

Un-Just War Against Terrorism and the Struggle to Appropriate Human Rights

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ABSTRACT

Although there are compelling reasons not to define the struggle against mega-terrorism as a “war,” for purposes of moral evaluation of defensive measures, Just War standards provide an essential second line of defense for human rights norms as well as a counsel of strategic prudence. Taking the sum of its policies in the wake of 9/11 it is evident that the Bush administration has failed to satisfy those standards even as it continues the effort of the American Right, launched during the administration of Ronald Reagan, to appropriate human rights for their purposes.

I. HUMAN RIGHTS AND POLITICAL STRUGGLE IN THE UNITED STATES: A HISTORICAL INTRODUCTION

A. Human Rights, Liberalism, and the Democratic Party

Whenever a phrase acquires the power to mobilize public opinion, competitors in a democratic electoral system will struggle, within the broad limits of their respective political identities, to appropriate it. Since the mobilizing power of a phrase lies in its capacity to evoke without benefit of discussion and argument intense feelings of affection or revulsion toward some group of people or some event, institution, or transaction in the world of brute fact, then, assuming equal access of contending forces to the media of communications, with respect to any given symbol the struggle for appropriation

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ought to be unequal. Why? Because in general the values, interests, identities, and related policies evoked by a symbolically resonant phrase are the values, interests, identities, and policies that differentiate political factions. Therefore, a symbol that summarizes a set of values and interests will normally coincide more closely with the political program and identity of one faction than with those of its principal political antagonist.

So one would expect the Democratic Party and the liberal elites that support and in part lead it to enjoy an inherent advantage in any competition to capture "human rights" for electoral advantage. After all, a defining feature of the political Right (indeed the origins of a political discourse organized around the right-left dyad) is defense of received authority with its hierarchy of status, opportunities, privileges, and obligations. Conversely the discourse of human rights, the idea that every human being simply by virtue of being alive is owed certain duties corresponding to irreducible rights coincides temporally with the great assaults on established religious and hereditary secular authority in the West, beginning with the American and French revolutions. Moreover, by the nature of its core claim about the equal entitlement of all human beings, human rights discourse is cosmopolitan in character. The political Right is particularistic, privileging members of some limited scheme of cooperation, generally the nation.

Alongside and substantially overlapping the discourse of human rights as it developed over the last two centuries has been the discourse of liberalism. Liberalism as a creed justified and inspired an assault on inherited authority, initially the authority of the state, particularly states without electoral legitimacy, to inhibit individuals in the pursuit of their interests and dreams. As the political economy of modernization concentrated increasing power in private actors, principally limited liability corporations, liberalism correspondingly expanded its concerns beyond the state to encompass all concentrations of power threatening to individual freedom, an expansion that the Right resisted. In addition, paralleling the logic of human rights, liberalism has been relatively cosmopolitan in its sympathies, inspiring efforts to enhance international cooperation and to reduce the role of force in international affairs. The sum of the matter, then, is that over time international law (as a restraint on state power), human rights, humanitarianism, and liberalism bonded symbolically.¹

B. Human Rights and the Republican Party: The Neo-Conservative Move to Co-opt Human Rights

Initially there was no serious competitive effort from the Republican Party to appropriate human rights to its ends. During the first three decades of

1. See PAUL BERMAN, *TERROR AND LIBERALISM* 193 (2004).



the Cold War, insofar as foreign policy was concerned, the Party was led by devotees of Realist political theory, the theory that reduces international relations to a Machiavellian interstate struggle for power in which claims rooted in moral principles merely cloak the impulse to dominate. To be sure, even the most ardent practitioners of realism, Richard Nixon and Henry Kissinger, imagined themselves as agents of moral ends, a conviction fed intravenously into the bloodstreams of American leaders by the original conviction of American Exceptionalism.² Such an unpacking of ends and means is not, however, peculiar to Americans. After all, Machiavelli himself saw strategic cynicism as a means to the ideal of Italian unity.³ But however committed in their minds to normative ends, Nixon and Kissinger ferociously resisted restraints on such means as they found efficient and made little effort to conceal their contempt for advocates of moral inhibition in the conduct of foreign policy.⁴ Consistent with that view of their stewardship of American interests, they colluded in the destruction of a democratic government in Chile⁵ and made a de facto alliance against the Soviet Union with one of the great killers of the twentieth century, Mao Tse-Tung.⁶

It was explicitly in opposition to the Kissingerian style of foreign policy that Jimmy Carter waged his successful 1976 campaign for the US presidency against Gerald Ford⁷ and to a modest extent, but an extent far greater than any predecessor, actually conducted foreign policy, particularly in relation to Latin America.⁸ In doing so he enraged right-wing publicists⁹ who accused him of undermining friends of the United States—like the Nicaraguan Dictator, Anastasio Somoza, and the Shah of Iran—by inhibiting their instinct to repress ruthlessly, by challenging, however implicitly, their legitimacy, and, ultimately, by failing to stiffen their resolve to persist. As a result, right-wing publicists argued, these autocrats notionally capable of democratic evolution had been replaced by enemies of the United States with totalitarian

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2. See, e.g., WALTER RUSSELL MEADE, *SPECIAL PROVIDENCE: AMERICAN FOREIGN POLICY AND HOW IT CHANGED THE WORLD* 132–217 (2001). See also *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005) (see especially the essays by Michael Ignatieff, Stanley Hoffman, and John Gerard Ruggie). Compare WALTER McDUGAL, *PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776* (1997).
 3. “So it is necessary for a ruler, if he wants to hold on to power, to learn how not to be good, and to know when it is and when it is not necessary to use this knowledge.” NICCOLO MACHIAVELLI, *THE PRINCE* 48 (David Wootton ed. & trans., 1994).
 4. See Christopher Hitchens, *The Case against Henry Kissinger*, *HARPER’S*, Feb. 2001, at 37.
 5. See KATHRYN SIKKINK, *MIXED SIGNALS: U.S. HUMAN RIGHTS POLICY AND LATIN AMERICA* 107–10 (2004).
 6. See MARGARET MACMILLAN, *NIXON AND MAO: THE WEEK THAT CHANGED THE WORLD* (2007).
 7. See Manoj K. Joshi, *The “Human Rights Phase” of American Foreign Policy*, 10 *SOC. SCIENTIST* 38 (1982).
 8. See SIKKINK, *supra* note 5, at 121.
 9. See, e.g., Jeane Kirkpatrick, *U.S. Security and Latin America*, *COMMENTARY*, Jan. 1981, at 29.



agendas.¹⁰ Thus Carter's policies were a setback for human rights (as well as US national security) both in those particular contexts and in the world at large, since any shift of political allegiance away from Washington in any country, large or small, correspondingly enhanced Soviet power and any gain for the Soviets in the Cold War was a per se blow to human rights. Carter's so called "moralism," in other words, was indictable for two sins. For Republican "realists" it was the sin of sacrificing the national interest on the altar of moral perfectionism.¹¹ For neo-conservatives it was moral myopia, a failure to see that minor transgressions by allies were inconsequential compared to the moral gains that would be achieved by heaving communism in all its forms into the dustbin of history.¹²

Both delinquencies were trumpeted by Republicans in the course of the triumphal 1980 presidential campaign that brought Ronald Reagan to the White House.¹³ But once in place Reagan initially identified himself with the realists by appointing Alexander Haig, a Kissinger protégé, to be Secretary of State. Rather than playing on both themes, Haig confirmed his intellectual heritage by quickly declaring that the suppression of terrorism (presumably he meant insurgencies against US allies) would replace human rights as a principal item on the agenda of American foreign policy.¹⁴ Suiting deed to word, he purged a number of ambassadors closely associated with Carter's concern for human rights in friendly countries¹⁵ and encouraged friendly but thuggish regimes, notably in Latin America where state terror was widespread, to believe that hyper-repression of left-wing antagonists would have a sympathetic resonance in Washington.¹⁶

Despite the chronological association of Carter's human rights concerns with the overthrow of the Shah¹⁷ and the subsequent occupation of the US Embassy in Tehran, which traumatized and enraged the American

10. *Id.*

11. See *Morals, Arms, and Liberals*, 29 NAT. REV. 194 (1977).

12. See Brian Crozier, *Crash Course*, 32 NAT. REV. 337 (1980).

13. See Norman Podhoretz, *The Reagan Road to Détente*, 63 FOREIGN AFF. 447 (1984).

14. Don Dberdorfer, *Haig Calls Terrorism Top Priority; Haig, in Assertive Debut, Rates Anti-Terrorism Before Human Rights; Human Rights Goals Demoted as Concern of Foreign Policy*, WASH. POST, 29 Jan. 1981, at A1.

15. Carla Anne Robbins, *A State Department Purge*, N.Y. TIMES, 3 Nov. 1981, at A19.

16. Alan Riding, *Reagan Impact Felt in Central America*, N.Y. TIMES, 16 Nov. 1980, at A17.

17. Ironically, the Shah was a principal beneficiary of Carter's occasional double standard. On New Year's Eve 1977, within thirteen months of the Shah's flight from revolutionary forces, Carter concluded a visit to Iran with an adulatory dinner in which he described the country as "an island of stability" and declared that "The cause of human rights is one that also is shared deeply by our people and by the leaders of our two nations" that is a "great tribute to the respect, admiration and the love of your people for you." University of California, Santa Barbara, The American Presidency Project, *Tehran, Iran Toasts of the President and the Shah at a State Dinner* (31 Dec. 1977), available at <http://www.presidency.ucsb.edu/ws/?pid=7080>.



public, Haig's effort to dismiss human rights from the foreign policy agenda encountered robust opposition in Congress, the media, and a substantial part of the public.¹⁸ Because Haig soon found himself a private citizen, a possibly tactical offer to resign in the face of some bureaucratic setback having been accepted by President Reagan, we will never know whether Haig might finally have muted his open hostility to human rights in the face of determined opposition. Certainly there were figures within the administration, self-identified neo-conservatives, who questioned its utility. Following his departure, they seized the day with a program to co-opt human rights for neo-conservative ends.

Among the Reagan administration coterie that spearheaded the effort to appropriate human rights was the hard-edged lawyer Elliot Abrams who, with Haig gone, acquired the human rights brief within the State Department. Like anyone with open eyes, he could sense the dissonance between, on the one hand, Reagan's emphatic, decidedly un-Kissingerian moralization of the US-Soviet competition as one between the "free world" and the "evil empire" and, on the other, noisy hostility to Carter's human rights legacy. Abrams and his ideological siblings like Jeane Kirkpatrick, chief US representative at the UN, adored the moralizing rhetoric which echoed that of neo-conservative publicists like Abrams father-in-law, Norman Podhoretz.¹⁹ To help it resonate around the globe winning hearts and minds to the Western side, they evidently believed that they needed to get rid of the rhetorical dissonance created by the good realist Haig while leaving intact Haig's commitment to support brutal regimes in their campaigns of extermination against leftist opponents.

Under neo-conservative guidance, the administration's streams of rhetoric segued into a single harmony that equated the defense of human rights with the promotion of democracy. In practice Abrams and his colleagues defined democracy narrowly in terms of elections that, however coercive the environment in which they were conducted, were not grossly fraudulent in the sense of stuffed ballot boxes and open denial of the ballot to persons or whole groups deemed unfriendly to the regime.²⁰ This rhetorical move was a conspicuous departure from the Carter administration's particular concern with torture, summary execution, and long-term detention without fair process even when perpetrated by dependable authoritarian clients including those, like the Somoza family in Nicaragua and successive military strong men in El Salvador, that maintained a thin, carefully fabricated veneer of electoral legitimacy.

18. AMERICAN PUBLIC OPINION AND U.S. FOREIGN POLICY 1979, at 8 (John E. Reilly ed., 1979).

19. *Human Rights—Not Dead Yet*, ECONOMIST, 7 Nov. 1981, at 51.

20. Aryeh Neier, *Human Rights in the Reagan Era: Acceptance in Principle*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 31, 31 (1989); see also Eric Alterman, *Elliot Abrams: The Teflon Assistant Secretary*, WASH. MON., May 1987, at 19.



After Haig's departure, latent tensions between realists and neo-conservatives eased. For whatever their differences in motives—for instance, between the realist aim of maintaining unchallenged US hegemony in the Western Hemisphere and the additional neo-conservative one of burying Marxism as a mobilizing ideology and to that end pulverizing its carriers—both supported ruthless right-wing regimes in El Salvador²¹ and Guatemala²² and efforts to overthrow a leftist one in Nicaragua.²³ Conflicts over relations with Moscow lost their edge once the Soviet Union began its slide toward dissolution.

But once George H.W. Bush replaced Reagan and put James Baker, a fellow realist, in charge of foreign policy, discord reemerged, particularly over the failure to use the occasion of the first Gulf War to eliminate Saddam Hussein²⁴ while at the same time attempting to engineer a settlement of the Palestinian-Israeli conflict. Modest pressure on Israel to cease its expansion of settlements into the only territory realistically available for a Palestinian state, including for the first time in years a hint of material sanctions,²⁵ evoked a furious assault from neo-cons, with some even implying that Baker was a covert anti-Semite.²⁶

Beyond factional conflict over particular issues lay the broader difference of world views. In a seminal statement of neo-conservative goals for the post-Cold War era, Charles Krauthammer caught the policy community's eye with an article calling for full exploitation of the "unipolar moment":²⁷ The US, he and others argued, must employ its unrivaled power to shape a world reflective of American values—elected governments and free markets. Neither the cautious democracy-promoting projects of realists nor their strategy of positive engagement with the nominally communist and undoubtedly authoritarian regime in China came close to satisfying this vision. And so the neo-conservative publicists noisily nursed their dissatisfactions,²⁸ seemingly as disappointed as right-wing Christian groups,²⁹ with an administration so

21. See MARK DANNER, *THE MASSACRE AT EL MOZOTE: A PARABLE OF THE COLD WAR* (1994).

22. See STEPHEN SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA* (1982).

23. See David K. Shipler, *Senators Challenge Officials on Contras*, N.Y. TIMES, 6 Feb. 1987, at A3; CHRISTOPHER DICKEY, *WITH THE CONTRAS: A REPORTER IN THE WILDS OF NICARAGUA* (1987); MARLENE DIXON, *ON TRIAL: REAGAN'S WAR AGAINST NICARAGUA* (1985).

24. Carla Anne Robbins & Brian Duffy, *A Long Road to Peace*, U.S. NEWS & WORLD REP., 18 Mar. 1991, at 56.

25. Rathnam Indurthy, *Human Rights in U.S. Policy toward Israel: Explanations 1987-Present*, 23 INT'L J. WORLD PEACE 45 (2006).

26. Triggering the venomous assault on Baker was the administration's decision to temporarily suspend loan guarantees to Israel in order to halt expansion of Jewish settlements in the West Bank. For a neo-con account of the fallout, see Jay P. Lefkowitz, *Does the Jewish Vote Count?*, COMMENTARY, Mar. 2001, at 50–53.

27. Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. 23 (1990–91).

28. Francis Fukuyama, *The Beginning of Foreign Policy*, NEW REPUBLIC, 17 Aug. 1992, at 24.

29. Carroll Bogert, *Pray for China*, NEWSWEEK, 9 June 1997, at 44.



plainly indifferent to the excited ambitions and cultural sensibilities of these oddly matched allies.

Whatever their sour disappointment with the first President Bush, it was nothing compared to the fury and contempt evoked by Bill Clinton. Aside from his incarnation of the detested *laissez-faire* life style, Clinton evoked rage for what neo-cons saw as the dissipation of the millennial opportunity to remake the world in the American image.³⁰

To the limited extent that the year 2000 presidential campaign debates engaged foreign policy, George Bush the son sounded the themes of the conservative realists. On his watch, US troops would be used only as combatants. Humanitarian hand-holding would be left to the UN.³¹

C. The Impact of 9/11

All this changed in the wake of the terrorist attack of 9/11. Suddenly the neo-conservative claim that the American national interest required a global environment saturated in American values could appear as a simple statement of fact rather than an ideologically-fired vision. As in the Reagan administration, neo-cons and those realists who had entered the administration merged agendas if not visions.³² Afghanistan would come first, then Iraq, and perhaps after that a settling of accounts with Iran. But realists outside the administration, Brent Scowcroft preeminent among them, demurred.³³ Afghanistan yes: It had harbored Al Qaeda and had to be reconstructed. Few Americans and even very few Europeans disagreed. Iraq was a different matter for them as for centrists and liberals associated with the Democratic Party. But in the emotionally charged post-attack environment, the country and the media and most of the political establishment were prepared to follow a president confidently riding the wave of national fury . . . or at least to get out of the way.

30. Coral Bell, *American Ascendancy—And the Pretense of Concert*, NAT. INT., 1 Sept 1999, at 55.

31. While referring to Somalia during the 11 October 2000 Presidential Debate at Wake Forest University, George W. Bush said, "I don't think our troops ought to be used for what's called nation-building. I think our troops ought to be used to fight and win war." See On the Issues, *Presidential Debate, Wake Forest U., Winston-Salem NC: on Foreign Policy*, available at http://www.issues2000.org/Archive/Wake_Forest_debate_Foreign_Policy.htm; see also Condoleezza Rice, *Promoting the National Interest*, 79 FOREIGN AFF. 45 (2000).

32. See JAMES MANN, *RISE OF THE VULCANS: THE HISTORY OF BUSH'S WAR CABINET* (2004); GEORGE PACKER, *ASSASSIN'S GATE* (2005).

33. Mark Mazzetti, *The Rush to War Hits a Speed Bump*, U.S. NEWS & WORLD REP. 26 Aug. 2002, at 20.



As subordinates and fellow-traveling publicists marshaled public opinion with the aid of a supine media³⁴ to support the invasion of Iraq, President Bush himself made the case for war primarily in terms of the risk to the United States stemming from Saddam Hussein's presumed possession of weapons of mass destruction.³⁵ In the words of the then Deputy Secretary of Defense Paul Wolfowitz, that was "the one rationale" for toppling Saddam on which everyone in the administration could agree.³⁶ But neo-con publicists, gathered admiringly around the administration to bray for war, gave roughly equal emphasis to the claimed moral merit of liberating the Iraqi people from rule by a monstrous dictator and building on the ruins of Saddam's regime an authentic democracy, an outcome that could trigger the evolution or overthrow (with American assistance) of autocracy throughout the region.³⁷ In short, they appropriated the human rights cause on behalf of war with Iraq. Following the invasion, when it became clear that UN inspectors had not found weapons of mass destruction because there were none to be found, human rights had to be the default explanation for why we were in Iraq, a default the president readily embraced.³⁸

So here we are, over four years and tens of thousands of deaths later,³⁹ thrashing around in that tragic country, once the most advanced of Arab states,⁴⁰ now a bloody ruin where nothing runs on time except, perhaps, sorties by US forces. The results of this feckless Marx Brothers invasion, its conduct castigated across the political spectrum, not least among neo-cons waging a fighting retreat from the ruins of an adventure they had praised,⁴¹ has become the main argument for its continuance; that is, having ignited an inter-ethnic and sectarian conflagration in Iraq, we need to stay not only to contain the human damage in Iraq itself but also to prevent all-out war there from rippling through the entire region.⁴² Thus the human rights theme continues to sound, but in a very minor key, the key appropriate to violation of the Hippocratic Oath: At least do no harm.

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34. See, e.g., Michael Massing, *Now They Tell Us*, N.Y. REV. BOOKS, 26 Feb. 2004, at 43.
 35. George W. Bush, State of the Union Address, Delivered to a Joint Session of Congress and the Nation, Wash. D.C. (28 Jan. 2003).
 36. Bill Keller, *The Sunshine Warrior*, N.Y. TIMES, 22 Sept. 2002, § 6 (Magazine), at 48.
 37. See Spencer Ackerman & Franklin Foer, *The Radical*, NEW REPUBLIC, 1 Dec. 2003, at 17; Lou Dobbs, *Freedom: Our Best Export*, U.S. NEWS & WORLD REP., 10 Mar. 2003, at 46; Thomas Carothers, *Promoting Democracy and Fighting Terror*, 82 FOREIGN AFF. 84 (2003); Efraim Karsh, *Making Iraq Safe for Democracy*, COMMENTARY, Apr. 2003, at 22.
 38. Carl M. Cannon, *What Bush Said*, 35 NAT. J. 2412 (2003).
 39. For a running total of figures of casualties and grave injuries, on all sides of the conflict, see Iraq Coalition Casualty Count, available at <http://www.icasualties.org>; GlobalSecurity.org, U.S. Casualties in Iraq, available at <http://www.globalsecurity.org/military/ops/iraq-casualties.htm>.
 40. See UNITED NATIONS DEVELOPMENT PROGRAMME, ARAB HUMAN DEVELOPMENT REPORT 2003: BUILDING A KNOWLEDGE SOCIETY (2003).
 41. See Scott Sherman, *Kristol's War*, NATION, 30 Aug. 2004, at 6.
 42. For one discussion of possible consequences of a US departure, see Nir Rosen, *If America Left Iraq*, THE ATLANTIC, Dec. 2005, available at <http://www.theatlantic.com/doc/200512/iraq-withdrawal>.



II. IRREDUCIBLE GROUNDS FOR CONFLICT: LIBERALS, NEO-CONSERVATIVES, AND HUMAN RIGHTS IN THE AGE OF MEGA-TERRORISM

A. Why Wars between Intellectuals Matter

Iraq's gory shambles has by no means halted the competition between liberals and neo-cons to appropriate "human rights." Like all ideologues, that is people such as old-time Marxists so intoxicated by their visions of noble ends as to scruple little (if they think in quotidian terms at all) about means, hardcore neo-cons like the irrepressible Richard Perle are thoroughly unchastened by events in Iraq.⁴³ As I suggest above, not entirely without reason they attribute the terrible effects on human rights of the adventure they helped to launch to tactical failures fathered by the president and the secretary of defense or other previously eulogized actors.⁴⁴ A democracy, they argue (undeterred by the prominent positions members of their sect like the Deputy Secretary of Defense Paul Wolfowitz occupied in the principal war-planning institution, the Department of Defense) could have been built if only the occupation had been conducted effectively. In any event, their narrative continues, however ugly things may look, however great the incidental violations of the right to life, the right not to be tortured, the right not to be punished without due process, on balance human rights has been furthered by Saddam's overthrow.⁴⁵ Those scholars and publicists, like Francis Fukuyama,⁴⁶ who disagree with this diagnosis, or who believe that whatever the effect on human rights the effect on the US national interest is deplorable, have simply dissociated themselves from the sect, at least in Fukuyama's case by decrying the second generation betrayal of neo-conservatism's founding distrust of ambitious social projects like the war on poverty.⁴⁷

What makes close study of the competition both fascinating and important is the light it casts on two deeply incompatible ways of seeing the world and, more specifically, two clashing ways of conceptualizing the ferocious engagement between, on the one hand, the governments and

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43. Devin Gordon, *PBS at a Crossroads*, NEWSWEEK, 23 Apr. 2007, at 58. This article discusses "The Case for War," one installment in a documentary miniseries on public television that featured Perle extensively and highlighted his persistent defense of the invasion of Iraq.
44. Larissa MacFarquhar, *Midge's Mash Notes*, NEW YORKER, 3 Nov. 2003, at 36; Jeffrey Goldberg, *Party Unfaithful*, NEW YORKER, 4 June 2007, at 40.
45. Frederick W. Kagan, *What We've Accomplished*, DAILY STANDARD, 19 Sept. 2007, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/126gmupw.asp>.
46. Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES, 19 Feb. 2006, § 6 (Magazine), at 62.
47. FRANCIS FUKUYAMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER AND THE NEOCONSERVATIVE LEGACY* (2007).



the great majority of peoples in the West and, on the other, networks of mega-terrorists. I suppose one might regard the contending diagnoses and prescriptions stemming from the agents of these different ways of seeing the contemporary world as hardly more than a struggle in a puddle of tiny but very complex creatures. But that view would be entirely wrong. Intellectual elites give coherent form to the deeply held values and causal assumptions of great numbers of people; and through the mass media they also reinforce, modulate, or undermine popular explanations and nostrums. In other words, intellectual elites are both agents and architects of popular opinion, registering views already formed and helping to form the views that they then register. So in studying and critically assessing the views of the few, we understand better the premises of the many and thus a key dimension of the opportunities for and limits on change in public policy.

B. The Neo-Conservative Indictment of Liberal Intellectuals

Jean Bethke Elshtain's polemic, *Just War Against Terror*,⁴⁸ offers an irresistibly tempting vehicle for illuminating the central and irreducible grounds for conflict between neo-conservative and liberal/social democratic elites. Although not formally identified with the neo-conservative movement, indeed appearing to embrace in the abstract values that are decidedly liberal, she plainly shares as she illuminates neo-con rages, diagnoses, and prescriptions at least insofar as the so-called "war on terror" is concerned. The resulting schizophrenia is itself revealing.

A polemic, to the extent it is anything more than a cathartic howl of rage, is an exercise in persuasion wrapped around an indictment; in other words, it is a call to potential supporters urging them to share your concern and your anger about the behavior or views of some persons or groups you find dangerous or loathsome and beyond the reach of your persuasive powers.

The Demand for a Demonic Narrative: In the era of state terror in Latin America, years corresponding roughly and not entirely accidentally to the duration of The Cold War, Latin fascists and their apologists used to identify two enemies. One enemy consisted of militants working clandestinely to overthrow right-wing authoritarian regimes. The other consisted of their "*tontos utiles*," their "foolish tools": Leftist academics and priests who sympathized with the goal of reducing inequality, lawyers who defended leftist political prisoners, and human rights activists who condemned the government's methods.⁴⁹ During the 1970s campaign of extermination against leftist mili-

48. JEAN BETHKE ELSHTAIN, *JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD* (2004).

49. When, in the midst of this period, I served as a member and ultimately President of the Inter-American Commission on Human Rights of the Organization of American States



tants, a principal issue dividing “moderates” and “hard liners” within the Argentine military establishment was whether to distinguish between the militants and their *tontos utiles*. One general famously summarized the hard line view when he announced that first we must kill all of the insurgents, then everyone who helped them, and finally everyone who did not help us. It was no doubt this same indiscriminate view of the enemy that encouraged the Salvadoran military establishment during that country’s brutal civil war to murder the leaders of its Jesuit university.⁵⁰

At this time of danger to Western states and peoples from Islamic *jihadists*, neo-conservative rhetoric replicates this binocular view of the enemy. There are the *jihadists* themselves and also there are the leftist intellectuals who would have us understand Muslim rage and see 9/11 as blowback from American policies in the Middle East and poverty and humiliation and who propose dialogue on the theory that conflict arises from misunderstanding and who worry about Western intolerance of other cultures.⁵¹

Although Elshtain affects to stand outside the unhelpful ideological categories of liberal or leftist and conservative or rightist⁵² to be simply a defender of human rights, she joins the Right in condemning the Western *tontos utiles* of Al Qaeda, the explainers and rationalizers and apologists and critics of American policy all of whom she associates with the academic and clerical left among whom she includes “liberals,” whether some, many, or most is unclear.⁵³ They are like the “humanists” in Albert Camus’s novel *The Plague*⁵⁴ who continue denying that there are plague-carrying rats in the city even as they walk over their bloated bodies:

Camus’s “humanists” are unwilling or unable to peer into the heart of darkness. They have banished the word *evil* from their vocabularies. Evil refers to something so unreasonable, after all! Therefore, it cannot really exist. Confronted by

as it conducted on-site observations in states ruled by terrorists of the Right, I frequently heard government officials, military officers, and their supporters in the civilian population use the phrase *tontos utiles* to describe persons they accused of being fellow travelers of clandestine Marxist groups.

50. Alexander Cockburn, *Beat the Devil: The Names of Freedom*, NATION, 11 Dec. 1989, at 707.

51. See, e.g., NOAM CHOMSKY, 9/11 (2002); CHALMERS JOHNSON, SORROWS OF EMPIRE (2004); BERNARD LEWIS, WHAT WENT WRONG? THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST (2003).

52. ELSHTAIN, *supra* note 48, at 82.

53. Consider Elshtain’s own words: “One wag’s somewhat bitter depiction of the dominant intellectual class as ‘the herd of intellectual minds’ struck me as all too apt all too often.” *Id.* at 73. “America’s critics lump America and her allies together with the Taliban and Al Qaeda victimizers” *Id.* at 77. “Confronted with an aggressive foe preaching hatred of any and all things Western, many have responded with a disturbing strain of Western self-loathing.” *Id.* at 145–46.

54. ALBERT CAMUS, *THE PLAGUE* (1991).



people who mean to kill them and to destroy their society, these well-meaning persons deny the enormity of what is going on.⁵⁵

Such people, Elshtain then suggests, do not cite the desperate conditions of post-World War I Germany to explain or rationalize Nazism or suggest it was an inevitable outgrowth of those conditions. Even they recognize, she implies, that to claim those conditions as causal “is to set in motion an exculpatory strategy that, whether intentionally or inadvertently, rationalizes political pathology.” “Why, then,” she asks rhetorically, “in the context of America’s war against terrorism, do so many tick off a list of American ‘failures’ or even insist that America brought the horrors of September 11, 2001, on herself?”⁵⁶

Who are these “many” and how many are there? She writes as if they swarm throughout the academic world but are also numerous in the clergy. They are the descendants of the “anti-anti-Communists” (“aided an abetted,” she concedes, “by the hyperbole of professional anti-Communists”) who “displayed a naiveté about anything that paraded under the name ‘socialism’ and continued to insist that the Soviet Union was no threat.”⁵⁷ They are people mired in the anti-war mindset of the Vietnam era, the 1960s, when

[t]o be an academic was to be on the left, minimally a liberal . . . [at a time when it] was unfashionable to suggest that, although the Vietnam War was unjust and needed to be brought to a halt as quickly as possible, communism posed a real threat . . . [a truth now documented by Soviet archival materials that] anti-anti-Communists are loathe to acknowledge . . . even today.⁵⁸

These were the people who disparaged Ronald Reagan’s emphatic moral indictment of Soviet communism and were reluctant to concede that that moralizing conservative was a key architect of the collapse of the Soviet Empire. They are the “dominant intellectual class”⁵⁹ and include not only “those who consider themselves radicals,” but also “other dominant voices both inside and outside the academy.”⁶⁰ But when it comes to naming names, Elshtain does not get much beyond Edward Said, the veteran British journalist Robert Fisk, and the one hundred signatories of an open letter⁶¹ responding to an earlier open letter entitled “What We’re Fighting For” signed by Bethke Elshtain and fifty-nine other intellectuals.⁶²

55. ELSHTAIN, *supra* note 48, at 1–2.

56. *Id.* at 2.

57. *Id.* at 71.

58. *Id.* at 72.

59. *Id.* at 73.

60. *Id.*

61. The text of the letter can be viewed at AmericanValues.org, available at http://www.americanvalues.org/html/us_letter_to_europeans.html.

62. ELSHTAIN, *supra* note 48, at 74–76.



Given the million plus faculty members in the United States,⁶³ these are not exactly whopping numbers. Moreover, very few signatories of either letter come from the professional graduate schools of law, business, public administration, public policy, and international affairs that are such a large and influential part of the American academic establishment. Nor does one encounter many names from the sciences and engineering or, for that matter, economics. In short, the signatories do not seem exactly representative of the American Academy. But that is merely a footnote point. What is really important and revealing in Professor Elshtain's indictment of the *tontos utiles*, which echoes the Jeremiads of conservative writers and structures her entire work, is first its conflation of sustained and systematic criticism of American foreign policy with apologetics for Islamic terrorism and inability to grasp the seriousness of the threat to the United States and human rights. Conflation is facilitated by largely ignoring the multitude of foreign policy analysts who are critics of past and present American policies but at the same time believe that terrorism emanating from the Islamic world poses a serious threat to the interests and values of the West.⁶⁴ Conflation in its turn facilitates the prescriptive conclusion lying at the heart of this and similar writing, namely that the terrorist threat is largely impervious to changes in American policy and therefore arguments for change need not be addressed with any sense of urgency, if at all.⁶⁵ On the contrary, all of our national energies must be marshaled to achieve military victory in a war of grand historic dimensions.

For someone who affects transcendence of conventional partisan categories, her disregard of explainers and apologists on the Right seems somewhat at odds with the even-handed broadly critical mind that is supposed to be at work in this book. Pat Robertson⁶⁶ and the late Jerry Falwell who interpreted 9/11 as God's judgment on American's society's Godlessness, lewdness, and tolerance of homosexuality⁶⁷ do not appear in her narrative. Presumably even if Dinesh D'Souza's recent book⁶⁸ imputing Muslim anger to the liberal-enabled sexual impieties of American society projected by the mass media into the Muslim community of faith, and urging an anti-liberal alliance between

63. See U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK (2006–07 ed.) available at <http://www.umsl.edu/services/govdocs/ooh20062007>.

64. See, e.g., RICHARD FALK, THE GREAT TERROR WAR (2003). See also DRUCILLA CORNELL, DEFENDING IDEALS: WAR, DEMOCRACY AND POLITICAL STRUGGLES (2004).

65. ELSHTAIN, *supra* note 48, at 153–54. To this effect she approvingly cites “A distinguished Johns Hopkins University psychiatrist,” Paul McHugh, who wrote “once peace is restored, we can deal with underlying issues.” Quoted in *id.*, but originally printed in WEEKLY STANDARD, 10 Dec. 2001, at 21–24. The journal is a leading outlet for neo-conservatives.

66. See PAT ROBERTSON, THE TEN OFFENSES (2004).

67. See transcript of Pat Robertson-Jerry Falwell Conversation on 700 Club, 13 Sept. 2001, available at <http://www.commondreams.org/news2001/0917-03.htm>.

68. D'Souza's *Drubbing*, CHRON. HIGHER ED., 9 Feb. 2007, at B4.



pious Muslims and their American counterparts, had been circulating at the time she wrote, he too would have been a non-person in her tale.

The Insistence on the Irrelevance of US Policy: Elshtain's description of the terrorist enemy is as reductive as her dichotomization of American thinkers into, on the one hand, those who recognize a serious terrorist threat and, on the other, those who would blame America and imagine the threat could be removed by a policy of conciliation or by ending poverty. Here too her impoverished view of reality leads to conflation, in this case the conflation of alienated anti-western Muslims with active terrorists. To put the problem slightly differently, by virtue of her apologetics for virtually everything done by the Bush administration since 9/11, she obscures the distinction between the large pool of potential recruits to terrorist networks and the hard core who are seeking to recruit them. David Kilcullen, a former officer in the Australian Army who has served as an advisor to the commander of coalition forces in Iraq, General David Petraeus, has plotted out a

“ladder of extremism” that shows the progress of a jihadist. At the bottom is the vast population of mainstream Muslims, who are potential allies against radical Islamism as well as potential targets of subversion, and whose grievances can be addressed by political reform. The next tier up is a smaller number of “alienated Muslims,” who have given up on reform. . . . They require “ideological conversion.” . . . A smaller number of these individuals, already steeped in the atmosphere of radical mosques and extremist discussions, end up joining local and regional insurgent cells, usually as the result of a “biographical trigger—they will lose a friend in Iraq or see something that shocks them on television.” With these insurgents, the full range of counterinsurgency tools has to be used, including violence and persuasion. [Finally there are the] very small number of fighters who are recruited to the top tier of Al Qaeda and its affiliated terrorist groups [and they] are beyond persuasion or conversion. “They’re so committed you’ve got to destroy them,” Kilcullen said. “*But you’ve got to do it in such a way that you don’t create new terrorists.*”⁶⁹

Elshtain might respond by cherry-picking a slyly preemptive, throwaway sentence⁷⁰ out of her polemic to support the claim that she herself is sensitive

69. Quoted in George Packer, *Knowing the Enemy*, NEW YORKER, 18 Dec. 2006, at 60, 68 (emphasis added).

70. ELSHTAIN, *supra* note 48. In a throwaway line almost obscured by her paragraphs of tirade against anyone who doubts that our way of life is the reason we were attacked (see among many others *id.* at 23), Elshtain herself condescends to concede that “[i]t is reasonable to argue that certain changes in U.S. foreign policy *might* reduce the attraction of radical Islamism to many young men.” But, she adds, it “is unreasonable to assume that changes in U.S. foreign policy would disarm radical Islamism.” *Id.* at 23. While shrinking their pool of recruits does not *disarm* persons already committed psychologically to mass murder, it can certainly reduce their capacity for harm. So if the revision of policy might achieve that end, why wait until the chimerical moment when, in Professor McHugh’s approvingly cited words, “peace is restored” before “deal[ing] with underlying issues”? See *id.* at 153–54.



to the ladder and the related risk of increasing the pool of recruits to terror and strengthening social support for terrorism in Muslim communities with a corresponding denial of critical intelligence to Western security services. But such a claim cannot be reconciled with her quietly vituperative⁷¹ indictment of writers who suggest that US policies, not the country's values or the character of its society, are the main source of Muslim anger and, as noted above, her insistence that we concentrate our energies on making war effectively rather than disputing the wisdom of our policies, as if it were beyond our capacities to employ reason, no less than zeal, in defending the United States and its allies against terrorist attack.

Like the neo-cons with whom she does not openly identify (if she did, of course her claim to transcend partisan categories would be empty), the general thrust of her argument seems to be that no plausible change in US policy would help assuage Muslim wrath⁷² and that, in any event, any move to reduce the nature and magnitude of the US presence in the Middle East would be bad policy.⁷³ In fact, unlike unabashed neo-conservatives, her views about US policy in the Middle East are hard to engage because they remain remarkably vague particularly for what purports to be an exercise in moral (or as she describes it "Augustinian") realism. To be sure, that vagueness is consistent with her insistence that American policy is not a source of the rage that fuels Islamic terrorism; the actual source, according to her, is simply our liberal democratic way of life.⁷⁴ It is a little less consistent with her suggestion that although much of the Western criticism of American policy is unconstructive where not frankly exculpatory of terrorism, nevertheless there is some space for constructive debate about the substance of US foreign policy. Why have that debate if our policies can do nothing to assuage Islamist anger? Well, I suppose that if pressed she could say that certain policies might be suboptimal for other reasons, for example because they do not do enough to encourage democracy or sustainable development in the Middle East. Or she might concede, as she does in the

71. Ironically one of her many indictments of "leftist" critics of the Bush administration is their vituperativeness, implying that her own work is an exercise in detached, scholarly analysis.

72. ELSHTAIN, *supra* note 48, at 3–6. In her own words: "We are not obliged to defend everything we have done, or are doing, as a country. But we do bear an obligation to defend the ideal of free citizens . . ." *Id.* at 6; "[S]uch persons hate us for *what we are and what we represent and not for anything in particular that we have done*. How could we respond to their demands? By refusing to educate girls and women? By repealing the franchise? By establishing a theocracy run by radicals?" *Id.* at 23 (italics in original); "The weak arguments and overheated rhetoric . . . are united by cynicism and a blame-the-victim mentality. Framing the whole is a refusal to grapple with the fog of war and politics." *Id.* at 96; *See also supra* note 70.

73. *Id.* at 6–7.

74. *Id.* at 3–4.



single sentence cited above,⁷⁵ that different policies might reduce the pool of potential recruits for Bin Ladin and company.

What are those policies? Concerning them this polemic seems to me a study in reticence. One cannot tell whether, for instance, she sympathizes with acknowledged neo-conservatives in supporting the approach of the Israeli Right to the Palestinian problem which is to chop the Palestinian population into tiny Bantustan-like enclaves in the territories occupied by Israel in 1967, to give them internal autonomy subject to Israeli control, and to deny their Palestinian residents either citizenship in a Greater Israel or a sovereign state.⁷⁶ At a minimum it would appear that she endorses a principal theme of neo-conservatives post 9/11 rhetoric which is the marginality of the Israeli-Palestinian issue to the problem of Islamic terrorism. Even its miraculous resolution, they implicitly argue, would have little if any effect on Arab militancy.⁷⁷ Hence it can be ignored. A remarkable feature of Elshtain's book on the present conflict is that one can search the index in vain for any reference either to Israel or Palestine. In short she elides the problem by pretending that it is not there continuing its four-decade feed of poison into relations between Islamic peoples and the West.

But indirectly she does respond to the danger of multiplying future terrorists by emphasizing the question of what means should be used to eliminate present ones. We mitigate that danger, as well as reaffirm the radical moral difference between us and them, she seems to be saying, by fighting terrorism within the normative confines of just war theory.

Are we replaying the Reagan era? However many problems one may find in Professor Elshtain's application of just war criteria, her insistence that war be waged within normative constraints rather than by whatever means the "Decider" (as President Bush has labeled himself) deems expedient creates some theoretical space between her and the Bush administration. Presumably, for instance, she does not endorse Vice-President Cheney's view, announced not long after 9/11, that the United States will have to wage war by moving onto "the dark side,"⁷⁸ a view that presaged the administration's furious resistance to legislation forbidding the use of torture and other cruel and inhuman treatment. However, theoretical space needs to be seen as a hypothesis in need of reality testing. If normative constraints are so construed or evasions so regularly ignored that constraints hardly constrain, then instead of inhabiting that morally fastidious world Elshtain passionately invokes, we are in the Hobbesian state of nature, red in tooth and claw, the state in which Elshtain locates the terrorists.

75. See *supra* notes 70, 72.

76. For a discussion of these issues, see TOM FARER, *CONFRONTING GLOBAL TERRORISM AND AMERICAN NEO-CONSERVATISM: THE FRAMEWORK OF A LIBERAL GRAND STRATEGY*, ch. 5 (2008).

77. ELSHTAİN, *supra* note 48, at 86.

78. Jane Mayer, *The Outsourcing of Torture*, *NEW YORKER*, 14 Feb. 2005, at 106.



Does Elshtain turn out to be indistinguishable in character from the neo-conservatives who came to power in the Reagan administration's State Department following the departure of Alexander Haig and claimed that the defense of human rights would be a central feature of the administration's conduct of the Cold War? As noted above, their rhetoric implied a sharp break with the "realist" or Kissingerian position Haig channeled which called for support of right-wing governments whatever their methods and goals, since they were dependable allies of the United States in the global struggle with the Soviet Union. In practice, however, neo-cons like Elliot Abrams supported the same murderous regimes like El Salvador's or movements like the CIA-created Nicaraguan insurgents (the so-called "Contras"), which Haig saw as allies, but the neo-cons did so in the name of contributing to human rights by building democracy or protecting incipient or latent democracies against totalitarian opponents. Where that required fiddling or overlooking ugly facts, so be it. The means justified the ends. For Elshtain, for any "just war" proponent, theoretically they do not.

III. WAGING JUST "WAR" AGAINST MEGA-TERRORISM: LIBERAL VS. NEO-CONSERVATIVE PERSPECTIVES

A. Is it "War"?

Before turning to her application of just war criteria, there is a preliminary question which to this point I have begged: That question is whether it is *useful* to think of the conflict with what Richard Falk labels "mega-terrorism"⁷⁹ as a "war" at all. I select the word "useful" with care. The word "war" is protean, available for application in peace and war, to existential grapples of entire peoples or efforts to eradicate microbes. "War" has been applied with marvelous indiscriminateness, withheld, for instance, from numerous violent interventions like the US invasions of various Central and Caribbean countries in the twentieth century,⁸⁰ and applied to utterly pacific campaigns like President Lyndon Johnson's anti-poverty initiative, the so-called "war on poverty." Thus, the choice should be one of utility not syntactical logic or aesthetics.

The disutility of choosing war in the present context is at least three-fold. In the first place, despite its indiscriminate use, in the present context the word encourages a disproportionate emphasis on military instruments, spe-

79. See generally FALK, *THE GREAT TERROR WAR*, *supra* note 64.

80. See MAX BOOT, *Neither New nor Nefarious: The Liberal Empire Strikes Back*, 102 *CURR. HIST.* 361 (2003).



cifically on firepower and kill ratios, rather than on political, psychological, and economic measures and policies designed to isolate the killers from the communities with which they identify and to promote a flow of intelligence about their intentions and whereabouts. Second, within the US constitutional system, it encourages the chief executive and his subordinates to claim a limitless, unreviewable discretion to act both at home and abroad in ways that in their judgment enhance the national security and it correspondingly fosters legislative and judicial abdication of constitutional responsibilities including oversight of Executive action.⁸¹

History underscores the resulting dangers to the very liberties we seek to protect and project, as the Japanese-American internees of World War II can attest. Moreover, the risk is not to constitutional liberties alone, a risk hugely aggravated to be sure where, according to President Bush, the “war” could last for a generation or two. The risk is also one of grave strategic error, the inevitable peril where a tiny leadership group can isolate itself from close critical scrutiny by experts outside the tight circle of loyalists. Finally, and related to the other two, the insistence on calling this particular clandestine security threat a war encourages recourse to means that render a war “unjust” according to the criteria for justness accurately enumerated by Elshain.

Objections to using the word “war” are usually met with the charge that the complainants are minimizing the threat, that they are part of Camus’ “humanist” crowd, criminally delinquent in their naiveté. That is the reductionist mind at work again, insisting in this case that there is nothing between war and policing as usual, a view of the matter that is either disingenuous or simply silly. For the reasons stated above, I think a word other than war, perhaps “struggle” or “conflict” would be more useful. It is not intended to imply the irrelevance of military means. They will certainly remain relevant. And during the course of the struggle there may be need for wars in the most conventional sense of armed conflict between states. The US invasion of Afghanistan was the initiation of just such a war, and I supported it as did a multitude of others who like myself believe that this administration’s overall conduct of the struggle, a struggle that preceded its coming to power and will long endure, has been disastrous for the national interest.

Nor does the use of a description other than “war” imply that the struggle may not require some loosening of traditional restraints on the internal security practices of the United States. For instance, it may be necessary to follow the European example and issue every resident with an identity card which will have to be presented in order to secure services in the private as well as the public sectors. We will probably need to expand

81. See, e.g., JACK GOLDSMITH, *TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).



the scope of employment security inquiries beyond the defense industries where they have long been required. These and other intrusions on privacy could result in the progressive loss of the very freedoms that are among the most valued of the goods our government is constitutionally endowed to produce. They will result in such loss if Congress and the judiciary abdicate their constitutional responsibility to monitor executive behavior and to block arbitrary and constitutionally impermissible forms of it. Insistence on calling the struggle a war makes that abdication more likely. My point, obviously, is that seeking to limit the risk of eroding the constitutional protection of human rights in the United States is not coincident with naiveté about the severity of the terrorist threat or the means required to mitigate it. Any claim to the contrary signifies either a mind in need of primitive dichotomies or a taste for demagoguery or a compulsion to curry favor with the powerful and well-funded constituencies of the American Right.

Although for the reasons stated I question the utility of calling the overall struggle a war, I agree with Elshstain that, for purposes of moral assessment, defensive measures against mega-terrorism should be judged against just war criteria as well as the overlapping but not identical human rights norms.⁸² Arguably the latter are more rigorous, while the former come closer to the standard of “reasonableness.” In the wake of terrorist attacks with casualties on the scale of those experienced in the United States on 9/11, fear and rage may temporarily overwhelm rigorous standards for assessing proposed responses. Just war standards constitute a safety net that can prevent both a plunge into the abyss of state terror and self-defeating spasms of indiscriminate violence, for just war is a counsel of prudence as well as morality.

B. Criteria for the Just Use of Force

There is little if any disagreement among writers about the criteria for just war. Elshstain’s enumeration is fairly conventional although slightly odd at the edges. The war must be authorized by a legitimate authority “so as to forestall random, private, and unlimited violence.”⁸³ Second, “a [just] war must be a response to a specific instance of unjust aggression perpetrated against one’s own people or an innocent third party, or fought for a just cause.”⁸⁴ The oddity here is the redundant modification of “aggression” by “unjust,” aggression being unjust by definition. More noteworthy is the implication that a war could be just even if it were not fought in self-de-

82. I presume that Elshstain would agree that the United States should also abide by human rights norms.

83. ELSHSTAIN, *supra* note 48, at 57.

84. *Id.* at 57–58.



fense or defense of an innocent third party. What Elshtain has in mind are humanitarian interventions to protect peoples facing an invasion of their human rights perpetrated by their own governments. This is arguably a recent expansion of just war doctrine, an expansion with which many ethicists and international lawyers including myself are sympathetic.⁸⁵

A third requirement is that the war “must begin with the right intentions”⁸⁶ and a fourth, implicit in the prior two, is that the war “must be a last resort after other possibilities for redress and defense of the values at stake have been explored.”⁸⁷ A fifth requirement she appears to include is that the recourse to force must have “a reasonable chance of success.”⁸⁸ Success is not self-defining. In the case of a war of self-defense let us say of a remote and inconsequential sliver of territory over which sovereignty had long been contested, it could mean only that the aggressor was defeated and omit from the moral equation the question of whether acquiescence or coerced compromise in certain cases of injustice might result in far less damage to the citizens of both states or the long-term prospects for peace. The question I am raising is whether the test of success should be tied to a sixth widely recognized criterion, namely that the party claiming to be engaged in a just war have a reasonable expectation that the war will produce more good than harm in terms of human values. Finally, the war must be conducted by just means. In other words, no matter how just the war is at its inception, it can segue into injustice by virtue of resort to illegitimate means.

After sketching the various measures adopted by the Bush administration following the terrorist attacks of 11 September 2001, Elshtain packages them into a single war against terrorism and pronounces it “just.”

Legitimate Authority: Believing, if I understand her correctly, that states should be seen as having the authority to wage war, Elshtain finds that the Bush administration’s invasion of Afghanistan and of Iraq satisfy the first just war test. Arguably the matter is slightly more complicated than she recognizes or, alternatively, chooses to concede.

It is a little unclear to me whether Elshtain locates legitimate authority by peering through legal or moral lenses or regards them as one and the same. Catholic theologians initially developed just war theory when the Roman Empire formed a single authority for most of the Mediterranean world. They elaborated it in the Middle Ages when legitimate authority was widely dispersed through the multiple levels and overlapping jurisdictions of feudal rule. The subsequent consolidation of authority in sovereign states coincided with both the doctrine’s secularization and its attenuation in the discourse

85. *Compare* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

86. ELSHTAIN, *supra* note 48, at 58.

87. *Id.*

88. *Id.*



of sovereigns who increasingly claimed an unreviewable authority to wage war for the advancement of their interests. International law coincidentally evolved as the normative framework of a state-structured international system. Its principal expression was the treaty, an agreement recognized as binding from which it followed that states could on the basis of reciprocity surrender a limited piece of their sovereignty.

The international agreement and the associated norm that agreements voluntarily concluded should be obeyed within their terms and reasonably construed form the vertebra of modern international law.⁸⁹ In the discourse of diplomacy as well as law the violation of a treaty is a wrongful act analogous either to a civil wrong in national legal systems or a crime, the appropriate analogy being a function of the agreement's importance to international peace, security, and human rights. The United Nations Charter is a treaty almost universally ratified and generally regarded as being in the nature of a constitutional document governing international relations. Read literally it divides the universe of force into acts of self-defense against an armed attack, acts authorized by the Security Council under its authority to maintain international peace and security against immediate threats, and illegal acts.⁹⁰

The Charter could be read as moving the principal locus of legitimate authority from states, except where they are responding to an actual or imminent aggression, to the United Nations Security Council. Under that reading, which for the past sixty years has enjoyed considerable support among international lawyers and diplomats, the United States did have legitimate authority to undertake the invasion of Afghanistan both because it had been attacked from territory controlled by the Taliban regime and further attacks were expected, and also because a post 9/11 resolution of the Security Council could fairly be construed as authorizing it albeit in general terms.⁹¹ By the same reasoning it did not have authority to invade Iraq.

However, there is solid ground supporting the claim that with respect to the use of force, the detailed limits contained in the Charter never became legally operative or that albeit operative initially, they gradually lost their legal authority through a widespread practice of non-compliance. That reading of the current condition of international law naturally appeals to right-wing commentators in that hostility to the United Nations and to cosmopolitan constraint generally is part of their canon. But the same understanding of

89. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331, (entered into force 27 Jan. 1980), reprinted in 8 I.L.M. 679 (1969).

90. See generally FARER, CONFRONTING GLOBAL TERRORISM, *supra* note 76, ch. 2, and accompanying sources.

91. S.C. Res. 1378, U.N. SCOR, 4415th mtg., U.N. Doc. S/RES/1378 (2001) (on efforts to establish a new and transitional administration leading to the formation of a government in Afghanistan).



international law can be found among some ardent internationalists like the eminent left-liberal scholar Richard Falk⁹² and the members of the High Level Panel⁹³ appointed by that iconic cosmopolitan, the former Secretary-General of the United Nations, Kofi Annan.

But unlike certain militants on the current American Right, they do not then conclude that states are left with an absolute discretion to decide what end is in their national interest and then to choose whatever means, including force, appear most efficient to achieve it. Falk, for instance, urges recognition and application of just war norms as a more flexible normative framework and an overriding rule of “reasonableness” by which I believe he means that force must be defensive and proportional to a well-defined and continuing threat of violent assault or the commission of crimes against humanity.⁹⁴

In brief, the present locus of “legitimate authority” is controversial and there is no position that commands near unanimity among legal experts and other participants in the discourse of international relations. Hence Elshstain’s confident resolution of the issue in favor of the Bush administration seems facile and inconsistent with the scholar’s obligation to wrestle with complexity and to identify and present accurately positions at odds with her own. If one’s deepest concern is to minimize human suffering and to promote progress toward a global order in which the vulnerable will be better protected and individual human potential more fully realized, precisely the concern that notionally fuels Elshstain’s cerebrations, then one would seem obligated at least to consider the question of whether those noble goals are best advanced through the unqualified attribution to states of legitimate authority to make war.

It is one thing to say that under extreme circumstances like ongoing crimes against humanity within a country, the inability to secure Security Council authorization of armed intervention should not be the last word on whether intervention is legitimate. It is another to simply dismiss casually and wholesale the formal process the UN Charter establishes for assessing claims that force is justified. At the time Elshstain wrote it was already known that the Bush administration had decided to invade Iraq and impose a new political order regardless of what the UN inspectors did or did not find and regardless of what the Security Council decided and, for that matter, regardless of the views of close NATO allies. Thus the Bush administration’s claim to be the locus of morally legitimate authority to determine whether to make

92. See, e.g., Richard Falk, *Kosovo, World Order and the Future of International Law*, 93 *Am. J. INT’L L.* 847–57 (1999).

93. UNITED NATIONS, *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY* (2004). See Tom Farer, *The UN Reports: Addressing the Gnarled Issues of Our Time*, 40 *INT’L SPECTATOR* 7 (2005).

94. Falk, *Kosovo, World Order and the Future of International Law*, *supra* note 92, at 856.



war was far more sweeping than the claim NATO made when it authorized military pressure on Serbia over Kosovo and that is why it has posed a far more dangerous threat to global order, a threat unrecognized in Elshtain's facile application of the first just war norm.⁹⁵

Just Cause: The second norm is again not terribly problematic for the Bush administration when applied to Afghanistan, but does pose problems when one turns to Iraq although the problems don't seem to trouble Elshtain, since she hardly notices them. The Bush administration's declared just causes were to preempt the possible transfer of weapons of mass destruction (WMD) to Al Qaeda or similarly inspired *jihadists* and to liberate the Iraqi people from an extraordinarily tyrannical regime. Two secondary purposes were to initiate processes of democratization in the Middle East by establishing democracy in the area's most developed country and to preempt the long-term danger to peace and security in the region which a nuclear-armed Saddam would pose. Those four purposes can be consolidated into three: the defense of the United States against the threat of attack by terrorists armed with weapons of mass destruction; the defense and promotion of human rights (democracy being both a means to the protection of human rights and a human right itself); the right to participate in governance, and defense of regional peace and security.

The first of these purposes was hard to defend as a just cause even in 2003 much less in 2008, when still more is known about the beliefs and intentions of the Bush administration. Focusing on the facts alone, the defense has several problems. First, when the administration opted for war, the UN inspectors had yet to find any evidence of WMD or ongoing programs for their production and they were prepared to continue looking until they were satisfied and they were finally operating in an acquiescent environment.⁹⁶ Second, the administration was sufficiently uneasy about the evidence of such programs that it felt the need to gloss over the low quality of the evidence it possessed.⁹⁷ Third, the evidence of a connection between Saddam Hussein, a secular Arab nationalist, and the religious fanatics of Al Qaeda was thin as gauze. Future cooperation seemed likely only in the event of an existential threat to Saddam from the United States. Treating so remote and speculative a threat as a just cause of war is to rend the fabric of restraint on the discretionary use of force. That fact probably explains in

95. See Tom Farer, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359 (2002); Tom Farer, *Agora: Future Implication of the Iraq Conflict: The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621 (2003).

96. See Ian Williams, *Blix Not Bombs*, NATION, 5 Apr. 2004, at 5; generally HANS BLIX, DISARMING IRAQ (2004).

97. Regarding the lack of solid intelligence in the run up to war, see The Secret Downing Street Memo, available at <http://www.downingstreetmemo.com/docs/memotext.pdf> (as originally reported in the *Sunday Times*, 1 May 2005).



substantial measure the depth and breadth of opposition to the war within Western countries and at the United Nations.

The alleged threat to regional peace and security suffered to some degree from the same defect. The impending collapse of support for continued economic sanctions against Iraq raised the prospect of Saddam gradually reconstituting his military strength. But that was a matter of years, assuming he survived internal challenges. Moreover, if and when it was reconstituted, it would remain a force grossly inferior to the armed forces of the United States which would still have ample incentive and a demonstrated will to deter Iraqi aggression. That being evident, the just cause argument had to rest on the proposition that Saddam was if not crazy at least reckless, in a word undeterable.⁹⁸ And that proposition rested largely on the supposed evidence provided by his previous acts of aggression against Iran and then Kuwait. They, however, were broken reeds on which to rest, since in the first instance he had been encouraged and supported by the United States which treated him as a *de facto* ally in the cold war against Iran⁹⁹ and in the second one the United States had failed to practice deterrence by telling him bluntly when he first made aggressive noises that an attack on Kuwait would be treated by the US as an act of war.¹⁰⁰ Thus this just cause like the prior one was distant and arguably even more speculative.

Which leaves the third claimed just cause: the promotion of human rights. The idea of a humanitarian-intervention exception to extant normative restraints on the use of force unauthorized by the Security Council enjoys substantial explicit support among scholars and has precedent in the practice of states.¹⁰¹ However, in just about every scholarly formulation of the conditions for legitimate intervention there needs to be a crisis, that is a sudden or anticipated surge in massive violations of the right to life or a massive ethnic cleansing which is invariably triggered and accompanied by gross violation of rights to physical security.¹⁰² The practice of states supports this formulation and it can be found articulated in the respected report of the commission of experts established after the Kosovo intervention by the government of Sweden.¹⁰³

98. *But compare*, John Mearsheimer & Stephen Walt, *An Unnecessary War*, FOREIGN POL'Y, 1 Jan. 2003, at 50, 51–60.

99. *See generally* Michael Dobbs, *US Had Key Role in Iraq Buildup*, WASH. POST, 30 Dec. 2002, at A1. The article cites a National Security Decision Directive 1399 of 5 April 1984, in which the Reagan administration states its intent to support Iraq in the war against Iran (parts of this Directive remain classified).

100. *U.S. Messages on July 1990 Meeting of Hussein and American Ambassador*, N.Y. TIMES, 13 July 1991, § 4, at 1.

101. HUMANITARIAN INTERVENTION, *supra* note 85.

102. Tom J. Farer with Daniele Archibugi, Chris Brown, Neta C. Crawford, Thomas G. Weiss & Nicholas J. Wheeler, *Round Table: Humanitarian Intervention After 9/11*, 19 INT'L REL. 211 (2005).

103. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT (2000) available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm>.



In recent history Iraq had twice been the scene of such crises. The first was the *Anfal* campaign carried out against the Kurds during the Iraq-Iran war, a campaign of slaughter by bestial means including chemical attack.¹⁰⁴ The second was in 1991 following the first Gulf War when Saddam put down with hideous cruelty the post-war revolts in the Kurdish north and the Shia south.¹⁰⁵ At the time of the first crisis, the United States responded by reassuring Saddam that he enjoyed its support in the war with Iran.¹⁰⁶ At the time of the second crisis, which the US may have helped to launch by calling on Iraqis to overthrow Saddam and thereby encouraging expectations of US assistance, President George H.W. Bush made no effort to restrain Saddam's forces until they had crushed the rebellion in the south with great loss of life among the civilian population. And in the Kurdish north, military intervention did not occur until the massive flight of the Kurdish population away from Saddam's advancing troops triggered a humanitarian crisis of enormous dimensions, which threatened to complicate US relations with Turkey, its NATO ally, and galvanized public and media criticism of American passivity.¹⁰⁷

In 2003, by contrast, there was no humanitarian crisis, just the normal quotidian delinquencies of a harsh dictatorship with fairly numerous counterparts in other parts of the globe. Thus the proposal to invade Iraq to end chronic violations of human rights, much less to establish democracy, would be a precedent for the invasion of countries all over the globe in which human rights violations are routine and high office is not apportioned on the basis of an open competition for votes. In a system of international relations still largely structured by sovereign states, such a proposal is, therefore, a revolutionary challenge to the system of order. Not surprisingly, it did not find much traction among UN members. The question then is whether a cause which enjoys very little support among governing elites or policy experts or scholars of international relations or the elites and experts and scholars of fellow democratic states, can be considered "just."

That rare bird, a thorough-going cosmopolitan hostile to the relatively narrow identity of "citizen" who believes that the state system unfairly privileges some human beings at the expense of others simply on the basis of the accident of birth in a successful or unsuccessful state, might say "yes, it is a just cause." Ironically, Elshtain is not one of those rare birds. On the contrary, she shares the Right's skepticism about international institutions and international justice. As I noted above, she defends the state as the lo-

104. HUMAN RIGHTS WATCH, *GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS* (1993), available at <http://www.hrw.org/reports/1993/iraqanfal>.

105. HUMAN RIGHTS WATCH, *WHATEVER HAPPENED TO THE IRAQI KURDS?* (1991), available at <http://www.hrw.org/reports/1991/IRAQ913.htm>.

106. Christopher Marquis, *The Struggle for Iraq: Documents; Rumsfeld Made Iraq Overture in '84 Despite Chemical Raids*, N.Y. TIMES, 23 Dec. 2003, at A10.

107. See KERIM YILDIZ, *THE KURDS IN IRAQ: PAST, PRESENT AND FUTURE* (2004).



cus of legitimate authority. To be consistent, therefore, she should not find the bringing of democracy to Iraq and the overthrow of its dictator to be a “just cause” for recourse to war, even if the conduct of the invasion were consistent with the claim that one of its principal motives was to protect the human rights of the Iraqi people. Or so it appears to me. How it appears to her is unclear since nothing in her polemic suggests a readiness to grapple with these conceptual difficulties.

Right Intention and Last Resort. In her 2004 epilogue, Elshtain, while clinging to the view that WMD will eventually be found,¹⁰⁸ declares that humanitarian concerns were a sufficient just cause for the invasion.¹⁰⁹ She then reminds us quite properly of Saddam’s brutality and the lives lost in the Iran-Iraq war ignited by Saddam’s aggression, as well as the terrible toll from his exterminating campaigns against the Kurds during that war and, after the Gulf War, against the Shia in southern Iraq. Yet she utters not a word about American support for Saddam during the Iran-Iraq war, including the issuance of assurances of continued support after the chemical attack on Kurdish villagers was exposed, actions consonant with a Machiavellian rather than an Augustinian view of the world. Elshtain deplores the “[m]any [?] opponents of the war . . . [who] resorted—and continue to resort—to what has been called ‘anti-knowledge’ by bluntly denying truths verified and documented many times over.”¹¹⁰ To advance her purposes, one might argue that Elshtain does not engage in “bluntly denying” truths, but her need to appropriate the mantle of human rights for the Right sometimes drives her to evade and also to soften disagreeable facts.

The conduct of the invasion of Iraq—the failure to send sufficient forces to occupy the country as opposed to scattering a number of armed camps through it, the failure, indeed the refusal, to plan for post-invasion scenarios other than the local population’s joyful embrace of their liberators and the arguably-related (albeit loosely) failure to prevent the looting of public institutions and the collapse of order—lend little support to the view that the welfare of the Iraqi people was a central concern of the administration. The subsequent abuse of its population through indiscriminate detention of suspects¹¹¹ and their pitiless interrogation, as revealed in various official

108. ELSHTAIN, *supra* note 48, at 189.

109. *Id.* at 183–87.

110. *Id.* at 191.

111. See Kirk Semple & Alissa J. Rubin, *Sweeps in Iraq Cram Two Jails with Detainees*, N. Y. TIMES, 28 Mar. 2007, at A1.



reports¹¹² and exposed by external investigators,¹¹³ could be seen to degrade further the claim that human rights conditions in Iraq under Saddam constituted a sufficient just cause. But perhaps those actions fit more snugly with the criterion of “right intention,” fit like a bomb under a car seat. Given the concern among experts inside and outside the administration about the prospects for order in a post-Saddam Iraq, given the concern about Iraq’s centrifugal ethnic and sectarian divisions Vice-President Cheney himself had invoked when supporting the decision of George W. Bush’s father not to march to Baghdad and remove Saddam in 1991,¹¹⁴ any claim that a central intention of the president and his closest advisors was to protect the human rights and welfare of the Iraqi people is risible except, perhaps, to people with no feeling for the comic elements of life.

Satisfaction of the criterion of “good intentions” thus depends on the moral quality of the administration’s other intentions which requires us to circle back to the discussion of just cause. Depriving a brutal dictator of weapons of mass destruction (even if he appears detestable) and keeping him weak is no doubt a good thing if it has no collateral damage. But if, as I noted, the means employed threaten to undermine the fragile structure of global order and risk grave losses to the country’s population from collateral damage and the unleashing of nightmarish inter-ethnic conflict and a general breakdown of order, and if there are substantial reasons for believing that the dictator can be deprived of residual weapons of mass destruction, if they exist, by continuing inspection and can be deterred from further acts of aggression, then there is no just cause. Lacking a just-cause base, good intentions are conceptually doomed to float irrelevantly outside the integrated discourse of just war. As for the criterion of “last resort,” it might be satisfied if toppling a chronic violator of human rights were an indisputably just cause; but for the reasons I sketched above, there is little support for humanitarian intervention against dictators in the absence of the kind of massive assault on human life that occurred in Iraq during the *Anfal* campaign against the Kurds in 1988 and the slaughter of Shia in southern

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112. See, e.g., Anthony R. Jones & M.G. George R. Fay, AR 15–6: Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade (23 Aug. 2004), available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf> [hereinafter Jones-Fay Report]. See also INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>; EXECUTIVE SUMMARY: INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, available at <http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf>.
113. HUMAN RIGHTS WATCH, LEADERSHIP FAILURE: FIRSTHAND ACCOUNTS OF TORTURE OF IRAQI DETAINEES BY THE US ARMY’S 82ND AIRBORNE DIVISION (2005), available at <http://hrw.org/reports/2005/us0905/us0905.pdf>.
114. Susan Milligan, *11 Years after Gulf War, Cheney Shifts Objective on Iraq*, BOSTON GLOBE, 29 Aug. 2002, at A20.



Iraq after the first Gulf War. Moreover, there is presumably even less support for attempting to topple dictators by means which promise awful collateral damage to the notional beneficiaries of the intervention.

I myself would prefer to live in a world where the leading states assumed the responsibility to remove tyrants and replace regimes so corrupt and incompetent that they fail to produce the public goods minimally necessary to prevent mass misery. But that is not our world, and neither the American electorate nor the American political elite seems disposed even to a presumption in favor of intervention in such cases much less to thereafter assuming the responsibilities of a trustee.

Reasonable Chance of Success and Reasonable Belief that War will do More Good than Harm: As I noted above, according to the conventional view, a view Elstain appears to share, in order to be just, a war must satisfy all of the criteria; the mere fact that it is triggered by a just cause is insufficient. What is less clear is whether "success" is to be measured in relation to the just cause alone or also to the criterion that the war must do more good than harm. Take, for instance, a clear-cut case of aggression, the Soviet invasion of Hungary in 1956. That aggression would, I believe, have constituted a just cause for military action by the United States against the Soviet Union as an act of collective self-defense (on Hungary's behalf) under the UN Charter. Let us suppose that a US attack on Soviet forces in Central Europe had led to a general war which devastated most of Europe and caused the death of 50 million people but resulted ultimately in the withdrawal of Soviet forces from the ruins of Hungary. And let us assume that that outcome was reasonably foreseeable. Would it have followed that US military action had been a "success" because the goal immanent in the just cause was finally achieved? Or should we factor into the moral equation the devastation of Europe including Hungary? If we do, then the hypothetical war was plainly unsuccessful.

It is not entirely clear to me how this ambiguity is best resolved. Since the criteria of justness are additive rather than alternative, perhaps it need not be, since the ultimate question of justness in many cases would be decided the same way under either interpretation. Nevertheless, my inclination is to choose the latter interpretation of the criterion, for there is something absurd about concluding that a war was "successful" in a moral sense even while concluding in the same breath that it did more harm than good.¹¹⁵ This view seems to be the conventional one¹¹⁶ and the one Elstain herself

115. It is essentially the same issue raised by that old chestnut "the operation was a success, but unfortunately the patient died."

116. Wikipedia's summary of leading authors combines the two criteria as follows: "Probability of success: Arms may not be used in a futile cause *or in a case where disproportionate measures are required to achieve success.*" *Just War*, Wikipedia, available at http://en.wikipedia.org/wiki/Just_war (emphasis added).



seems to support. She writes: "The historic just war tradition grappled with Augustine's statement that war may be resorted to in order to preserve or achieve peace—and not just any peace, but a just peace *that leaves the world better off than it was prior to the resort to force.*"¹¹⁷

Under either interpretation, how do the Bush administration's wars in Afghanistan and Iraq measure up? For Elshtain both are thumbs up. For a more dispassionate, less ideologically driven commentator, only the Afghanistan case looks pretty clear. In relation to the just cause of destroying Al Qaeda's base, constraining its operations, and punishing its Taliban collaborators, the war had until recently appeared indisputably successful. Moreover, against the backdrop of the Taliban's massive violations of human rights, particularly the rights of women and the right to participate in governance, at this point it seems fair to say it has done more good than harm,¹¹⁸ although the good could have been greatly enhanced if the US had concentrated far more resources on securing and rehabilitating the country rather than shifting to Iraq so many of the military and economic assets that could have been used there.¹¹⁹ The probably connected deterioration of political-military conditions there over the past year suggests that at this point a final judgment about the war's success may be premature. The means employed particularly with respect to prisoners are a separate matter I will address below.

Iraq presents a much more problematical case. If, for the reasons I sketched in the discussion of "right intentions," there was no just cause, then success, being stripped of any reference point, is meaningless. If, on the contrary, one is persuaded that Saddam's long-term threat to regional peace and security or his chronic violations of human rights are just causes, then the sheer act of toppling him can be said to make the war successful irrespective of whether taking all in all it has done more harm than good.

Like "success," "harm and good" need a reference point, but, I would like to suggest, since just war is a moral idea, the reference point need not be the just cause. The Hungary case I referred to above is one example of what I have in mind. Here is another. Suppose the just cause is self-defense by country A against an act of aggression by country B (In the Iran-Iraq War

117. ELSHTAIN, *supra* note 48, at 57 (emphasis added). Similarly, in her Appendix, Elshtain writes: "just war principles often insist . . . that it must be proportionate, such that the social goods that would result from victory in war discernably outweigh the evils that will attend the war . . ." *Id.* at 215.

118. *But see* Ron Moreau & Sami Yousafzai, *A Harvest of Treachery: Afghanistan's Drug Trade is Threatening the Stability of a Nation America Went to War to Stabilize. What Can Be Done?* NEWSWEEK, 9 Jan. 2006, at 32; John Ward Anderson, *Emboldened Taliban Reflected In More Attacks, Greater Reach: U.S., Afghan Officials Disagree With Analysts' Notion of a Major Resurgence*, WASH. POST, 25 Sept. 2007, at A11.

119. Carlotta Gall, *Lost in Afghanistan (Maybe): Bin Laden (Still) and 2 Others*, N.Y. TIMES, 15 Jan. 2003, at A11; Linda Bilmes, *Bush's Gamble on the Afghan Front*, FIN. TIMES, 30 Mar. 2004, at A15; *Marines in Iraq May Shift to Afghanistan*, L. A. TIMES, 11 Oct. 2007, at A16.



of the 1980s, obviously Iran is A and Iraq B) and suppose the only means of repelling the aggression is initiating a nuclear exchange which will kill at least three-quarters of the population of each country. Presumably we should take this prospective holocaust into account in deciding whether under those circumstances the president of A will be initiating a just war when, having failed to halt the aggression by conventional means and by threatening a nuclear response, he initiates an exchange of nuclear weapons.

Applying this reasoning to the US invasion of Iraq, any claim that the Bush administration has satisfied the more-good-than-harm test must rest on one of two possible grounds: That despite arguments to the contrary, the risk that Saddam possessed WMD or would soon acquire and use them or make them available to terrorists constituted so great a potential harm as to offset all of the prospective or actual costs in human life, and life prospects in Iraq, and possibly in the region in the event the conflict spreads in one form or another; alternatively, that despite the terrible conflagration the invasion has ignited—the deaths of tens of thousands of innocent civilians,¹²⁰ the ethnic cleansing,¹²¹ the flight of roughly 5 million people from their homes,¹²² the virtual collapse of the country's universities,¹²³ the destruction of infrastructure, and the massive insecurity in parts of the country—the Iraqi people are better off now than they were under the chronically brutal regime of Saddam, taking into account the lives lost through his periodic aggressions which, if past is prologue, could have occurred again. Before reading Elstain's *Just War On Terror* I would have thought that the best a fair-minded person (even one eager through ideological inclination to defend the Bush administration) could say is that "it remains to be seen."

Jus in Bello: The means by which the war is fought: Elstain's polemic has two main and integrally-related purposes. One is exposing what she sees as the despicable failure of leftist intellectuals and clergy to appreciate the absolute moral distinction between the US and its terrorist enemies in the Islamic World *not only in our ideals but in our actual practices at home and abroad* and their corresponding disparagement of the Bush administration's efforts to wage war effectively against this pitiless and irreconcilable foe. The other is demonstrating that Bush and his colleagues have been waging the war against terrorism in a manner consistent with just war and human rights norms, thereby underscoring the absolute moral distinction between the terrorists and us. I share her view that at the level of ideals, both in terms of what constitutes a good society and what constitute just means for

120. See Iraq Coalition Casualty Count, *supra* note 39.

121. See Peter Grier, *If Iraq Fragments, What's Plan B?*, CHRIST. SCI. MON., 5 Jan. 2007, at 1.

122. See Joseph-Huff Hannon, *No Refuge Here: Iraqis Flee, but Where?* DISSENT 58 (2007).

123. See Zvika Krieger, *Oasis in Iraq: Universities Flourish in Kurdistan*, CHRON. HIGHER ED., 17 Aug. 2007, at 1.



advancing one's ideals, the West and the Bin Ladins live in two different moral universes. It is at the level of practice that the distinction becomes less sharp than one would like, because American behavior abroad has sometimes slipped its normative traces and substituted Machiavellian reasons of state for humanitarian values.

Elshtain herself is blind to this morally compromising fact, as she is to most facts that blur to any degree whatsoever the distinction between the way we behave in conducting our national security policy, whether now or in the past, and the behavior of our opponents. Not only does she dismiss as irresponsible claims made at the time of her writing about US conduct, in addition, she seems to offer blanket assurances that given the procedures, practices, and guidelines employed by the Bush administration, fear of future delinquencies is baseless. Specifically she addresses mainly the detainment and treatment of suspected terrorists.

With respect to detainment, she comments concretely on the arrest of Muslim aliens in the immediate aftermath of 9/11 on grounds that terrorists might be found among them. Recalling the Palmer Raids following World War I and the World War II detentions of entire families of Japanese and Japanese Americans which she deplores, she concludes that they "bear no similarity to the carefully targeted and delimited detentions, with built-in safeguards, of today."¹²⁴ In reviewing this initial set of detentions, Professor David Cole of Georgetown Law School, probably the most careful and learned analyst of detainee treatment since 9/11 (and a pro bono attorney for a number of detainees) writes as follows:

In June 2003, the Justice Department's inspector general issued an extensive report on the federal government's treatment of immigrants locked up as "suspected terrorists" following September 11. The report found that in the first year . . . more than seven hundred foreign nationals had been swept up, often on no charges at all, and placed in preventive detention under immigration law auspices. . . . The prisoners were initially held incommunicado, and thereafter limited to one phone call per week. At the Metropolitan Detention Center in Brooklyn, where eighty-four of the prisoners were kept, guards tried to deny them even that right by treating an affirmative response to the question "you doing all right?" as a waiver of their right to make their weekly phone call.

Immigration law permits detention of foreign nationals while they await the outcome of their deportation proceedings, but generally only if there is evidence that they are dangerous or pose a risk of flight. The government lacked such evidence about most of those rounded up . . . so it contrived various strategies for delaying the hearings that would reveal how little evidence it had. When detainees were able to get hearings, and immigration judges started ordering some released, [Attorney General] Ashcroft issued a regulation permitting his

124. ELSHTAİN, *supra* note 48, at 91.



immigration prosecutors to keep detainees in prison despite the judge's release order, simply by filing a notice of appeal—without regard to whether the appeal had any merit. . . . Many detainees were brutally beaten. Today [July 2007] not one of these over seven hundred detainees stands convicted of a terrorist crime.¹²⁵

This is perhaps a bit less than the “carefully targeted and delimited detentions, with built-in safeguards”¹²⁶ that Professor Elshtain so confidently invokes as she disparages that ill-defined left (consisting largely of academics and clergy, by her account) that engages in hysterical and “alarmist” accusations which “lead persons who may have qualms about the government's actions to defend the government against outlandish charges.”¹²⁷ To be fair, human rights conventions allow detention for limited periods on the basis of reasonable suspicion during a time of emergency. The weeks immediately after 9/11, when officials feared a follow-on attack, were such a time. Whether a round-up of persons on the basis of their membership in the gross category of non-citizen Islamic males satisfies the test of reasonableness is a matter on which fair-minded people may differ. But particularly where the evidentiary basis for arrest is so thin, the government would seem to have a special obligation to minimize the inherently punitive nature of detention. From the accounts of Cole and others, it appears that that obligation was not satisfied. No hint of that failure, no concern whatsoever with the detention process, appears in Elshtain's call for a just war against terror.

But among the *jus in bello* issues that mark the Bush administration's conduct, this first set of detentions is a mere bagatelle. Certainly as far as American moral capital (an important facet of our “soft power”) is concerned, it pales beside the concerns ignited by the treatment of persons seized outside the United States—primarily but by no means exclusively in Afghanistan and Iraq—and detained in Guantanamo, Afghanistan's Bagram Air Base, and various secret CIA interrogation centers or renditioned to countries long identified (by the US State Department as well as other reliable sources) as places where the torture of prisoners is commonplace. Although much more is known now about the intentions and practices of the Bush administration, even in 2003 a writer would have known that the administration did not intend to apply the Geneva Conventions to any combatants in Afghanistan on the basis of arguments that did not persuade many military lawyers or Secretary of State Powell, former Chair of the Joint Chiefs of Staff.

A scholar less determined to exonerate the administration preemptively might have worried that the decision not to apply the Conventions together

125. David Cole, *The Grand Inquisitors*, N.Y. REV. BOOKS, 19 July 2007, at 53.

126. ELSHTAIN, *supra* note 48, at 91.

127. *Id.* One naturally wonders whether her words are self-referential and are intended to justify the tone of her book.



with the claim (later dropped) that no military tribunal needed to review the status of persons characterized as enemy combatants were ominously suggestive of what could and in fact did follow. Elshtain would also presumably have known at least by 2004, when she published her epilogue, that cruel methods of interrogation had been authorized. And she would or should have known that the president was claiming the authority to hold persons he or his proxy designated unlawful enemy combatants without specific charge or hearing or trial until he or more likely his successors decided the war was over which, according to him, could be in a generation or two. And she would further have known that the president regarded such detentions as being beyond the habeas corpus jurisdiction of civilian courts.

None of these things concerned Elshtain. What did concern her, to the point of what one might call “vituperation” were it not for the fact that Elshtain regards it as a property peculiar to the left, was the “enormous reluctance in intellectual circles to credit the US government . . . with responding appropriately . . . to September 11”¹²⁸ and the concomitant tendency to “occupy a stance of lofty condemnation”¹²⁹ rather than following the lead of Secretary of Defense Rumsfeld who by his own account was trying to puzzle through how best to extract needed intelligence.¹³⁰

It is hard to tell whether her perky optimism that we would not follow Vice-President Cheney to “the dark side” (in fact, she is silent about his revealing early statement of where he thought the US would need to go)¹³¹ springs from her loathing of the left and of European (particularly German) intellectuals and political commentators more generally or from her insouciant construction of the administration’s intentions. Whatever its source, her Panglossian optimism casts a sunny glow over facts that a more sober soul might find disturbing as where in a reference to the then merely mooted military tribunals for trying some enemy combatants she chirpily reassures the reader that US citizens “are excluded from the jurisdiction of any tribunal,” failing to add that in the event any of them were determined to be “enemy combatants” and moved to Guantanamo or Bagran or a secret CIA detention center in Syria, they would then have no recourse at all. As for the tribunals, she notes that they are by no means unprecedented. And while one may dispute, she says, whether the most recent precedent, the military tribunal set up by order of President Franklin Delano Roosevelt during World War II, provided the accused with due process, in the present instance “[s]afeguards

128. *Id.* at 92.

129. *Id.* at 97.

130. *Id.* at 96–97.

131. See Mayer, *supra* Note 78, at 106.



of the sort that did not pertain in the Roosevelt tribunals have been set to try and ensure that war prisoners receive fair trials."¹³²

Under a shower of condemnation from legal authorities, including military lawyers,¹³³ whom even Elshtain would presumably not describe as irresponsible leftists, the administration subsequently revised those safeguarding procedures but not to the point where they could be regarded as providing the minimal guarantees of a fair trial.¹³⁴ The accused will be tried in an environment saturated with hostility toward them and their lawyers, however respectable, by serving officers who will be reviewing evidence collected by their brother officers and who, of course, remain subject to the chain of command at the peak of which stand officials who have been steadily assuring the country that all those persons detained at Guantanamo are the "worst of the worst."¹³⁵ Neither the defendants nor, presumably their counsel, will have access to evidence the Department of Defense chooses to classify, although they may be given summaries. And evidence obtained through methods that are "cruel and inhuman" and some of which—such as suffocation in water and exposure to extreme cold to the edge of hypothermia and beating—would be regarded as torture by many authorities on human rights and humanitarian law,¹³⁶ albeit not by the president and his lawyers, will be admissible. Hearsay will be admissible as well.

Therefore, conviction under the following circumstances will be entirely plausible. A man, we will call him Haji Mohamed, a refugee from Somalia, is kidnapped off the streets of Rome by agents of the US government and flown to Syria. When the Syrians finish interrogating him, he is flown to Guantanamo and finally brought before a Military Commission charged with conspiring to blow up the American Embassy in Italy. At his "trial," an agent of the CIA reports that a contract employee of the agency believed to be very reliable overheard him planning the embassy attack and warned the local station chief. The name of the employee, his normal occupation, the length of his employment, the quality of information he or she had provided in other cases, the place where the alleged conversation was overheard, and the date are classified. Hence defense counsel cannot cross exam to determine how the agent identified Mr. Mohamed, his distance from the conversation, the amount of ambient noise in the place where the conversation occurred, whether it was absolutely clear that the defendant was not saying what he

132. ELSHTAİN, *supra* note 48, at 93.

133. Carol J. Williams & Julian E. Barnes, *Tribunals are Dealt Another Legal Setback*, L.A. TIMES, 5 June 2007, at A1.

134. Tom Farer, *Agora: Military Commissions Act 2006: The Two Faces of Terror*, 101 AM. J. INT'L L. 363 (2007).

135. Tim Golden, *The Battle for Guantanamo*, N.Y. TIMES, 17 Sept. 2006, §6 (Magazine), at 60.

136. See Farer, *Agora: Military Commissions Act 2006*, *supra* note 134.



would like to do as distinguished from what he had concrete plans to do. Nor would counsel have any way of determining whether the informant had any personal bias whether against Muslims, Somalis, Africans, refugees, or Mr. Mohamed himself.

The only other evidence is Mr. Mohamed's confession. During the proceedings, he testifies that he confessed after being tortured for twenty-three days by Syrian intelligence officers in the presence of an American. He was beaten, thrown water-soaked into a refrigerated room and kept there for twenty-four hours, then subjected to repeated near drowning in a feces-laden bowl of water, then beaten again, then cuffed in a position where cramping soon caused excruciating pain, then had his hands chained to his feet and was left overnight in an unventilated extremely hot room. Except when he was being interrogated and tortured, he was held in solitary confinement in rooms where recorded screams were played at an almost unbearable decibel level. The food he ate gave him intense diarrhea and for many hours at a time he would lie chained to the ground covered with his own shit. Eventually, he says, they broke him when they said that his wife would be next. He signed the demanded confession. An agent of the CIA confirms that he was seized in Rome and that he was subsequently interrogated in a clandestine center. He says that interrogations were extended, but that no physical pressure was applied. A military doctor testifies that when he examined the defendant at the time he arrived in Guantanamo, he found no evidence of physical mistreatment. The military prosecutor says to the Commission: "To find this defendant innocent you would have to take the word of this most self-interested of persons, the defendant himself, over the testimony provided by responsible officials of the Central Intelligence Agency which has no interest in anything other than the protection of our national security."

If the Commission were to find the accused not guilty, it would be repudiating the fellow officers who decided that the prisoner should be charged and it would be confirming, however implicitly, as it could not help but appreciate, that an innocent man had been mercilessly tortured by or under the direction of US officials. Moreover the Commission members would be functioning in an environment, Guantanamo, where, according to one expert observer who visited, the Commanding Officer has declared in a briefing: "Today, it is not about guilt or innocence. It's about unlawful enemy combatants . . . [and] they are all unlawful enemy combatants."¹³⁷

137. The observer was Karen Greenberg, co-editor with Joshua L. Dratel of *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 118–121 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); see also Karen J. Greenberg, *Guantanamo Is Not a Prison: 11 Ways to Report on Gitmo Without Upsetting the Pentagon*, *TOMDISPATCH.COM*, 8 Mar. 2007, available at http://www.tomdispatch.com/post/172761/karen_greenberg_gitmo_decorum.



If I were a betting man, I would bet on conviction. True, convictions are subject to judicial review, but only on questions of law, while here there are in the end only questions of fact.

Some hint of what is in store for the relatively fortunate few who will be tried—the administration estimates about eighty out of the hundreds languishing in Guantanamo—is provided by the Combat Status Review Tribunals (CSRT) that the Department of Defense finally established after first denying that they were obligatory or needed in order to do justice. Through ultimately aborted habeas corpus proceedings and Freedom of Information Act requests, scholars led by Professor Mark Denbeaux of the Seton Hall Law School secured full records for 102 of the 558 CRST proceedings that have been conducted and the transcripts of all 361 processes in which detainees chose to participate. The resulting report documents the following elements of the process, the only process most Guantanamo detainees will ever enjoy.¹³⁸

- Detainees were denied counsel; instead they were allowed a personal representative appointed by the military authorities who informed the detainee that “None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.”¹³⁹ Where detainees did see personal representatives, meetings were brief and occurred shortly before the hearing. The detainee was also told by the personal representative that the Government had already determined through multiple levels of review that he was an enemy combatant, that the Government’s finding rested upon classified evidence that he could not see, and that the Tribunal would presume that the classified evidence was reliable and valid.¹⁴⁰
- “In the majority of the CSRT hearings, the Government rested on the presumption that the classified evidence was sufficient to establish that the detainee was an enemy combatant. The Government never called any witnesses and rarely adduced unclassified evidence. In the majority of cases, the Government [simply] provided the detainee . . . with [nothing more than] a summary of the classified evidence. This summary was so conclusory that it precluded a meaningful response. The Government then relied on the presumption that the secret evidence was reliable and accurate.”¹⁴¹

138. MARK & JOSHUA DENBEAUX, ET AL, NO-HEARING HEARINGS: CSRT- THE MODERN HABEAS CORPUS, 17 Oct. 2006, available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (Report).

139. *Id.* at 15.

140. *Id.* at 5.

141. *Id.*



- More than 50 percent of the detainees sought either to inspect the classified evidence or to present exculpatory evidence in the form of witnesses or documents. Naturally all requests to inspect classified evidence were denied.¹⁴² Less naturally, all requests for witnesses not already detained in Guantanamo were denied. Even in cases where the detainee claimed that documents would prove that the charges against him could not be true—documents such as passports, hospital records, and judicial proceedings—efforts to secure their admission into the record were rejected even where the documents were in the hands of the Government or could readily be obtained.¹⁴³ For instance one defendant had apparently been cleared of identical charges by the Supreme Court of Bosnia which had found no evidence to support them. When he asked that a copy of the Supreme Court's decision be introduced in evidence, the Tribunal told him that it was "unable to locate" one.¹⁴⁴
- In the three cases where tribunals found the detainee to be "not/no longer [which, is unclear] an enemy combatant," the Defense Department, without notifying the detainee of the original decision, simply ordered the convening of a new tribunal to rehear the case. In two instances the second tribunal found the detainee to be an enemy combatant. In the third case, when the second tribunal came to the same conclusion as the first, the Defense Department convened yet a third one and it finally vindicated the Government's record of inerrancy by finding that the detainee was, indeed, an unlawful enemy combatant.¹⁴⁵

Turning now to the methods of interrogation practiced by the Bush administration, let me begin by noting that the laws of war (*jus in bello*) are codified in Hague Convention IV of 1907 respecting land warfare and the Geneva Conventions of 1949 which elaborate in great detail the treatment owed to prisoners of war and to the inhabitants of occupied territories. In addition, common Article 3 of the four Geneva Conventions sets out a minimum standard of treatment owed to all persons¹⁴⁶ including those who fall neither into the category of prisoners of war (protected by the Third Geneva Convention) nor citizens of occupied territories (protected by the Fourth Convention). It prohibits "cruel treatment," "torture," and "outrages upon personal dignity, in particular, humiliating and degrading treatment." As a kind of back-up set of defenses that prevent anyone from falling into a normless

142. *Id.* at 2.

143. *Id.* at 32.

144. *Id.* at 33.

145. *Id.* at 37.

146. See the majority opinion in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).



abyss because he or she is defined, however implausibly, out of the Geneva Conventions' zone of protection stands the International Covenant on Civil and Political Rights, applicable in all times and places to all people, which also prohibits torture and cruel, inhuman, and degrading treatment.¹⁴⁷

We have known for some time that not long after 9/11 the White House expressed concern about possible criminal liability for federal officials violating the Torture Convention and sought legal advice. The advice that came from the Office of the Attorney General defined torture as "Physical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death. . . . [In sum], we conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts."¹⁴⁸

Insofar as criminal liability was concerned, the memorandum assuringly concluded that officials would be vulnerable only if it could be shown that they intended to inflict severe pain. For conviction, it would not be sufficient that the officials acted "knowing that severe pain or suffering was reasonably likely [to result]," for in that event they would have acted only with general intent rather than the specific intent called for by the statute.¹⁴⁹

Under this construction, such tactics as the removal of teeth by means of hammers and the extraction of finger and toe nails by pliers might be found merely cruel and inhuman in that they were not akin to acts producing organ failure or the impairment of bodily functions and therefore could not be presumed to cross the required intensity-of-pain threshold.

We know that the White House authorized the establishment of secret detention centers operated by CIA personnel, authorized the rendition of detainees to countries where torture is commonplace, fiercely opposed a

147. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 8, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).

148. *Memo 7. January 25, 2002, To: President Bush, From: Alberto R. Gonzales, Counsel to the President, Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*, in *THE TORTURE PAPERS*, *supra* note 137, at 118, 118–21.

149. See Jay Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (1 Aug. 2002), *available at* <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>; Jay Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (7 Feb. 2002), *available at* <http://news.findlaw.com/wp/docs/torture/bybee20702mem.html>. *But compare especially* William H. Taft, IV, Memorandum, Comments on Your Paper on the Geneva Convention (2 Feb. 2002), *available at* <http://www.texscience.org/reform/torture/taft-2feb02.pdf>. In his recently published book, JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006), Yoo writes that the second memorandum, notionally repudiating the first (written largely by Yoo) was an "'exercise in political image-making' . . . [which] included a footnote to say that all interrogation methods that earlier opinions had said were legal were still legal." See Michiko Kakutani, *What Torture Is and Isn't: A Hard-Liner's Argument*, N.Y. TIMES, 31 Oct. 2006, at E1.



legislative effort led by Republican Senator John McCain to prohibit torture and cruel and inhuman treatment and, when it appeared that legislation would pass, demanded that it not apply to the CIA or indeed any agency of the Federal Government other than the Department of Defense and we know that when the president finally signed the legislation, he reserved the right to ignore it in the exercise of his authority as Commander-in-Chief.

Thanks to a series of reports commissioned by the Department of Defense following news media exposure of the Abu Ghraib photographs, we know a great deal about cruel and degrading treatment of detainees in Iraq. Here, for example, from the report conducted by serving generals Anthony Jones and George Fay:

In October 2003, DETAINEE-07, reported alleged multiple incidents of physical abuse while in Abu Ghraib. . . . He was interrogated on 8, 21, and 29 October; 4 and 23 November and 5 December 2003. DETAINEE-07's claims of physical abuse (hitting) started on his first day of arrival. He was left naked in his cell for extended periods, cuffed in his cell in stressful positions ("High cuffed"), left with a bag over his head for extended periods, and denied bedding or blankets. DETAINEE-07 described being made to "bark like a dog, being forced to crawl on his stomach while MPs spit and urinated on him, and being struck causing unconsciousness." . . . On yet another occasion DETAINEE-07 was forced to lie down while MPs jumped onto his back and legs. He was beaten with a broom and a chemical light was broken and poured over his body. . . . a police stick was used to sodomize [him]. . . . [He was hit in the ear and cut, requiring stitches.]¹⁵⁰

After describing this treatment, the report reviews the evidence and concludes that "it is highly probable Detainee-07's allegations are true."¹⁵¹

One of the most damning inquiries into military behavior at Abu Graib was carried out by General Antonio Taguba. What was only suspected when the report was issued in 2004 is now confirmed by General Taguba himself (now retired), namely "that he was specifically prevented from investigating the conduct and involvement of higher military and civilian authorities."¹⁵²

Reports of abuse at Guantanamo have been equally searing. In FBI documents released to the ACLU following a Freedom of Information Act request, one agent assigned to Guantanamo in 2004 reported to his superiors that "the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious

150. Jones-Fay Report, *supra* note 112, at 74–75.

151. *Id.* at 75.

152. Victor Hansen & Lawrence Friedman, *The Taguba Revelations: Lessons(?) from Abu Ghraib*, JURIST, 22 June 2007, available at <http://jurist.law.pitt.edu/forumy/2007/06/taguba-revelations-lessons-from-abu.php>.



on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night."¹⁵³ Another agent complaint to superiors states: "On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more."¹⁵⁴

IV. CONCLUSION

In the Epilogue to the 2004 edition of her book, Professor Elshtain writes as follows: "I do not see how anyone can look at the evidence and come to any conclusion save that the *in bello* criteria have been met . . ." ¹⁵⁵ Although the Epilogue addresses the Iraq dimension of George W. Bush's war on terror, if the news from Guantanamo or revelations about the Justice Department's torture memoranda or the reports of secret detention centers had caused her to have any doubts about the conduct of the war in other quarters, presumably she would have found space to mention them. Elshtain's professional philosophical interests seem to lie outside the area of epistemology, that is the theory of the origin, nature, methods, and limits of knowledge. But one might suppose that even the commonest of common people, let us say the average juror, looking at the evidence, would conclude quite the opposite, would conclude that the administration's failure to satisfy the criterion of just means is indisputable. Certainly much of the world has so concluded.

So how does one explain Elshtain's willful blindness? Hate blinds as war silences us. In a recent profile on former Republican Presidential candidate Rudy Giuliani, the author seeks to explain how a man of multiple marriages who favors choice in the abortion debate could be embraced by the forces of the Right. The answer, he proposes, is that they hate liberals and Giuliani gives that hatred a fierce voice.¹⁵⁶

Elshtain certainly speaks of Osama Bin Laden in less than warm terms, but the main objects of her venom are the people whom she sees as the anti-anti-terrorists, the lineal heirs of the anti-anti-communists who, according to her, never grasped the evil and the danger represented by the Soviet Union and its Marxist collaborators. If you despise President Bush and his colleagues, if you doubt that they are really good and decent people, if you

153. American Civil Liberties Union, FBI e-mail (2 Aug. 2004), available at <http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf>.

154. *Id.*

155. ELSHTAIN, *supra* note 48, at 192.

156. Jonathan Chait, *Flipping Off*, NEW REPUBLIC, 19 Mar. 2007, at 7.



think that the way in which they have conducted the struggle against terrorism has done grave damage to the national and the human interest, if you think that the president's claims about executive power are dangerous to the balance of the American constitutional system, if you question his honesty, if you believe that the intelligence about Iraq and WMD was fixed to facilitate the marshalling of public opinion for war, and if you believe that American policies have *contributed* to a climate of opinion in the Muslim world that make it fertile ground for the recruitment of terrorists by irreconcilables like Bin Laden,¹⁵⁷ if you believe those things you are, of course, a liberal.

And you or your ideological fathers were anti-anti-communists. Her distortions of the present, achieved by dividing the intellectual and policy worlds into sturdy idealists like herself and President Bush and the leftist fringe, reflexively hostile to every movement of American policy, mirror her distortions of the past. In both instances she omits the liberal intellectuals in part because if they can be rendered invisible, then the Right and its fellow travelers can appropriate the idiom of American idealism for illiberal projects at home and chauvinist ones abroad.

The claim that the great debate during the Cold War was between anti-communists and apologists for the Soviet Union is a sham. Within the foreign policy community many liberal intellectuals argued (a) that the containment of Soviet power did not require alliance with every thuggish regime that proclaimed itself anti-communist; (b) that Marxist governments could under some circumstances be detached from the Soviet bloc, as Yugoslavia was at the very beginning of the Cold War and even, in certain circumstances converted into *de facto* allies, as China became (a view shared by some realist conservatives like Henry Kissinger); and (c) that leftist governments and movements should be judged in terms of the particular alternative in that time and place and should be treated in ways that under the circumstances were more likely to promote human rights and were consistent with basic

157. But what about already estranged young men and women who are drawn to fundamentalism and who believe that the US is the enemy of Islam but who have not taken up the gun? No doubt far more numerous than those who have already taken up the gun, should they be deemed already lost to the ranks of terrorism or would it be more prudent to consider changes in policy that might reduce their susceptibility to the view that the US and its allies seek permanent imperial control over the Middle East and West Asia? Elshtain herself concedes that in fighting our just war we risk creating new terrorists even as we eliminate existing ones and seems to recognize that our policies, not just our tactics, could conceivably aggravate that risk. See ELSHTAIN, *supra* note 48, at 23. The counter-insurgency expert David Kilcullen, quoted earlier, Packer, *supra* note 69, believes that what moves young people into active insurgency is some "biographical trigger" which could include the death of a friend in Iraq or images from the wars in Palestine and Lebanon and Iraq. If Elshtain is simply saying that changes in US policy will not lead every Islamic radical away from anti-American terrorism, she is no doubt right. But the implication that many people believe the contrary is misleading. Long live the straw man!



norms of international law. Persons with these views were relatively early opponents of the war in Vietnam, a war that Elshtain herself deploras. In addition, they believed that soft power is real power and it was dissipated when the US colluded in the overthrow of elected governments¹⁵⁸ or became the protector of vicious authoritarian ones. Moreover, they were cosmopolitans in the sense that they valued the development of international law and institutions out of belief that in the longer term that development, although it constrained the raw edge of American power, would benefit Americans and the generality of humankind.

"The reactions I criticize," Elshtain writes

share four characteristics . . . and [are] *always* present in ideological attacks that refuse to come to grips with current realities: they distort or ignore facts; they deploy tired categories . . . of a previous era; they assert a false clarity that makes things much simpler than they really are and that ignore the "fog of war" and politics by deploying inflammatory rhetoric . . .; and they attack American motivations, aims, and, not infrequently, Americans themselves . . .¹⁵⁹

In her enumeration of the four characteristics of ideological assault, Elshtain has unintentionally summarized the defects of neo-conservatism's response to mega-terrorism which the bulk of her book so dutifully exemplifies. This brief essay attempts to illustrate the evasion of disagreeable facts like those relating to the Bush administration's violation of human rights and just war norms,¹⁶⁰ the inflammatory rhetoric deployed against critics of the Bush administration's conduct of the struggle against terrorism and the distortion of their views, and the vituperative attacks on whole categories of Americans (liberals, academics, clergy in the main line churches), not to mention even broader categories of Europeans like "German intellectuals."¹⁶¹ But underscoring these shabby ploys does not sufficiently distinguish the views of liberal policy intellectuals from their neo-conservative counterparts.

That distinction, which to me seems categorical, has two principal features. One is the neo-conservative insistence, perhaps the sincerely held article of faith, that US policy has played no role in shaping the terrorist threat and, therefore, that no possible change in the overseas behavior of the United States could reduce that threat. Any claims to the contrary are held to reveal dangerous naivety, reveal the claimants as *tontos utiles* of the terrorists.

158. See STEPHEN KINZER, *OVERTHROW* (2006).

159. ELSHTAIN, *supra* note 48, at 75–76.

160. Reminiscent of the white washing of El Salvador's terrorist national army and of the Nicaraguan insurgents carried out by neo-cons in the Reagan administration. For a discussion, see DANNER, *supra* note 21; DICKEY, *supra* note 23. See generally ARYEH NEIER, *TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS*, ch. 9 (2003).

161. ELSHTAIN, *supra* note 48, at 147.



Pushing more programs that deal with poverty and despair or rethinking American foreign policy, including our approach to Iraq, may have desirable outcomes. But no such change, either singly or together, will deter Osama Bin Laden and those like him. To believe such is to plunge head-first into the strategy of denial characteristic of the citizens of Oran in Camus's novel. We could do everything demanded of us by those who are critical of America, both inside and outside our boundaries, but Islamist fundamentalism and the threat it poses would not be deterred. . . . [T]he reason is quite basic: They loathe us because of who we are and what our society represents.¹⁶²

The "they" are adherents of "Islamic fundamentalism," a term Elshtain says she reserves "for those who believe in a literal understanding of the Qur'an and condemn all who disagree . . . who advocate militant theocracy . . . and who insist that there can be no distinction between civil and . . . Shari'a law."¹⁶³

Now people with those views have abounded in part of the Islamic world for decades or longer; indeed those views sound not remarkably different from the long-time position of the government of Saudi Arabia or at least the Wahabbist religious establishment with which it partners.¹⁶⁴ That being so, one might reasonably ask why did mega-terrorism emerge only in the early 1990s, punctuated by the 1993 attempt to topple the World Trade Center, rather than decades earlier. Could there be any connection between its appearance and Israel's brutal response to the first large-scale resistance by Palestinians to its colonial rule over the occupied territories, the *intifada* of the youthful stone-throwers? Is it mere coincidence that the first attacks occurred after the 1991 Gulf War during which Saudi Arabia served as a staging base for US forces and the US-led coalition heavily damaged key elements of the Iraqi state's civilian infrastructure, particularly its electrical generating capacity, which led quickly to a spike in infant mortality?¹⁶⁵

Could there have been at that time a tipping point of rage and frustration within the middle classes particularly of Saudi Arabia (from which place came a great majority of the 9/11 suicide terrorists) and Egypt focused on the decades-old alliance between the United States and the corrupt and intractable regimes in those countries? While the semi-satellite relationship between the US and those regimes was old, perhaps the sense of stagnation, of humiliation and subordination to an external power, bottled up in these sclerotic societies was accelerated and focused by the exogenous elements of the Gulf War, the *intifada* and the increasingly conspicuous presence of

162. *Id.* at 3.

163. *Id.*

164. Tarek Masoud, *Desert Storm*, NEW REPUBLIC, 28 Dec. 1998, at 17.

165. Jeanette M. Smith & Alberto Ascherio, *Effect of the Gulf War on Infant and Child Mortality in Iraq*, 270 J. AM. MED. ASSN. 931 (1993).



American military power on Saudi soil and just off shore in the Gulf which ratcheted up the appearance of the US as the heir to the British and French colonial policy in the region that included the employment of indigenous elements and the constant threat of intervention to keep Arab political actors pliant and thus to assure access to the area's natural resources on comfortable terms.

Moreover, the heightened profile of American military power coincided with a demographic explosion and the increasingly intense penetration of the area's traditional culture by the consumption-oriented economy that has spread from the West to the rest of the world. If the pace of cultural change, the in-your-face challenge to the millennial sexual and family practices and bedrock beliefs of communities of faith has produced something like cultural war in the United States,¹⁶⁶ a political society built on liberal premises, must it not be having a far more convulsive effect within the societies of the Middle East and of Western Asia which have never been liberal in their premises? In brief, then, I ask again: Is it not entirely plausible or at least not plainly implausible that US policies—the de facto blank check given to Israel's post-1967 colonial enterprise, the alliance with corrupt and stagnant regimes unable to organize rapid *and* broadly participatory economic growth, the first Gulf War and its aftermath, the stationing of forces within and around the Arab world, the sharing of intelligence and the arming and training of police and security forces—gave a lethal focus to the rage that so often coincides with deep societal change made particularly traumatic by virtue of occurring at warp speed?

To me the question is rhetorical. Of course it is plausible that policy mattered, so plausible that the burden of persuasion should lie with those who insist that it did not and still does not. And surely that burden cannot be met by sheer assertion to the contrary which is the stock neo-conservative response. From the probability that policies have mattered of course it does not follow that policies should be changed. The merits of the policies I have described are a separate question and need to be debated separately on moral and prudential grounds. Insisting that policy does not matter is a

166. See, e.g., PAT ROBERTSON, *COURTING DISASTER: HOW THE SUPREME COURT IS USURPING THE POWER OF CONGRESS AND THE PEOPLE* (2004); ANN COULTER, *SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT* (2002). Christmas is often used as a focal point for airing religious grievances against secularism. See, e.g., FOX NEWS anchor JOHN GIBSON, *THE WAR ON CHRISTMAS: HOW THE LIBERAL PLOT TO BAN THE SACRED HOLIDAY IS WORSE THAN YOU THOUGHT* (2005). In 2004, fellow FOX NEWS anchor Bill O'Reilly ran a segment in the "Talking Points" portion of his program entitled, "Christmas Under Siege," which became a regular feature in 2005. Bill O'Reilly, *Christmas Under Siege: The Big Picture*, FOX NEWS, 24 Dec. 2004, available at <http://www.foxnews.com/story/0,2933,140742,00.html>. "Now most people, of course, love Christmas and want to keep its traditions, but the secular movement has influence in the media, among some judges and politicians. Americans will lose their country if they don't begin to take action." *Id.*



way of short-circuiting that debate perhaps out of fear that over time debate could result in the revision of policies championed by neo-conservative collaborators of Israeli right-wing nationalists and to a reconsideration of the costs and benefits of playing an imperial¹⁶⁷ role in the Middle East and elsewhere.

In channeling neo-conservatism, Elshtain does more than dismiss the claim that US policies interacted with powerful social, psychological, economic, political, and demographic forces cycloning through the Middle East and West Asia to make the US a target for enraged fundamentalists. It is not enough that the claimants are wrong. In addition, they are said to be dangerous, even by implication treacherous. For, as she essentially argues, to seek explanations either in historical forces or in US policies or in some mixture of the two is to engage, however subtly, in the exculpation of mass murderers. Comparing the present moment to the rise of National Socialism in pre-World War II Germany, she writes:

Of course, it is important for historians and political analysts to take account of the political, social, and economic milieu out of which National Socialism emerged. But the difficulty and desperation of post-World War I conditions—run-away inflation, a war-torn economy, and war reparations, all of which Germany faced—do not add up to the inevitability of the evil that was Nazism. To claim such is to set in motion an exculpatory strategy that, *whether intentionally or inadvertently*, rationalizes political pathology. . . . Why, then, in the context of America's war against terrorism, do *so many* tick off a list of American "failures" or even insist that America brought the horrors of September 11, 2001, on herself? . . . [It is because they] have banished the word *evil* from their vocabularies. . . . Confronted by people who mean to kill them and to destroy their society, these well-meaning persons deny the enormity of what is going on. . . . [N]aivete—including the conviction that horrific events are momentary setbacks and will surely be brought to heel by "reasonable" persons (who shrink from speaking of evil)—can get thousands of innocents killed.¹⁶⁸

What Elshtain, an echo of neo-conservative polemicists, really seems to be condemning is at its core, a failure of so "many of our intellectuals, academics, and religious leaders," unlike down-home "icons of the popular culture,"¹⁶⁹ to hate. Evil people are bent on destroying our "freedom." When we have exterminated them, albeit notionally in ways that don't swell their ranks, then we can discuss the nuances of policy. Proposing changes in policy that might affect the behavior of potential recruits or passive sympathizers is

167. I use the word "imperial" for purposes of description, not judgment. Whether the imperial role can be benign under some circumstances is also a matter requiring a separate debate.

168. ELSHTAIN, *supra* note 48, at 1–2 (emphasis added).

169. *Id.* at 5.



treated as the equivalent of proposing negotiations with Bin Laden, a form of naivety that could kill thousands of innocent people.

What confirms the sheer evil of enraged Islamic fundamentalists, Elshtain's neo-conservative polemic instructs us, and what should therefore bar on moral no less than prudential grounds any effort to assuage or even to understand that rage is the refusal to distinguish combatants from non-combatants, the readiness to slaughter indiscriminately. which amounts to the repudiation of a, arguably the, central value of the civilized world. In terms of historical precedent, this is undoubtedly the weakest of Elshtain's arguments for waging unreflective, exterminating, worldwide war on fundamentalist Islam. For one of the few things we can say with confidence about the objectively instructive value of history, which most of the time teaches only what we have decided to learn from it, is that under the right circumstances, every government and most people will kill indiscriminately. Did we not kill indiscriminately when we dropped atomic bombs on Hiroshima and Nagasaki?

American leaders who thought of themselves as thoroughly decent people, as exemplars of the values of the West, authorized the incineration of the inhabitants of those cities, and years afterwards continued to defend the decision, defended it in the only way they could, on grounds that in doing so, they were saving American lives¹⁷⁰ and carrying out the purposes for which the long and terrible Second World War was fought. It is a pure consequentialist argument unless one takes the position that through their passive support for the government of Japan, all of the Japanese were in some sense guilty, a position that cannot be reconciled with the distinction between combatants and non-combatants that, as Elshtain rightly argues, is central to just war thought.

Palestinian suicide bombers and their defenders make exactly the same consequentialist argument: "We are illegally and unjustly occupied. We are penned into what amount to open-air concentration camps run by the inmates but surrounded by guards. We tried passive resistance and were beaten down.¹⁷¹ We tried negotiation, but did not delay by one second the seizure of our land and the proliferation of armed colonies in our midst.¹⁷² We threw stones and were shot down and had our limbs broken.¹⁷³ Thousands of us are imprisoned without due process of law;¹⁷⁴ thousands have

170. They also argued, not implausibly, that they were saving, as well, the lives of Japanese who would have died in the course of a US invasion or a blockade.

171. Amos Elon, *From the Uprising*, N.Y. REV. BOOKS, 14 Apr. 1988, at 10.

172. See the non-paper prepared by EU Special Representative to the Middle East Process, Ambassador Moratinos on the Israeli-Palestinian negotiations at Camp David in the summer of 2000, available at <http://www.mideastweb.org/moratinos.htm>.

173. Elon, *supra* note 171, at 43.

174. HUMAN RIGHTS WATCH, WORLD REPORT 2006: ISRAEL/OCCUPIED PALESTINIAN TERRITORIES (Jan. 2006), available at <http://hrw.org/english/docs/2006/01/18/isrlpa12224.htm>.



been subjected to cruel and inhuman interrogation.¹⁷⁵ We have no army, no air force. We cannot attack combatants, so we must drive up the cost of occupation by attacking non-combatants." And they could cite as precedents the actions of pre-state Jewish military formations, primarily the Irgun which numbered among its leaders a future Prime Minister of Israel, Menachem Begin. The hawkish historian, Benny Morris, writes of a dialectic of terrorism between Israelis and Arabs beginning in mid-1937: "Now for the first time, massive bombs were placed in crowded Arab centers, and dozens of people were indiscriminately murdered and maimed."¹⁷⁶ In one exemplary case "an Irgun operative dressed as an Arab placed two large milk cans filled with TNT and shrapnel in the Arab market in downtown Haifa. The subsequent explosion killed twenty-one and wounded fifty-two."¹⁷⁷ Referring to this period the political philosopher Hannah Arendt, favorably and repeatedly cited by Elshain, wrote: "They think it is all right to murder anyone who can be murdered—an innocent English Tommy or a harmless Arab in the market of Haifa."¹⁷⁸

Defenders of human rights must in the end reject consequentialist arguments no matter who makes them. The right of the innocent to life is trumps. But those of us who in the name of human rights deny weak objects of alien domination the only means they may have to make their oppressors recalculate costs and benefits have a special obligation to help them. It is in part because their recognition of that obligation is so selective that the neo-conservatives' claim to be champions of human rights seems meretricious. In the particular case of Palestine, they are not simply indifferent to the status quo of subordination and misery that is the Palestinians' lot; rather they are among its advocates.¹⁷⁹ When as members of the Reagan administration they saw continued US support for Saddam Hussein even as he waged genocidal warfare against the Kurds, they did not resign. When the government of El Salvador massacred peasants they saw no evil.¹⁸⁰ They have repeatedly proven that they are consequentialists; for them human

175. *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32: Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, In Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 10(a), U.N. Doc. E/CN.4/1994/31 (1994).

176. BENNY MORRIS, *RIGHTEOUS VICTIMS* 147 (1999).

177. *Id.*

178. *Quoted in* Jeremy Waldron, *What Would Hannah Say*, N. Y. REV. BOOKS, 15 Mar. 2007, at 8.

179. See William Kristol, *It's Our War*, WEEKLY STANDARD, 24 July 2006, at 9; Robert Satloff, *The Rogues Strike Back: Iran, Syria, Hamas and Hezbollah vs. Israel*, WEEKLY STANDARD, 24 July 2006, at 23; Efraim Karsh, *Saddam and the Palestinians*, COMMENTARY, 1 Dec. 2002, at 56, 56–60.

180. See DANNER, *supra* note 21; NEIER, *TAKING LIBERTIES supra* note 160, at 209–16.



rights are not trumps, and that is a second critical difference between them and liberal advocates of human rights.

As Elshtain rightly says, one of the features that “is *always* present in ideological attacks that refuse to come to grips with current realities [is] they distort or ignore facts.”¹⁸¹ She then like any good neo-con fellow traveler indulges in the declared sin by refusing to recognize that, as a matter of historical fact, most people in what they perceive to be extreme circumstances are prepared to treat other people as means rather than ends. Therefore, the recourse to indiscriminate attack is not itself conclusive evidence that the attacking group kills for the sake of killing people it deems alien, that it has goals beyond the reach of policy. And while we may be confident in the case of Bin Laden and his colleagues that whatever may once have been true before their world view hardened, they have long since become intractable enemies, the same cannot be said of the wide penumbra of latent or actual sympathizers.

At this point we are uncertain about the numbers who have passed beyond the reach of policy and become committed killers. But to our good fortune, the numbers of the former far exceed the latter. What mix of revisions in existing policies and new ways of relating to the Islamic world¹⁸² would most effectively combat the narrative about the West and Islam that Al Qaeda uses in its efforts to propagate itself is not certain. What is certain is that the policies and postures Elshtain so angrily defends have recruited effectively for Bin Laden and his offspring.¹⁸³

Elshtain is right in seeing just war norms as beacons helping to mark a path away from the status quo toward policies and practices that will isolate irreconcilable islamists from the great bulk of the faithful. But being twisted by rage for those who think we have managed since 9/11 to multiply our enemies and weaken ourselves, despite those beacons she has lost her way. She does not see that the blind hate she demands leads inexorably to the defiance of normative constraints on cruel treatment of individuals and to the view that those who are not with us must be deemed against us, thus widening the circle of our enemies. She does not see that blind hate trumps prudence no less than human rights and empowers leaders who champion violent action at the expense of careful calculation and strategies that mix threats with incentives.

Reading Elshtain’s neo-conservative polemic helps one to see all too clearly the vision of those leaders who in the name of human rights, as well as the national interest, plunged the American nation into the Iraqi abattoir. Now, having been betrayed by those who parroted rather than practiced the ideals of Augustinian realism, we search for a just exit.

181. ELSHTAİN, *supra* note 48, at 75.

182. See FARER, *CONFRONTING GLOBAL TERRORISM*, *supra* note 76, ch. 6 for some suggestions.

183. Gideon Rachman, *America’s Self-Inflicted War Wounds*, *FIN. TIMES*, 11 Sept. 2007, at 15.



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