANDERSON

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True conservatives should be wary of passion. Edmund Burke, after all, penned his classic conservative manifesto¹ amid the social and political wreckage of the French Revolution. He saw public passion unleashed as never before, and he deplored what he saw. Recently, however, in an article explaining why suspected terrorists should be tried before military tribunals rather than in the federal courts of the United States, Professor Kenneth Anderson appealed to the passions of war—war not against global criminals, but against “an *enemy*.”² Enemies, unlike criminals, are out to destroy us. They must be fought and crushed, not pursued and punished.

At a time when the harvest from the Al Qaeda caves yields memoranda on how to position truck bombs and oaths of loyalty to a life of killing infidels, the language of “enemy” does not ring untrue.³ Far from it. Ironically, however, it is also the language of our enemies. It is the language that refers to America as the “great Satan,” as the “infidel.” It paints a people as a faceless mass—as the men and women inside the World Trade Center, the Pentagon, and even the planes they flew must have seemed to the hijackers. It dignifies Al Qaeda members as soldiers in a holy war, precisely as they wish to see themselves. Using the language of enemy is thus an error that allows Al Qaeda to frame the terms of their attack and our response.

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1. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

2. Kenneth Anderson, *What to do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 611 (2002) (emphasis in original).

3. See, e.g., David Rohde & C.J. Chivers, *Qaeda's Grocery Lists And Manuals of Killing*, N.Y. TIMES, Mar. 17, 2002, at A1.

Even more troubling is Anderson's central claim that the distinction between criminal and enemy is "a great moral gap"—one that only military tribunals can fill.⁴ Only with military tribunals can the President determine "who is not merely a criminal, but a criminal who is *also* an enemy," because "this person has committed aggression against the United States . . ."⁵ Anderson's insistence on this distinction, and on the emotional and political freight that the concept of enemy carries, is deeply flawed. It points us in the wrong direction legally, politically, and morally.

Legally, Anderson would turn back the clock on one of the most important legal developments over the past half-century—the individualization of international law. Politically, Anderson's distinction invites the world to take sides. Morally, it betrays our deep commitment to the rule of law as part of our national identity, by substituting vengeance for punishment. In this brief Response I will take each point in turn. Before turning to these arguments, however, I will answer Anderson's challenge to my own work—mindful that if brevity is the soul of wit, it is equally the heart of repartée.

I. SHOOTING STRAW MEN

Anderson devotes a substantial section of his article to characterizing and rebutting my arguments in favor of having an international tribunal *in addition to* federal courts as the appropriate fora to try terrorists. He ultimately dismisses my arguments and those put forward by other scholars and commentators chiefly as a way of clearing the ground for his own claims regarding the virtues of military tribunals. In the meantime, however, he often invents the arguments to which he wishes to respond.

First, Anderson acknowledges with but a single word that "liberal internationalists," as he calls them, argue for an integrated criminal justice system including *both* the national courts of the United States and other countries *and* an international tribunal. (Indeed, in my own work I even have recognized a limited role for military tribunals as part of this

4. Anderson, *supra* note 2, at 634.

5. *Id.* at 633 (emphasis in original).

system.)⁶ Anderson writes: "Liberal internationalists conclude that the appropriate forum for trying accused terrorists ought to be some form of international tribunal, convened under the authority of some international body, rather than *simply* the national courts of the United States"⁷ He then proceeds to address only the argument for an international tribunal, claiming that these same liberal internationalists view "'national' [as] synonymous with 'parochial' and, indeed, practically synonymous with 'illegitimate.'"⁸ That statement is absurd if those whom he wishes to confront simultaneously favor a national response as well as an international option.

The second problem with Anderson's argument is the purported target of his attack. His language is instructive. He refers to "these groups" and "these folks," which he identifies as "including many members of the international non-governmental organization (NGO) movement that generated support for international tribunals to deal with the atrocities in the former Yugoslavia and in Rwanda."⁹ For "these groups," "advocating international tribunals is not a policy choice, but rather a cultural preference. . . ."¹⁰ Because they believe in "universality," they purportedly "hold a profound belief in the goodness of a *federal* world, a world in which local and national institutions must finally be subordinate to international ones."¹¹

Yet nowhere in this passage does Anderson bother with a citation to any actual arguments put forward by "these groups." Indeed, he only cites himself. And for good reason. None of the human rights NGOs that pushed for the international criminal tribunals for the former Yugoslavia and Rwanda, a position supported by the U.S. government, seek a "federal world." They do champion universal human rights, but find that position, which is also the position of all recent U.S. administrations, liberal and conservative, to be entirely consistent with a pluralist world in which national

6. Anne-Marie Slaughter, *Tougher Than Terror*, AM. PROSPECT, Jan. 28, 2002, at 22.

7. Anderson, *supra* note 2, at 594 (emphasis added).

8. *Id.*

9. *Id.* at 594-95.

10. *Id.* at 595.

11. *Id.* at 595 (emphasis in original).

governments retain principal power. Although Anderson might find support for his characterization in the literature of the World Federalist Society, the World Federalist Society is not a mainstream human rights group.

Third, Anderson engages in similarly popular but equally inaccurate liberal bashing when he seeks to ground my own arguments for an international tribunal that would include Muslim judges in “a superficially sweet sense of multiculturalism and sensitivity.”¹² My approach has far less to do with multiculturalism, whatever that may mean today, than with internationalism—the sense, as President Bush argued in his first major address to the nation after September 11, that this is not just “America’s fight, but the world’s fight.”¹³ My argument also rests on a political calculation about how best to prosecute the war against terror, including an assumption that the inclusion of Muslim judges on a global court charged with trying terrorists would enhance the legitimacy of such a court and its judgments in Muslim countries. That assumption may be wrong, but both my claims for it and Anderson’s claims against it are completely speculative. We need specialists in the politics, law and culture of the Islamic world to help make those determinations.

But here Anderson takes a bizarre tack. He takes my argument that it would behoove the West to “recognize the relevance and value of Islamic law” in condemning terrorism and suggests that I would thereby elide our separation of church and state.¹⁴ We cannot acknowledge Islamic law both because “we reject explicit references to religion and religious codes in secular justice and government generally” and because “we in the West have come to reject important tenets of its faith, not least its view on the role and status of women.”¹⁵ This is not the place to engage in a full debate on the separation of church and state, much less the complex inter-relationship between judicial identity and judicial role, but even if Americans were completely convinced that the judges on a regional tribunal composed entirely of Muslim countries

12. *Id.* at 603.

13. Address to a Joint Session of Congress and the American People, 37 WEEKLY COMP. PRES. DOCS. 1347 (Sept. 20, 2001).

14. Anderson, *supra* note 2, at 605.

15. *Id.*

would be completely secular in their application of the law, we might still find the trials of Americans before such a court to be more legitimate if the court included Christian and Jewish judges. Issues that may be entirely out of bounds within a country may legitimately resurface at the international level. Further, the idea that certain problematic aspects of a legal system invalidate the whole is ridiculous. That would mean that foreign countries or international tribunals should have refused to apply United States laws during the eras of Jim Crow or slavery.

Finally, Anderson's description of a "disturbing co-dependence between the Muslim world and Western elites, founded upon the principle of victimhood,"¹⁶ is again an example of his attempts to rally conservative audiences by sounding popular anti-liberal themes, without any concrete basis. No one, to my knowledge, is suggesting that the West should recognize the importance of Islamic law to well over a quarter of the world's peoples because of Muslim "victimization." Such a move is better understood either as the result of hard-headed political calculation or as the reflection of deeply embedded American ideas of universalism, which identify a core of common principles and values in all the world's great legal systems.

II. THE INDIVIDUALIZATION OF INTERNATIONAL LAW

Turning now to Anderson's positive argument for military tribunals, I will consider his core distinction between criminal and enemy. This distinction is valuable as a way of focusing attention on the hybrid nature of the war against terrorism: it is both an effort to bring criminals to justice and a military campaign. Traditionally, of course, the commission of a crime required the state to exercise its power against an individual; an act of war engaged the state against another state. In this framework, individuals are criminals; states are enemies.

Soldiers' talk reflects this distinction. We hear of seeing "the" enemy, not "an" enemy. We might hear reference to "an enemy soldier," but that signals an individual who is part of the military machine of the entity designated the enemy. To talk of "an enemy," as in "making an enemy of someone," is actually

16. *Id.* at 606.

only private language. "Public enemy number one" is used, but it is used with precision to identify a highly wanted criminal.¹⁷

Yet Anderson insists on differentiating between criminals and enemies in the person of the same individual. Criminals are "deviants;" crime is a "*deviation from the domestic legal order.*"¹⁸ Enemies are "outsiders;" they perpetrate "*attacks upon that order.*"¹⁹ But what then of Timothy McVeigh? He was in fact a "true outsider," according to Anderson, but unfortunately his citizenship entitled him to trial in U.S. court.²⁰ Members of Al Qaeda, however, get no such protection, and thus can be treated entirely as enemies.

The main problem with Anderson's analysis is that it ignores and potentially reverses one of the most important developments in international law over the past fifty years—a development that the United States has encouraged and that is potentially of great value to the promotion of U.S. values and interests. The traditional international law fiction is that states are unitary entities—equal and undifferentiated sovereigns. The development of human rights law has pierced this fiction by regulating the relations between governments and their own citizens. Thus individual citizens came to have rights against their own governments under international law.

Governments themselves have also become more transparent. The increasing availability of civil and criminal suits against individual government officials for human rights violations, from Ferdinand Marcos to Augusto Pinochet, has underlined the reality of governments as aggregations of individual officials. These officials can now be held individually responsible for their actions under international law. The suits brought against various foreign government officials under the Alien Tort Claims Act and against former leaders such as Pinochet and Chadian dictator Hissen Habré have all been brought in national courts. But at the same time, the rapid growth of international criminal law under the

17. This is more than a semantic discussion. This war is all about language. Anderson himself published an article on the topic immediately after September 11. Kenneth Anderson, *Language, Law and Terror*, TIMES LITERARY SUPP. (London), Sept. 21, 2001, at 13.

18. Anderson, *supra* note 2, at 610 (emphasis in original).

19. *Id.* (emphasis added).

20. *Id.* at 611.

auspices of the International Criminal Tribunals for the Former Yugoslavia and Rwanda has focused on individual criminal liability for war crimes, crimes against humanity, and genocide. Prosecution under international law for such crimes can take place in domestic or international courts.

The desire and need to punish the perpetrators of September 11 opens the door to the next stage of this process of individualization. Osama bin Laden would be charged with a crime against humanity not as a government official, but as a member of society who has perpetrated a crime against his fellow human beings. Here the traditional nexus between international law and state entities would be broken completely; like domestic law, it would regulate the acts of individuals against other individuals.

International law thus has at its disposal a new set of instruments, potentially more effective at combating threats to individual dignity and world order. Yet it simultaneously remains a body of law regulating relations between states. Individuals have not replaced states as the sole subjects of international law; they are instead additional subjects. States are both unitary and disaggregated entities, subject to one body of rules as collective entities and an additional body of rules as agglomerations of individual officials. Indeed, this is how we have come to understand states under domestic law; they are sometimes granted immunity as unitary entities and sometimes held liable for the acts of individual officials.

Why does this matter so much? Because the war on terrorism, including efforts to combat a deadly new threat to world order arising from the combination of individual irrationality and weapons of mass destruction, requires the widest possible range of legal, political, and military tools at our disposal. Just as the Bush Administration simultaneously pursues Al Qaeda's individual members and the states that harbor them, international lawyers and policymakers should follow rules aimed at states, individuals, and the relations between them.

The most promising way to utilize these options is to continue identifying individuals as criminals and states as enemies. Further, entities that have the capacity of states—to wreak destruction on other states, for example—can simultaneously be treated as undifferentiated units that act in a

corporate capacity and as collections of individuals. We can thus wage war against Al Qaeda subject to the rules of interstate war and, at the same time, seek to prosecute each of its individual members as global criminals.²¹ In light of these considerations, Anderson's preferred analytical lens, whereby individuals bear the burden of enemy status under the law of war, is comparatively crude and inattentive to the legal and political possibilities created by a far more complex set of legal relationships between individuals and states, states and states, and individuals and individuals under international law.

III. FIGHTING THE ENEMY'S WAR

By putting all of our eggs into a military basket, whereby we wage war on terrorism and deliver military justice to terrorists, Anderson's approach plays into Al Qaeda's hands. War is precisely what bin Laden wants, a war reminiscent of that which he waged against the Soviet Union as a member of the Afghan mujahedeen. It is he who seeks to arouse the passions of a crusade. Yet the Administration uses the rhetoric of war to stoke the fires of national patriotism, satisfying the deep psychological hunger for a response that matches the attack in its enormity.

The insistence that we are "at war" also justifies extraordinary measures that would be unthinkable in ordinary times. In fact, the size and scale of our campaign in Afghanistan is much closer to our military campaigns in Kosovo, Bosnia, or Somalia—all specific and limited "missions"—than the Gulf War, during which half a million men were mobilized with the public expectation of large-scale casualties.

Thus both sides may emphasize war over terrorism, attack over crime, and enemy over criminal largely for domestic consumption in order to mobilize supporters. However, by

21. The only time that the distinction between criminal and enemy truly collapses, in this schema, is prosecution of individual war criminals for the crime of aggression. Anderson reminds us of Robert Jackson's pride in making aggression a crime, though he challenges its value. *Id.* at 632. However, we prosecuted German leaders for aggression not because they were "enemies" rather than "criminals," but because they violated what was then a new law of war, aimed at those waging it unprovoked. In other words, as leaders making the decision to wage war, they were responsible for transforming their state into "the enemy."

overplaying the military dimension of this conflict and downplaying the criminal justice dimension, Washington ties its hands in ways that it may come to regret. It raises the stakes of the conflict, making it hard to say when it will end or what the precise objectives are, beyond "defeating terrorism." And it creates its own momentum, making it harder for U.S. leaders to ratchet back expectations and prepare the nation for the longer and slower process of global intelligence cooperation, police work, and sleuthing by financial regulators, which is the approach most likely to result in the apprehension of individual terrorists.

Further, and most worrisome, although the United States may see this as the equivalent of World War II, with the "axis of evil" substituting for the Axis powers, such characterizations only inflame public opposition to U.S. action in many of the countries whose support will be most crucial in the long-term fight against terrorism. At a moment when United States support for Israel's reoccupation of the West Bank is generating massive street protests in Arab countries throughout the Middle East, it is unnecessary to belabor the point. Yet as early as December and January, a Gallup poll of nearly 10,000 residents of nine Muslim countries—Indonesia, Iran, Jordan, Kuwait, Lebanon, Morocco, Pakistan, Saudi Arabia and Turkey—yielded frightening results.²² Across countries, fifty-three percent of respondents had an unfavorable opinion of the United States, ranging from a low of thirty percent of Indonesians to a high of sixty-eight percent of Pakistanis. Further, only twenty-seven percent of Indonesians had a favorable opinion of the United States—forty-three percent were undecided. Worse still, when asked if they considered the campaign in Afghanistan morally justifiable, seventy-seven percent of all respondents found it unjustifiable. Even in Turkey, whose public was most favorably disposed to the campaign, fifty-nine percent found it morally unjustifiable; in Pakistan that number was eighty percent and in Indonesia it was eighty-nine percent.

The language of good and evil is deliberately chosen to frame the war against terrorism in moral terms. But if these are

22. USA Today, *Poll Results* (Feb. 27, 2002), at <http://www.usatoday.com/news/attack/2002/02/27/usat-pollresults.htm>.

the stakes, and the rest of the world is either with us or against us, then the Muslim world is against us—precisely the clash of civilizations that Osama bin Laden seeks. In this instance, the moral rhetoric necessary to lead a nation into war justifies a terrifying cycle of extremism, in which suicide bombers are martyrs for a cause rather than criminal fanatics. If we are good and they are evil, in our own eyes, then why should we be surprised when they reverse the equation?

On the other hand, one might argue that if they hate us, and will to continue to hate us, we should fight back. Isn't the only recourse military might? But even from this perspective, the United States has never been able to win by simply fighting an enemy. We have to know what we are fighting *for*. Kenneth Anderson's moral calculation thus fails because it is inconsistent with the deepest values of American social, political and legal order. These are the values that we must fight to defend.

IV. CLOSING THE MORAL GAP

The heart of Anderson's argument is that prosecution and punishment of a terrorist for "so many murders, so many injured victims, so much destruction of property, and so on" is not enough, even when it results, as with Timothy McVeigh, in public execution.²³ Writing of McVeigh's trial, Anderson argues that the "actual charges available to prosecutors . . . , and hence the conduct of the trial itself, in a curious but profound way, missed the point of his act, which was not merely to murder people, but to make war upon the United States."²⁴ The inability of the domestic legal system to charge terrorists—"enemies," Anderson notes, who are, unlike McVeigh, not even citizens—is the "moral gap" that he insists must be remedied.²⁵ Even a charge of crimes against humanity would not be enough.²⁶

The need to treat criminals who are also enemies differently from ordinary criminals is "part of the moral argument that takes us to military commissions, because they permit us to

23. Anderson, *supra* note 2, at 610.

24. *Id.*

25. *Id.* at 634.

26. *Id.* at 632.

treat these accused with a form of due process, but which is a process unlike that given to ordinary criminals."²⁷ But it is odd, to say the least, to deny the ordinary U.S. court's ability to impose punishment on avowed enemies of the United States. What of the charge of treason? Charges under the Alien and Sedition Acts? In seeking to try and punish those whom we suspect of enmity against the United States, we have often cast the net too wide, as in *Korematsu*,²⁸ and brought shame rather than honor to our legal system. But the problem is certainly not that domestic courts are inadequate to the task.

It is Anderson who fundamentally misses the point. Is aggression against the domestic order of the United States really worse, morally, than the murder of thousands of people? Or has September 11 brought home to us the analytical alchemy that the legal system accomplishes—the translation of “war” or “aggression” into thousands of individual lives lost, bodies maimed, and things destroyed? Perhaps war is *less* than the sum of its individual parts. If so, the greater moral stain is responsibility for each individual crime.

This is one of the most powerful lessons of September 11. “Civilian casualties” must be measured in terms of absent parents, children, spouses and siblings, each of whom was an essential part of the fabric of a life very much like ours. Abstractions like “aggression” cannot capture the reality of those lives. The concept of crimes, of individual perpetrators of acts that violate a universal moral code, can.

More pragmatically, criminals can be hunted, convicted, and punished in perpetuity. The crimes of September 11 must not be subject to a statute of limitations. Soldiers, however, revert to civilians when the war is over—their killings absolved and merged into the larger fact of victory or defeat. Here again, the war paradigm diminishes the loss America suffered.

Further, what more could happen to a defendant than the punishment visited on Timothy McVeigh? Drawing and quartering? Those are sentiments of revenge rather than justice. They fuel the passions of posses and lynch mobs. They are ultimately antithetical to the rule of law. Indeed, that is the basic lesson that all first year law students must learn—how to

27. *Id.* at 633.

28. 323 U.S. 214 (1944).

dissect and tame their emotional reactions in order to see the law clearly and apply it fairly.

To the extent that Anderson seeks to remind us of the moral dimension of law, both international and domestic, he is to be praised. But he seems to want a response reflecting the sentiment that no punishment can be too severe for the individuals who brought such tragedy to our country. He, and we, must recognize that in the end any response is emotionally inadequate. The passion we feel must be turned inward, to help repair broken lives and heal a deep scar on the national psyche.

V. CONCLUSION

We must deploy all of our resources—political, legal, economic, and military—to fight terrorism and pursue individual terrorists. A world in which unprovoked attacks on civilians proliferate is a world of both moral chaos and fundamental insecurity. The question is how best to succeed.

Bringing the full power of the United States's legal system to bear, as in the investigation, apprehension, and trial of Zacarias Moussaoui in federal court, is one way. We are prepared to prove him to be the criminal we say he is. Using military force to destroy terrorist bases and to deter the governments that sponsor them is another. These are twin tracks; we can and should proceed along both.

What Anderson seeks, however, is to forge a new paradigm of war and crime—exemplified by creating special courts to try criminals who are also enemies. Why? To capture the special moral heinousness of the crime—killings that are also attacks on an entire political and social order. Passion points in that direction, a deep desire to forsake ordinary instruments designed for ordinary times. But here, in these extraordinary times, we might do well to listen not only to Edmund Burke but also to Abraham Lincoln. "Passion has helped us," he wrote, "but can do so no more. It will in [the] future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence."²⁹ Reason, today, should warn us away from the passions of war.

29. Abraham Lincoln, Temperance Address (Feb. 22 1842), available at <http://showcase.netins.net/web/creative/lincoln/speeches/quotes.htm>.