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## On Terrorism: Reflections on Violence and the Outlaw\*

*Ileana M. Porras\*\**

Scarcely a week goes by without at least one terrorist related incident making the headlines. The subject of terrorism has, meanwhile, engendered a vast and growing expert literature. Much of this vast body of literature is pragmatic in nature, in the sense that the authors are concerned with developing policy proposals. They present and analyze the problem of terrorism and then promote what they think is the appropriate response to terrorists—a response that often involves changing the legal framework. The bulk of what I call “terrorism literature” is produced in the “West.” For the most part, it is written from the perspective of terrorism as a threat to western liberal democracies. For purposes of this paper, I have limited my inquiry to such literature and to terrorism as a western phenomenon. I am interested in exploring the repetition of rhetorical structures in terrorism literature and their reproduction in media reports of terrorist incidents. The choice of focus was dictated by the belief that terrorism is not just an objective “something” out there to be located with a telescope and examined with a microscope, but that it is also, less obviously, a creation or by-product of western liberal democracies; that it is intimately linked with the self-image or self-understanding of western liberal democracies.

The claim that terrorism is a creation or by-product of western liberal democracies should not be mistaken for the simple claim that “terrorism does not exist” or that “it’s all politics, and one man’s terrorist is another’s freedom fighter.” Rather, it is a claim about the origin of the concept of terrorism. Not an origin that can be pinpointed in time, but a continuing process of origination. It is a claim about the complex function that terrorism has come to perform vis-a-vis western democracies. It is a claim about the way in

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which terrorism has come to be the thing against which liberal western democracies define themselves; about the way it has come to be the repository of everything that cannot be allowed to fit inside the self-image of democracy; about the way it has become the "other" that threatens, that desires the annihilation of, the democratic "self," and against which democracies therefore strenuously defend themselves. Exploring the rhetorical structures of terrorism literature and media reports provides an alternative way to not only understand the meaning and function of terrorism for liberal western democracies, but to evaluate our response to terrorism.

In reflecting on terrorism, I seek also to pursue a second inquiry: Why are critical scholars writing about international law so often drawn to themes of violence and the outsider? One obvious response would be that we are simply pursuing the trajectory, first traced out by Freud, of examining that which is suppressed. Here, the image would be that international law understands itself to banish violence, religious passion, the irrational, and the exotic/erotic. The banished, however, being imperfectly suppressed, is constantly threatening to re-enter and extinguish the realm of international law. International law is, from this perspective, engaged in a perpetual struggle for predominance, just managing to hold at bay its desiring (and desired) exiles. To focus on violence and the outsider is thus a critical strategy which places international law on the couch, in the hopes of healing it by making it acknowledge, and come to terms with, its violent and passionate fantasies.

At a more prosaic level, another response might be that critical scholars, like everybody else, are simply drawn to issues of violence by the commonly held belief (and the surprisingly seductive notion) that real law is that law which helps our societies maintain or establish order by restraining the chaotic passions otherwise manifested as violence. Thus, at the national level, we ultimately believe that "real law = criminal law" while at the international level we conclude that "real international law = international law about violence." Such a response is not as uninteresting as it might at first seem. The interest of such a response lies in its connection to, even perhaps its derivation from, our deeply held conviction that violence at least is real—that violence matters. That the "real" occurs, is discernible, identifiable, and recognizable at the moment violence erupts. Violence, we say, is not just talk. Violence traverses the body, leaving traces of its passage. If anything is real, it is the pain of violence. If anything is real, it is the viscosity of death. Violence makes us serious. We righteously condemn those who display a frivolous attitude to violence—to real violence on real bodies. The "reality/violence," in its turn, elicits a real reaction (anger) and

a real response (law and its correlative: legitimate violence). Forbidden violence thus unleashes approved violence. In the face of violence, we have to act. We cannot simply stand by and watch dispassionately. "People are getting killed out there!" If, as critical scholars, we are drawn to write about violence in international law, then it is because we recognize the seductiveness of this notion, and seek to understand how this connection between violence and the real drives the development and self-understanding of international law.

In focusing on terrorism, my purpose has not been simply to demystify international law—to expose it for what it really is "once and for all." Of all the categories or subdivisions of law, international law is surely the one least in need of de-mystification. In fact, the history of the development of international law can be described as a succession of re-mystifications, following each cyclical bout of debunking to which it is ritually subjected.<sup>1</sup> Resilient as it is, international law has survived each de-mystifying challenge slightly diminished, but victorious and ready to re-charge. International law thus seems peculiarly immune to de-mystification as a strategy.

In my work, I approach international law as a cultural production—our cultural production—and recognize within it, and through it, our fascination, our obsession, with violence and the outsider. In looking at terrorism, I have found that international law forges an intimate and seemingly indissoluble connection between violence and the outsider or outlaw. It is this connection, this link, that appears to exist between violence and the outlaw and the production of international law which I think useful to explore.

## I. READING TERRORISM

In looking at the literature on terrorism, I have been struck by the way a double project emerges. The terrorist is transformed through the authors' rhetoric from an ordinary deviant into a frightening, "foreign," barbaric beast at the same time that extra-normal means are called for to fight terrorism. Since terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them. In the face of terrorism, extra-ordinary law, it seems, is required. Terrorism literature emphasizes, through its choice of metaphors, that the situation is one of "us" or "them." To survive,

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1. I use the words *de-mystification* and *re-mystification* advisedly, to suggest international law's persistent relationship to religion/mysticism and its rhetorical reliance on (mimicry of) religious narratives. See, e.g., David Kennedy, *Images of Religion in International Legal Theory*, in *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 137, 137–46 (Mark W. Janis ed., 1991).

we must destroy them. To fail to destroy them is to destroy ourselves.

A similar double project is apparent in the popular press and the public statements of politicians and policy-makers. Here the label "terrorist" or "terrorism" is attached to a person, group, or activity at the very moment that a call to action is made. Those wanting the government to take extra-ordinary measures against abortion clinic demonstrators or environmental activists are likely to adopt the terminology of terrorism.<sup>2</sup> To label a person, group, or activity "terrorist" serves not just as a shorthand description, nor even simply as a statement of moral indignation, but primarily as a call to action—a demand for elimination.

[T]errorism is the crassest antithesis to democracy. It is the attempt to subjugate and pervert the will of the people and its elected leadership by a minute bunch of reckless people resorting to terrifying threats and unbridled violence. They say they kill for the cause. What is that cause? Liberty from oppression? Freedom from want? Justice for a people? If that would be their cause, how could they plot the extermination of another people, terrorize their own kinsmen and stuff their war chests with oil money from Saudi Arabia, to finance the assault against the regimes of these countries? Their cause is killing. Their vocation is violence.

They are not the avant-garde of a popular upsurge, but a fiendish fringe which worships violence and despises humanity.

They are part of an international demolition squad disguised as freedom fighters, presented by perverted publicity as glamorous guerrillas, idolized by a disoriented community of alienated adolescents. They are the outlet for uncontrolled savage passions.<sup>3</sup>

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2. Following the murder of Doctor David Gunn outside an abortion clinic in Pensacola, Florida, pro-choice advocacy groups characterized the killing as "domestic terrorism" and called on the President "to have the FBI investigate the recent spate of violence against abortion providers and to order federal marshals to guard women and doctors at clinics targeted by protestors." *U.S. Reaction to Murder: A Series of Hues, Cries for Protection at Clinics*, SALT LAKE TRIB., Mar. 12, 1993, at A1. These same groups are "seeking legislation to make it a federal crime to block access to an abortion clinic." *Id.*

Ranchers who graze their livestock on public lands in AZ, CA and NV are increasingly being targeted by "eco-terrorist" vandalism and threats, Rep. James Hansen (R-UT) told a House panel 5/12 . . . . He was speaking in support of his bill that would make it a felony to kill or harass livestock on public lands, increasing possible penalties to five years in prison and a \$250,000 fine. (Jeff Barker, Arizona Republic, 5/13).

*Ranchers: "Eco-Terrorists" Strike Public Land Grazers*, GREENWIRE, May 14, 1992, at 1.

3. Gideon Rafael, *Chairman's Opening Remarks*, in INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE 111, 111-12 (Benjamin Netanyahu ed., 1980) (remarks before Third Session of Jerusalem Conference on International Terrorism, July 3, 1979) [hereinafter INTERNATIONAL TERRORISM].

Some of the most frequently used mechanisms to transform the terrorist into a creature quite distinct from us are nicely illustrated by Gideon Rafael in the above passage. First comes the claim that terrorism is the "antithesis of democracy"; both cannot therefore concurrently exist. By necessity one threatens or extinguishes the other. Since democracy is good, terrorism must be evil. Terrorism, we are told, "subjugates and perverts"; these are images of domination and perversion. Terrorists are "reckless" and resort to "unbridled violence." They are out of control. They "plot the extermination of another people"; they are heartless, cruel, and extreme and seek the total destruction of their "other," that is, "us." They "terrorize their own kinsmen"; they do not even recognize family ties, the most basic human allegiance. "A fiendish fringe which worships violence and despises humanity"; they are devils, or devil worshipers, and outside the human family. "They are the outlet for uncontrolled savage passions"; they are everything that civilization was created to suppress. They threaten us with falling back into our primitive and savage past.

Although we, the readers, might be tempted by such an outpouring of invective to ask the author what prompted him to say these things—to ask him what evidence he has in support of the appropriateness of his language and his images—we are unlikely actually to challenge him. Even if we think that he really is going a bit far—exaggerating for the sake of dramatic effect—we will hesitate to contradict him. One problem for the critic of "name calling" as a form of argument is that the literature on terrorism is so full of hyperbole, of hintings and suggestions, of drama and emotion, that to criticize this instance is to take on the whole genre.

In a typical statement, for instance, the director of the CIA develops both drama and pathos in his description of what terrorists do:

In confronting the challenge of international terrorism, the first step is to call things by their proper names, to see clearly and say plainly who the terrorists are, what goals they seek, and which governments support them. What the terrorist does is kill, maim, kidnap and torture. His or her victims may be children in the schoolroom, innocent travelers on airplanes, businessmen returning home from work, political leaders . . . They may be kidnapped and held for ransom, maimed or simply blown to bits.<sup>4</sup>

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4. William J. Casey, *The International Linkages—What Do We Know?*, in HYDRA OF CARNAGE: INTERNATIONAL LINKAGES OF TERRORISM—THE WITNESSES SPEAK 5 (Uri Ra'anani et al. eds., 1986) [hereinafter HYDRA OF CARNAGE]. It is interesting to note the prominent absence of police or military personnel from this typical list of terrorist victims. In a report to Congress, the Acting Coordinator for

While it may seem amazing that the head of the CIA should be able to reach such heights of pathos, it is indicative of the rhetoric deployed by authors on terrorism. Although we may question the description of what terrorists do (surely terrorists do other things than "kill, maim, kidnap and torture"—sometimes they just blow up pylons or rob banks or have parties) and we may wonder at the insistence on "children in the schoolroom" (how many children in the schoolroom have been victims of terrorism?), or wonder at the surprising coincidence that businessmen are always attacked by terrorists precisely as they are "returning home from work," we are still left with a feeling of culpable cynicism. The pathos and the drama are so pervasive that we cannot help but be moved and convinced. To criticize the rhetoric is to be heartless. What matter if only one child died in a schoolroom the victim of terrorism? Isn't that enough? Instead of finding fault with those who truly care about the innocents' dying, we should be out there doing something about terrorism.

## II. AN INTERLUDE FOR THE NORMATIVE BIND

The term [terrorism] is somewhat 'Humpty Dumpty'—anything we choose it to be.<sup>5</sup>

Although it has become popular in the terrorism literature to refer to "terrorism" as being Humpty Dumpty, this seems to be an inaccurate way to think. Humpty Dumpty said that a word would mean whatever he wanted it to mean. With "terrorism," on the contrary, everyone means the same thing. What changes is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list. Everyone uses the word "terrorism" to mean a kind of violence of which he or she does not approve, and about which he or she wants something to be done. The sense of the word always stays the same; it is the referents that change.

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### Counterterrorism specifies:

For purposes of [the definition of terrorism], the term "noncombatant" is interpreted to include, in addition to civilians, military personnel who at the time of the incident are unarmed and/or not on duty . . . . We also consider as acts of terrorism attacks on military installations or on armed military personnel when a state of military hostilities does not exist at the site . . . .

U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 1992, at v n.1 (1993) [hereinafter STATE DEP'T REPORT].

5. WILLIAM R. FARRELL, THE U.S. GOVERNMENT RESPONSE TO TERRORISM: IN SEARCH OF AN EFFECTIVE STRATEGY 6 (1982).

How the word *terrorism* came to be understood universally as pejorative is an interesting question that I will not attempt to answer here. It is important, however, to examine the implications of the word *terrorism's* inevitably pejorative sense. To say anything about terrorism or terrorists, it turns out, is to be caught in a normative bind; that is, I have only two choices available—for or against. In terrorism discourse, if I am not explicitly against terrorism then I am necessarily for it. There is no middle ground. No ambivalent position is available. To not condemn terrorism is to condone it,<sup>6</sup> and to condone terrorism is to be morally as bad as a terrorist.<sup>7</sup> Indeed, to publicly sympathize with terrorism may itself become a terrorist offence.<sup>8</sup> Thus, I find that there is really only one legitimate position that I may hold vis-a-vis terrorism and terrorists—I must think terrorism a great evil. This is so even though, or especially because, “[t]he term has no precise and completely accepted definition . . . [because] the United Nations, has been unable to agree on a definition of the term,”<sup>9</sup> and “[n]o one definition of terrorism has gained universal acceptance.”<sup>10</sup>

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6. Moderate environmental groups have been urged to “police” the entire environmental movement.

These ecoterrorists are a tiny, fringe group. They in no way represent America’s broad environmental movement. . . . [B]y failing to denounce loudly and openly the ecoterrorists, mainstream environmentalists risk bringing their entire movement into disrepute.

HERITAGE FOUND., *ECO-TERRORISM: THE DANGEROUS FRINGE OF THE ENVIRONMENTAL MOVEMENT* (Apr. 12, 1990).

7. “Terrorism . . . a moral evil, infecting not only those who commit such crimes, but those who, out of malice, ignorance, or simple refusal to think, countenance them.” Benjamin Netanyahu, *Preface*, in *INTERNATIONAL TERRORISM*, *supra* note 3, at 1–2.

8. See, e.g., *Ley Organica 9/1984, de 26 de Diciembre, Contra la Actuacion de Bandas Armadas y Elementos Terroristas*, reprinted in *CÓDIGO PENAL* § 8 (1989).

The present Law is applicable to persons belonging to armed bands or bands associated with terrorist or rebel activities who plan, organize or perpetrate offenses listed in the following paragraph, and to those who collaborate in them or incite participation in the same, or conceal those implicated. It is also applicable to those who publicly support such offenses. (Author’s translation.)

*Id.* art. 1.1; see also, 28 STRAFGESETZBUCH [STGB] § 130a, reprinted in *THE AMERICAN SERIES OF FOREIGN PENAL CODES* (1987). In response to the activities of the Baader-Meinhof Faction, the Penal Code of the Federal Republic of Germany was modified to criminalize the dissemination, public display, or otherwise rendering accessible of a writing which contained support of one of the offenses enumerated in article 126(1) (dealing with “terrorist associations”), or who set up, referred to, furnished, held in possession, offered, advertised, commended, exported, or imported such writings, etc. *Id.*

9. FARRELL, *supra* note 5, at 6–7.

10. STATE DEPT REPORT, *supra* note 4, at v.

The normative bind is not easily escaped. I may seek to avoid the problem by saying, for example, that "Euskadi ta Askatasuna"<sup>11</sup> ("ETA"), in Spain, is a resistance movement whose political purpose is the establishment of a Basque homeland. Although I have not used the word *terrorism*, I cannot escape it. I am immediately faced with two problems. The first is that because the words *terrorism/terrorist* are commonly used to refer to ETA, it will be assumed that my choice of referring to ETA as a "resistance movement" is a pro-ETA statement condoning ETA's activities<sup>12</sup> (although I intended no such thing). The second is that since ETA is officially declared a terrorist organization, I could be making myself liable to prosecution as a terrorist sympathizer, even if I condemn their acts, but in good faith, would not include ETA in my list of terrorists. The power of the terms *terrorism* and *terrorist* thus reach out well beyond their immediately apparent borders. In other words, even though it seems each of us is free to establish the content or reference of the terms, their pejorative sense constrains us at all times, imposing meanings not necessarily intended.

### III. AFTER THE INTERLUDE: TECHNIQUES FOR TRANSFORMING THE TERRORIST INTO AN OTHER

#### A. *Transformation Through Violence*

The U.S. contends that [Mahmud Abouhalima] is the epitome of the modern terrorist, a self-made commando pursuing a homemade agenda to disrupt Western civilization.<sup>13</sup>

Terrorism literature and media reports are replete with statements about the threat terrorists and terrorism pose to civilization and democracy. The question of how exactly this threat is posed, however, is rarely explored. The seriousness of the threat is instead suggested by various means. One popular mechanism is through the development of frightening metaphors whose relevance or aptness

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11. "Euskadi ta Askatasuna" translates as Freedom for the Basque Homeland.

12. Germany's response to terrorist activities provides a similar example. Whether to refer to the Baader-Meinhof terrorists as constituting a group ("gruppe") or gang ("bande") became itself a contentious issue during the seventies, the former being thought by some to accord the terrorists too much unwarranted political legitimacy, the latter more appropriately placing them on par with ordinary criminals. Indeed, then Minister President Bernard Vogel was heard to suggest that anyone employing the nomenclature "gruppe" would be assumed sympathetic to terrorists. DARIA M. KRISTICH, WEST GERMANY'S RESPONSES TO TERRORISM DURING THE 1970'S; Irene Dische, *Germany's Terrorist Lexicon*, THE NATION, Nov. 19, 1977, at 524.

13. Richard Behar, *The Secret Life of Mahmud the Red*, TIME, Oct. 4, 1993, at 56.

are rarely, if ever, explained. A good example of the use of a metaphor to create a powerful image, which will color our subsequent thinking about the subject of terrorism, is the title of the book *Hydra of Carnage*.<sup>14</sup> Following the Title Page, but preceding the Table of Contents, appears a page with the following inscription:

### HYDRA

A serpent or monster slain by Hercules. It had nine heads, any of which, when cut off, was succeeded by two others, *unless the wound was cauterized*.<sup>15</sup>

The metaphor of terrorism as a Hydra is not developed in the book, which is a collection of articles by various authors who could be described as "hawks." The editors' choice of emphasis in their definition of this mythological creature provides a clear indication that the focus of the book will be on what should be done to "cauterize" terrorism.<sup>16</sup> The image of a "Hydra" conjures up quite effectively the idea that the thing to be feared is a monster, that it is hard to deal with this monster, but it can be overcome, and that unless action is taken the thing will grow uncontrollably. Moreover, by describing terrorism as a Hydra "of Carnage," the editors effectively convey a sense of the countless mangled bodies that terrorism leaves in its wake.

Another popular metaphor used to describe terrorism, and its effect on society and civilization, is that of terrorism as a disease. This can take many forms. From William Casey's passing reference to terrorism as "this dreadful scourge,"<sup>17</sup> to the extended "cancer" metaphor of Paul Johnson in his *The Cancer of Terrorism*:

Terrorism is the cancer of the modern world. No state is immune to it. It is a dynamic organism which attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer: unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags it down to destruction.<sup>18</sup>

14. HYDRA OF CARNAGE, *supra* note 4, at ii.

15. *Id.* at iii (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 404 (12th ed. 1961)).

16. The metaphor, here as elsewhere, is faulty. Cauterization usually is a term of healing—you have to stop the wound from bleeding or else the patient will die. Here the underlying idea is that the Hydra herself must be stopped—the Hydra is not the patient but the illness.

17. Casey, *supra* note 4, at 5.

18. Paul Johnson, *The Cancer of Terrorism*, in TERRORISM: HOW THE WEST CAN WIN 31, 31 (Benjamin Netanyahu ed., 1986).

The image remains the same, terrorism like disease is something we have to put a stop to.<sup>19</sup> Although Johnson develops his metaphor, using it to its fullest rhetorical extent, he does not explore the implications. It is as if the body is healthy but for the cancer. Western democracy is hunky dory but for terrorism. The metaphor of terrorism as a disease seems to call for a discussion of society as sick, or in poor health, or needing a change of air, or needing some new blood. It seems to beg the question of what caused the disease. Instead, we find the focus is inevitably on eliminating the symptoms of the disease.<sup>20</sup> Although the relevance or aptness of these metaphors is not explained, they serve to heighten the sense of terrorism's distinctively alien nature and render the very existence of terrorists threatening.<sup>21</sup> Monsters and diseases must be eliminated because, regardless of whether or not they are actively harming us, their destructive power is latent within them, ready to

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19. Referring to the often criticized legal response of the United Kingdom to terrorism, one author states approvingly: "It has been suggested that other countries would not hesitate to enact laws even more stringent than those of Northern Ireland if they were faced with a comparable plague of terrorist violence and murder." William R. Nelson, *New Developments in Terrorist Trials in Northern Ireland*, in *THE IRISH TERRORISM EXPERIENCE* 155, 166 (Yonah Alexander & Alan O'Day eds., 1991) [hereinafter *IRISH TERRORISM*]. A recent example of a similar use is that of the Turkish Prime Minister, Tansu Ciller, who, following a series of attacks on Turkish targets by Kurd separatists, referred to the attacks as a "terrorist plague." Stephen Kinzer, *Anti-Turkey Kurdish Separatists Blamed for Attacks Across Europe*, N.Y. TIMES, Nov. 5, 1993, at A6.

20. The theme of terrorism as a disease appears to have been particularly popular at the Jerusalem Conference on International Terrorism, held under the auspices of the Jonathan Institute, July 2-5, 1975. Papers and speeches presented at this conference were collected by Benjamin Netanyahu. See *INTERNATIONAL TERRORISM*, *supra* note 3.

This theme was then pursued by various contributors. Benjamin Netanyahu stated that "[i]t is evident that in their struggle with the terrorists, the attacked nations must admit to failure—that is, if their purpose was to arrest the tide of terrorism in the world and place the malady under control." Benjamin Netanyahu, *The Face of Terrorism*, in *INTERNATIONAL TERRORISM*, *supra* note 3, at 4. Gideon Rafael went on to say that "[t]he malignancy of terrorism not only accounts for growing numbers of victims, slain and maimed men, women and children whose only offence was to travel in commercial airliners, blown up in midair, or to live in peaceful villages and be massacred in their sleep." Gideon Rafael, *The Threat of Terrorism to Democratic Societies*, in *INTERNATIONAL TERRORISM*, *supra* note 3, at 112-13. This "epidemic insanity" . . . is spreading. It must be checked by worldwide quarantine measures." *Id.* at 113.

21. Another version of the metaphor of terrorism as a disease is that of terrorism as a virus which threatens to spread its contagion. In an article introducing their latest collection devoted to Irish terrorism, for instance, two frequent contributors to the literature state: "[I]t remains speculation whether the terrorist virus will spread." Yonah Alexander & Alan O'Day, *Introduction: Dimensions of Irish Terrorism*, in *IRISH TERRORISM*, *supra* note 19, at 1.

be unleashed. It is in their nature to destroy.

The threat terrorism poses to civilization passes through violence. A recurring problem for authors on terrorism is the need to distinguish terrorist violence from other kinds of violence. The terrorist should not be said to be using run-of-the-mill kinds of violence, the everyday kind of violence that affects the citizens of our democracies in a matter of fact way—the violence that we have come to live with. If the violence of terrorism is not distinguishable, then the average terrorist may not seem much worse (if not any better) than the average rapist, murderer, robber, or vandal.

A relentless emphasis on the almost metaphysical “innocence” of the terrorist victim is one powerful mechanism that makes terrorist violence different. Indeed, terrorism is often defined in relation to the “innocence” of its victims.<sup>22</sup> Victims of common criminals may be innocent, although we are often quick to blame them: the rape victim was asking for it—she was too seductive; the murder victim probably deserved it—he was a bad lot; and the robbery victim was careless—he didn’t take sufficient precautionary measures. Terrorist victims are, on the contrary, doubly innocent. They are inherently innocent (not to blame as victims), but they are also innocent because they are in some sense sacrificed and sacrificial victims. Sacrificed by the terrorists because they stood for the things the terrorists despise. Sacrificial in that if our governments had taken strong action against terrorists, as they should have, these innocent people would not have been victims. While rhetorically, crime often confers guilt on its victims, terrorism always confers innocence. Emphasizing the tragic innocence of terrorist victims serves to distinguish the outrageous and intolerable violence of terrorism from mundane, everyday violence. Highlighting the special innocence of terrorist victims also serves to heighten the urgency of the call to action, since the government, through its inaction, is implicated in the innocent victims’ death or suffering.

Another effective device for creating a distinction between terrorist violence and other forms of violence is that used by James Poland in *Understanding Terrorism*.<sup>23</sup> After defining terrorism,<sup>24</sup> and presenting various typologies of terrorists, Poland creates a

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22. One author defined terrorism as “the premeditated, deliberate, systematic murder, mayhem and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience.” JAMES M. POLAND, *UNDERSTANDING TERRORISM: GROUPS, STRATEGIES AND RESPONSES* 11 (1988).

23. See *id.*

24. *Id.* at 16.

subheading "Terrorist Atrocities." Under this subheading, he refers to authors who have discussed "the varying degrees of *extranormal violence* used by terrorist guerrillas or revolutionaries."<sup>25</sup> We cannot help but wonder at this point what he means by "extranormal" violence. Does he mean then that there is a category of "normal" violence? And, how did extranormal violence come to be worse than normal violence?

Law enforcement authorities are concerned that terrorists will go "nuclear." The mystery and threat surrounding anything nuclear makes it an effective source of terrorists fear and manipulation. This extranormal dimension can also be illustrated in other acts of violence such as shooting innocent travelers, shooting a teacher in the presence of the teacher's students, cutting off an ear or finger to dramatize the extortionist/kidnapper's demands, "kneecapping" or shooting the legs of the victims to cause permanent disability.<sup>26</sup>

Poland then adds: "[T]erroristic atrocities serve several essential objectives for the terrorist. First and foremost, they can produce *pure terror* or *paralyzing fear*."<sup>27</sup> As our imagination leaps off to seek what kind of violence would be capable of producing "pure terror" or "paralysing fear," Poland brings us down to earth by providing an example: the "systematic assassination of police officers" in the "revolutionary film" the *Battle of Algiers*.<sup>28</sup> Although he does claim that the atrocities are most effective when directed at specific critical groups (i.e., law enforcement), we are still surprised by his choice of example. What happened to the pathos, the hyperbole, to which we had already grown accustomed by this point in the text? Where are the maimed babies, the tortured mothers? The targets of this terrorist violence are police officers. The violence perpetrated against the police officers is that of straightforward assassination—hardly the first thing that comes to mind with the word "atrocities," especially after the vivid description of kneecapping or cutting off fingers. Even more problematic for anyone who has seen the movie, is that the *Battle of Algiers* vividly portrays the terroristic nature of the French counter-terrorism measures. The

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25. *Id.* at 16–17 (emphasis added).

26. *Id.* at 17. The "nuclear threat" posed by terrorists is itself an interesting theme well worth exploring. There have not, to date, been any incidents of terrorists going nuclear, and yet the nuclear terrorism literature has mushroomed. Even in legislation we find that "terrorist activity" is defined specifically to include the use of a nuclear weapon or device. See Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 182 (1952) (codified as amended at 8 U.S.C. § 1182(B)(ii)(V)(a) (Supp. IV 1992)).

27. POLAND, *supra* note 22, at 17 (emphasis added).

28. See *id.*

depiction of the systematic use of torture by the government, against the suspected terrorists, makes it difficult to think of "atroc-ity" as an attribute specific to terrorist violence. Building on his example from the movie, Poland proceeds to describe two real-life examples of "extranormal violence" or "terroristic atrocities": the "indiscriminate killing of police officers from ambush" by the IRA in Northern Ireland and by the Black Liberation Army in the United States. Thus ends the subheading on "terrorist atrocities."<sup>29</sup> Although Poland's incapacity to depict pure terror or paralysing fear convincingly is puzzling, the claim that terrorist violence is extranormal continues to ring true.

*B. Transformation Through Links to Traditional Enemies,  
Foreign Ideologies, and Pre-Rational Beliefs*

Until recently, before the much vaunted end of the cold war, a popular mechanism used to transform the terrorist into a frightening enemy "other" was the implication that he was directly related to the Soviet Union, to communism, or to both. The connection between the Soviet Union, communism, and terrorism was sometimes made explicitly and dramatically, while at other times it was only subtly suggested. All terrorist trails at the time of the cold war, it seems, led to Moscow. The force of the "otherness"-creating power of "communism" cannot be overestimated. The saying "better dead than red," though it has lost some of its currency, does capture the very real fear that communism, even today, evokes in many western minds. In some western liberal democracies, the effect of labelling someone a "communist" may still be almost as harmful as labelling that person a "terrorist." Both, for instance, are excludable under the United States Immigration and Nationality Act.<sup>30</sup>

The linking of terrorism to communism served many evident purposes. First, the threat posed by each "ism" individually was greatly enhanced by its association with the other. Thus a terrorist seemed more threatening if he was also a communist. His political objective was made both more coherent and more credible by such an association—more coherent because it could then be understood as part of a carefully worked out, powerful, and effective political philosophy, and more credible because of the material and logistic support that became presumptively available. At the same time, the demonization of communism was enhanced. As the credibility of the Soviet threat was waning, as the picture of a uni-dimensional evil

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29. *Id.*

30. See 8 U.S.C. § 1182(a)(3)(B), (D) (Supp. IV 1992).

Soviet Union was being displaced by an almost human representation, full of ambivalence, the connection still drawn between terrorism and communism helped reclaim some of the lost territory.<sup>31</sup> The invocation of horrific images of terrorist atrocities, of the total moral degeneracy of the terrorist, powerfully reinvested the Soviet Union and communism with evil. It helped discredit the still-communist Mikhail Gorbachev's claim of wanting good relations with the United States and other western liberal democracies. From the point of view of objectifying the terrorist, the foremost advantage of using the technique of imaginatively linking terrorism and communism was that it provided a ready made, and easily assimilable, way of both characterizing and explaining terrorism. To the question "why do terrorists do what they do?" a sufficient answer became "because they are communists." The heuristic use of communism eliminated the need to analyze the phenomenon further.

Another link, that between communism and the "religious fanatics" or terrorists of the Middle East, also frequently appeared in terrorism literature before the end of the cold war.<sup>32</sup> The "crazy states," Syria and Lybia, were often described as either Soviet influenced or Soviet puppets. This link between the East (Soviet communism) and the religious fanatics of the Middle East should come as no surprise. Like Turkey (the Ottoman Empire), Russia (the Soviet Union) has only ever had a precarious toe-hold on western European identity. Both Russia (the Soviet Union) and Turkey (the Ottoman Empire) are better understood as part of the global (Islamic or Orthodox) East against which the West has defined itself. The propensity of Russians for mystical religious excess is part of our culturally shared understanding of them, an image not very different from western images of Islamic excess. While Soviet communism

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31. This is not to suggest, of course, that had the Soviet Union remained as threatening and imaginatively frightening as it had been in its hey-day, less emphasis would have been placed on the Soviet-terrorist connection. On the contrary, it seems that there is no limit to the desire to paint the enemy as ugly as possible. There is seemingly no end to the benefits to be gained from having a clear, distinctive, and powerful enemy with which to contend.

32. Addressing this issue, Benjamin Netanyahu has stated:

This collaboration between Marxist and Muslim radicals is not accidental. Modern terrorism has its roots in two movements that have assumed international prominence in the second half of the 20th century, Communist totalitarianism and Islamic (and Arab) radicalism. These forces have given terrorism its ideological impetus and much of its material support. Both legitimize unbridled violence in the name of a higher cause, both are profoundly hostile to democracy, and both have found in terrorism an ideal weapon for waging war against democracy.

Benjamin Netanyahu, *Terrorism: How the West Can Win*, TIME, Apr. 16, 1986, at 48.

was criticized by the West for its suppression of religious expression, the Soviets were imagined to have a correlative propensity for ideological excess. Communism had taken the place of mysticism, yet the West's attribution of excess remained the same.

Following the collapse of communism, it was to be expected that the West would look for a re-emergence of religious mysticism in the ex-Soviet Republics.<sup>33</sup> The numerous reports of a chaotic, uncontrolled return to faith in the former Soviet Union confirm our western instinct, producing new themes for our continued othering of these perpetual "Easterners." Furthermore, as the Soviet empire has come loose, the West has rediscovered the large pockets of Muslims contained within the "evil empire's" now fragmented borders. This discovery has made the West nervous because it cannot help but imagine a terroristic outcome to this welding of the two Eastern identities.<sup>34</sup>

The theme of the close relationship between religious fanaticism and terrorism has also, independently, become an important method of establishing the difference between them and us. Fanaticism is not something we ever attribute to ourselves. We are patriotic—they are fanatical. To be a fanatic is to be pre-rational. It is to be almost, if not totally, insane. It is a dangerous thing which warps the mind. To be a fanatic is to be incapable of heroism. To go on a suicide mission, if you are a religious fanatic, is to be crazy and deluded—not heroic. Crazy and deluded people are frightening. They are capable of anything. We have to do something about them. It is that kind of people who would be capable of dropping a nuclear bomb. Like communism, religious fanaticism serves the heuristic function of explaining terrorism.

The terrorist is always the "enemy." The trick is to locate him in the category of the most terrifying traditional enemy—that one which the public is accustomed to think of as the barbarous and primitive outsider. The enemy of legend and history books. The bloodthirsty invader of our collective imagination and individual nightmares. The moslem moorish turkish invader of Europe dark mysterious turban wearing merciless scimitar wielding head cutting

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33. See, e.g., Malcom Gray, *Kiev's Cult of the Doom, Near-Hysteria Grips Devotees as They Await the End of the World*, MACLEAN'S, Nov. 22, 1993, at 32; Larry B. Stammer, *Study Points to Religious Revival in Russia*, L.A. TIMES, Dec. 25, 1993, at B5.

34. See, e.g., Raymond Bonner, *Playing Dominoes in Central Asia*, N.Y. TIMES, Nov. 7, 1993, at D4; Thomas L. Friedman, *U.S. to Counter Iran in Central Asia*, N.Y. TIMES, Feb. 6, 1992, at A3; Tom Hundley, *Islam Surges as Communism Recedes*, CHI. TRIB., Mar. 1, 1992, at C1; Gilliam Tett, *Soviet Mullahs Who Threaten Gorbachev*, FIN. TIMES, Aug. 17, 1991, at 1.

harem keeping mosque going minaret prayer chanting magician christian hating jerusalem prophanator holy war maker of the past has made a remarkable comeback.

Images of "Islamic fundamentalists" as terrorist fanatics who have infiltrated our country in order to organize secret conspiracies of destruction and terror, have come to dominate the public imagination in the United States. So closely have the ideas of terrorism and Islamic fundamentalism come to be connected, that the U.S. State Department in its *Patterns of Global Terrorism 1992*, issues the following disclaimer:

Adverse mention in this report of individual members of any political, social, ethnic, religious, or national group is not meant to imply that all members of that group are terrorists. Indeed, terrorists represent a small minority of dedicated, often fanatical, individuals in most such groups. It is that small group—and their actions—that is the subject of this report.<sup>35</sup>

Although the disclaimer does not specify what group or groups it is concerned about, it is not difficult to conclude that the reference is to Islamic fundamentalists and perhaps to Muslims more broadly. Meretricious though it is, this disclaimer is belied by the images in the text itself. The report, which purports to provide a global picture of international terrorism in 1992, includes eight photographs, three on the cover and five within the text.<sup>36</sup> Of the eight photographs, six depict persons or incidents related to Islamic fundamentalism. Of these six, three depict men wearing turbans and robes.

The image of terrorists as Arabic fanatics is ubiquitous in the media. So ubiquitous is this image, that *The New Yorker* magazine, in its July 26, 1993 issue, depicts on its cover four children playing at the beach. In multicultural harmony, three children—one black, one hispanic, one caucasian—build an elaborate sand castle (reminiscent of New York) from which two towers loom prominently. The children gape in horror as a fourth child, wearing Arab headdress and dark glasses, leaps onto the towers. The illustration carries the caption "Castles in the Sand" in the credits.<sup>37</sup> There is no mention of terrorism in the magazine. The illustration needs, it seems, no explanation—it stands alone.

The focus on terrorists wearing turbans or Arab headdress in the popular press is evocative. The American public has been presented with image after image of the blind Sheik Omar Abdel

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35. STATE DEPT REPORT, *supra* note 4, at v.

36. *Id.* at 16.

37. David Mazzucchelli, *Castles in the Sand*, NEW YORKER, July 26, 1993, cover.

Rahman.<sup>38</sup> Although Rahman has, to date, not been accused of any violent act—only of inciting others to violence or of condoning such violence—he has become the familiar face of terrorism:

The striking thing about Sheik Omar Abdel Rahman as he was led by guards into Federal court in Manhattan last week was not that he seemed a strange and exotic figure in his clerical robes, dark glasses and red and white turban. Rather, it was that he was entirely familiar—the one of the fifteen defendants accused in a terrorist conspiracy on American soil who was immediately recognizable.<sup>39</sup>

It is his turbanned and robed blindness that is immediately familiar. More recognizable than the other fourteen accused co-conspirators because he is bedecked with the attributes of his frightening “otherness”—the turban and the robe of the Islamic Jihad; the turban and the robe of the cruel Ottoman; the turban and the robe of that other fanatic nemesis of the West—the Ayatholla Khomeini. Sheik Rahman is frequently described as blind, self-exiled,<sup>40</sup> and smiling.<sup>41</sup> These are further attributes of his fanaticism. The blindness of terrorist violence is visibly conveyed. Sheik Rahman’s exile is rendered suspicious. He was not forced out, but, we are told, chose to leave. He is thus not a refugee, but a fugitive. The Sheik’s capacity to continue smiling, in the face of the horrors of which he is accused, suggests that he is “crazy” and/or morally degenerate and, therefore, dangerous.

### C. *The Terrorist as Nomad and the Fear of Porous Borders*

In describing and displaying these fanatical terrorists we slip, not quite consciously, into familiar images that reinforce our sense of endangerment. Thus, shortly after the World Trade Center bomb-

38. A striking example is in *Time* for the week of March 15, 1993, which carried a photograph of the blind Sheik juxtaposed with that of David Koresh, leader of the Branch Davidian “sect” besieged in Waco, Texas. At that time, the “blind Sheik” had not been directly connected to the World Trade Center bombing. *In the Name of God: What Happens When Believers Embrace the Dark Side of Faith*, TIME, Mar. 15, 1993, cover.

39. Richard Bernstein, *American Law Tackles Terrorism*, N.Y. TIMES, Aug. 29, 1993, § 4, at 1.

40. Mary B.W. Tabor, *Specter of Terror: U.S. Indicts Egyptian Cleric as Head of Group Plotting “War of Urban Terrorism,”* N.Y. TIMES, Aug. 26, 1993, at A1.

41. The Sheik is often portrayed as “still” smiling. See, e.g., Behar, *supra* note 13, at 56 (photo of Sheik smiling); *Why Not Just Deport Him?*, TIME, July 5, 1993, at 25 (showing photo accompanied by caption “The Sheik still smiles at a press conference after arrest of followers”).

ing, Mohammed A. Salameh, "an illegal immigrant from Jordan,"<sup>42</sup> was described in *Time* magazine as "a slight, dark-skinned man about 5 ft. 8 in. tall, with close-cropped dark hair and beard, dressed in sneakers and a light gray sweat suit that billowed around him."<sup>43</sup> It is hard to imagine what kind of sweat suit the author is describing, until we realize that, when he uses the term "billowing," the author has simply imagined Salameh to be wearing traditional Arab robes—billowing in the wind. It is an image not of Salameh, but from *Lawrence of Arabia*. Commenting on Salameh's frequent changes of residence, and induced by the same familiar exotic, an FBI investigator is quoted as saying: "One search is leading to another. . . . *But these are nomadic people*. While it may lie in the culture, they bounce from place to place. All different people sleep there, stay a short time, then leave."<sup>44</sup> The reference to nomads seems strangely appropriate. His constant moving is attributed not to his status as an illegal immigrant, trying to keep one step ahead of the authorities, but to a cultural predisposition for shiftiness. Salameh (like all Arabs) is imagined as a nomad. He moves in and out. Borders are permeable to nomads. Like terrorists, nomads are migratory. They have no fixed abode. Familiar as dangerous and destructive of stability and rationality, these nomadic people threaten us with their potentiality for disruption.<sup>45</sup>

Western distrust of nomads has a long history. International law has, in fact, from its inception been wary of nomads—it has not known what to do about them. In discussing the European nations' appropriation of the New World, Emmerich de Vattel, in 1758, posed the question "[whether] a Nation may lawfully occupy any part of the vast territory in which are to be found *wandering tribes* whose small number cannot populate the whole country."<sup>46</sup> He responded that

[the wandering tribes'] uncertain occupancy of these vast regions cannot be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon

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42. George J. Church, *A Case of Dumb Luck*, *TIME*, Mar. 15, 1993, at 26.

43. *Id.* at 28 (emphasis added).

44. Ralph Blumenthal, *Suspect in Trade Center Bombing Now Seen as Part of Conspiracy*, *N.Y. TIMES*, Mar. 9, 1993, at A1 (emphasis added).

45. See GILLES DELEUZE & FELIX GUATTARI, *THOUSAND PLATEAUX: CAPITALISM AND SCHIZOPHRENIA* 351-423 (Brian Massumi trans., 2d ed., Univ. of Minn. Press 1987) (1980), for a fascinating psychoanalytic discussion of nomads as the quintessential war-machine and their relationship to the state.

46. 3 EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* § 209, at 85 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (emphasis added).

lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.<sup>47</sup>

And, we might add, delineate proper boundaries in them. Henry Wheaton, writing in 1836, states that "[t]he peculiar subjects of international law are Nations, and those political societies of men called States. A State is 'also distinguishable from an unsettled horde of wandering savages not yet formed into civil society.'<sup>48</sup> Referring to the European nations' colonization of the African continent, J.B. de Martens Ferrao, in 1890, states: "Natural rights are born with man . . . [b]ut international rights cannot be recognized in those [savage] tribes, for want of the capacity for government. . . . Being nomads or nearly such, they have no international character."<sup>49</sup> In modern international law, the formal requirements for statehood include a "permanent population," as well as a "defined territory."<sup>50</sup> Nevertheless, it has now been established that a significant number of "permanent inhabitants" will suffice "even if large numbers of nomads move in and out of the territory."<sup>51</sup> Thus, the presence of nomads will not make it impossible for an entity to become an internationally recognized State, so long as there are at least some settled, permanent inhabitants. Given the difficulties international law has traditionally had with nomads, it is not surprising that Palestinians function so satisfyingly and convincingly as terrorists. Sharing in the nomadic quality the West ascribes to all Arabs, Palestinians are also "stateless," and therefore outside of the state system of international law—not recognizable by international law. Stateless and nomadic, they are imagined as highly mobile and invisible. Their mobility and invisibility, in turn, making them effective terrorists.<sup>52</sup>

47. *Id.*

48. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 16–17 (Richard H. Dana ed., 8th ed., Boston, Little, Brown & Co. 1866) (1836) (emphasis added).

49. JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 145–46 (Fred B. Rothman & Co. 1982) (1894) (quoting J.B. DE MARTENS FERRAO, L'AFRIQUE: LA QUESTION SOULEVEE DERNIEREMENT ENTRE L'ANGLETERRE ET LE PORTUGAL CONSIDEREE DU POINT DE VUE DU DROIT INTERNATIONAL 6 (Lisbonne 1890)).

50. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986).

51. *Id.* § 201 cmt. c. For a modern day attempt by international law to "fit" nomads, who do not respect state boundaries, into the framework of international law, see the Western Sahara, (advisory opinion) 1975 I.C.J. 12, 38–49 (Oct. 16).

52. "Whatever they do, we can expect terrorists to remain mobile, able to strike targets throughout the world." Brian Jenkins, *Terrorists at the Threshold*, in LEGAL AND OTHER ASPECTS OF TERRORISM 80 (E. Nobles Lowe & Harry D. Shangel eds., 1979).

Terrorists are usually imagined as coming in from the outside, as being foreign<sup>53</sup> or foreign bred<sup>54</sup>—they are foreign, their tactics are foreign, their ideology is foreign, or all three.<sup>55</sup> Terrorists, like nomads, make us worry about our boundaries. They make visible our vulnerability to incursion. Sheik Omar Abdel Rahman is said to have “slipped into the United States in 1990.”<sup>56</sup> “Borders are porous; potential terrorists can slip in easily.”<sup>57</sup> “[T]he porousness of American borders appear[s] to pose extremely high obstacles to an effective anti-terrorism effort. As in Europe, the [terrorist] groups in the United States appear to be made up mostly of recent immigrants and a few naturalized American citizens bent on making the country suffer . . . .”<sup>58</sup> “It is a tale that highlights the startling ease with which undocumented immigrants are able to enter New York.”<sup>59</sup> The solution is that we have to police our borders better, make our frontiers less porous, and keep “them” out.<sup>60</sup> Not surprisingly, shortly after the World Trade Center bombing, a bill seeking to amend the U.S. Immigration and Nationality Act was introduced in Congress. The amendment’s purpose was, *inter alia*, to strengthen border security and defend against acts of international terrorism.<sup>61</sup>

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53. One British author’s curious claim is that “[a]ssassination and terrorism are foreign or Irish, both in popular belief and in practice. If we have a native mainstream of violence it is in occasional rebellions.” Hugh Fraser, *The Tyranny of Terrorism*, in *INTERNATIONAL TERRORISM*, *supra* note 3, at 29.

54. “[I]n recent years there has been an increase in this country of militant groups who have adopted foreign-bred terrorist tactics as their method of focusing attention on various political issues.” Robert L. Rabe, *Crisis Management of Terrorist Incidents*, in *LEGAL AND OTHER ASPECTS OF TERRORISM*, *supra* note 52, at 39.

55. An interesting recent example of the drive to externalise the “terrorist” was given by Israeli Prime Minister Yitzhak Rabin, following the Hebron Massacre. Referring to extremist Jewish settlers in the occupied territories he stated: “You are not part of the community of Israel . . . You are a foreign implant. You are an errant weed. Sensible Judaism spits you out. You placed yourself outside the wall of Jewish law.” Clyde Haberman, *Rabin Urges the Palestinians to Put Aside Anger and Talk*, N.Y. TIMES, Mar. 1, 1994, at A1.

56. Alison Mitchell, *Bombing Suspect Flown to U.S. After Egypt Puts Him on Plane*, N.Y. TIMES, Mar. 25, 1993, at A1, B7.

57. George J. Church, *The Terror Within*, TIME, July 5, 1993, at 22, 27.

58. Bernstein, *supra* note 39, § 4, at 1.

59. Ralph Blumenthal, *Fitting the Pieces of Terrorism*, N.Y. TIMES, Apr. 26, 1993, at B1.

60. Germany’s elite—and now controversial—counter-terrorist police squad, GSG-9, is known in German as “Grenzschutzgruppe,” which translates to “border protection group.” Stephen Kinzer, *Police Scandal Is Giving Germans an Inside Look at War Against Terrorists*, N.Y. TIMES, Aug. 13, 1993, at A1.

61. S. 1351, 103d Cong., 1st Sess. §§ 701–704, 803, 805 (1993).

*D. The Terrorist as Outlaw*

Terrorists, we are told repeatedly, do not respect the law. "Terrorist do not play by the rules."<sup>62</sup> Now, this is hardly a surprising proposition. Yet, it seems that the authors are claiming more, or something different than the notion that terrorists, like criminals do not respect the law. There is something special about the quality of the terrorist's "not respecting the law" that we are expected to grasp. The complaint is that the terrorist respects no law—not the criminal law, not moral law, not the law of peace, and not the law of war. The terrorist is understood to be flouting all of these sets of law simultaneously. Such a complaint is surprising—if only because it seems a logical impossibility. In our usual parlance, for instance, war and peace are mutually exclusive. We are either in a regime of peace, in which case we are held to the law of peace, or in a regime of war, in which case we are held to the law of war. Further, it seems that terrorists should either be thought of as acting within the scope of the criminal law, in which case they might be accused of violating criminal law, or they should be thought of as acting within the scope of "war and peace," in which case they might be accused of violating either the law of war or the law of peace. The choice between these two conceptions is important because it is critical to a determination of the status of the terrorist.

Surprisingly, the complaint is often stated predominantly in the form that terrorists do not respect the laws of war: "He has no moral restraints in the choice of his objectives, as he has none in his methods of warfare . . . . He respects no code of law which was ever established for war or peace."<sup>63</sup> "War, even civil war, is predictable in many ways. It occurs in the light of day and there is no mystery about the identity of the participants. Even in civil war there are certain rules, whereas the characteristic features of terrorism are anonymity and the violation of established norms."<sup>64</sup>

The recognition of the potential existence of a state of war requires recognition of at least two opposing factions—in international law, two states—each capable of adopting a stance of war against the other. By placing terrorists within the realm of "war or peace," charging them with violating the accepted norms of "war and peace," the authors appear to elevate them to the status of an

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62. Jenkins, *supra* note 52, at 49.

63. Benjamin Netanyahu, *Chairman's Opening Remarks*, in *INTERNATIONAL TERRORISM*, *supra* note 3, at 5.

64. WALTER LAQUEUR, *THE AGE OF TERRORISM* 3 (1987).

enemy state army; precisely the status they would claim for themselves. Two logical problems then arise. First, as mentioned above, terrorists (equated with nomads) are often understood to be stateless. Borders cannot contain them—and without borders, there is no state. Second, if terrorists are to be held accountable to the law of war, they must also be entitled to treatment in accordance with the laws of war—such as international rules for the treatment of prisoners of war. This is precisely what a number of terrorist groups have claimed—and the very thing that is consistently denied them because they are terrorists.<sup>65</sup> Only legitimate combatants are entitled to be treated in accordance with the laws of war, and terrorists, it is emphatically repeated, are not legitimate combatants.<sup>66</sup> Only by holding firmly to such a position can it be maintained unambiguously and authoritatively that unlike war—for which there is a long tradition of “just war” theories—terrorism can never be justified. The paradoxical result is that terrorists are charged with being violators of the laws of war and, yet, are treated as being outside of the scope of the law of war since they can never be recognized as legitimate combatants. One practical result is that, rather than treating captured terrorists as prisoners of war or as war criminals, terrorists are usually treated as if they were common criminals—albeit of a very bad and dangerous kind.<sup>67</sup>

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65. Various “terrorist” groups have claimed the right to be accorded “prisoner of war” status upon capture. They include the ANC in South Africa, see John D. Battersby, *4 Rebels Accused in South Africa Refuse to Take Part in Their Trial*, N.Y. TIMES, Feb. 2, 1989, at 12, the Puerto Rican FALN in the U.S., see E.R. Shipp, *Puerto Rican Nationalists Guilty of Plotting Bombings in Chicago*, N.Y. TIMES, Aug. 6, 1985, at 16, the Red Army Faction (formerly the Baader-Meinhof Gang) in West Germany, see *Police Search For Terrorists*, U.P.I., Feb. 2, 1985, available in LEXIS, Nexis Library, UPI File, and perhaps most famously the IRA in Northern Ireland and Britain, see *Jury Rules on Maze Hunger Deaths*, U.P.I., Dec. 1, 1981, available in LEXIS, Nexis Library, UPI File. Indeed, in 1987, U.S. President Ronald Reagan, moved against ratifying part of a proposed major revision to the 1949 Geneva Convention on the Treatment of Combatants and War Victims because of the fear that it could be interpreted as support for the claims of “terrorist” groups to be combatants and prisoners of war. *Reagan Said Against Ratifying Treaty on Treatment of Captives*, REUTERS, Feb. 16, 1987, available in LEXIS, Nexis Library, Omni File.

66. When British Prime Minister Margaret Thatcher referred to the shooting of the former governor of Gibraltar as part of the IRA’s campaign of “guerrilla warfare,” she was castigated by politicians and the media for her careless choice of words. In referring to them as engaged in a campaign of “guerrilla warfare” she was thought to have accorded the IRA a degree of legitimacy and violated the long standing British policy of denying the IRA’s claim that they are engaged in armed struggle. Richard Ford, *Dismay in Ulster at Ill-Chosen Words*, THE TIMES (London), Sept. 20, 1990, available in LEXIS, Nexis Library, Omni File.

67. Of course in some instances “terrorists” are held outside the law in a literal sense. Such was the case, for instance, when Lebanese captives were held by Israel:

The next striking thing about the above passages, is the authors' apparent faith and reliance on the assumption that everyone else observes the laws of war. Such an assumption in our day and age seems at best naive. Laqueur's facile comment that "[w]ar, even civil war, is predictable in many ways . . . [and] occurs in the light of day and there is no mystery about the identity of the participants"<sup>68</sup> seems to refer to a bygone and probably legendary age when gentlemen warriors on horseback fought battles against one another. It has, in any case, little relevance to the modern wartime reality of satellite spying and stealth bombers. The problem, of course, is that unless everyone else is taken to observe the laws of war, the criticism of terrorists as norm violators ceases to carry much force or conviction.

One effect of claiming that terrorists are not legitimate combatants—that they are engaged not in war but in terrorism—is that it liberates the state from having to itself abide by the laws of war in its "war against terrorism." The strange claim that terrorists do not abide by the law of war, provides additional ammunition to the equally strange assertion that they do not deserve to be given the benefit of law. Not only does this allow the state to ignore the law of war in its dealing with terrorists, it morally relieves the state from its duty to treat terrorists in accordance with normal rights and entitlements recognized by municipal law or international law. By placing himself voluntarily outside of the law, the terrorist loses his claim on the law.

The starting point of terrorism literature is that terrorism is an impermissible and abhorrent kind of violence—a violence qualitatively different from, and worse than, normal, everyday violence or the perhaps equally familiar violence of war. Because the devastating effects of war can hardly be denied, the distinction cannot be based on a comparison of the body counts of war and the body counts of terrorism. As we have seen, one way in which terrorism authors seek to distinguish the two is by focussing on rules. War, they insist, is played by the rules. Terrorism, on the other hand, is played by no rules—not even the rules of war. The problem is that terrorism, by definition, can never be played by the rules of war. If it could, it would be war, not terrorism. At least, the authors seem to imply, there are rules to war (even though they may sometimes be violated), whereas there are no rules to terrorism at all. War is

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"[Israel] calls them 'terrorists' but has neither put them on trial nor given them rights as prisoners of war." *The Hostage Trade: Beware of the Dangers*, THE ECONOMIST, Aug. 17, 1991, at 13.

68. LAQUEUR, *supra* note 64, at 3.

ennobled by its amenability to rules. While we are familiar with the concept of a "Law of War," we cannot imagine a "Law of Terrorism." What would we mean by a violation of the Law of Terrorism? Terrorism is by its very nature (and/or by definition) incapable of rules.<sup>69</sup> It is not amenable to rules. It is precisely the absence of rules that defines Terrorism. This is its disruptive potential. This is its destructive potential. The existence of terrorism is a challenge to law. "Practically, [terrorism's] effect is to destroy the law itself—the only thing which stands between humanity and a state of permanent terror."<sup>70</sup> In combatting terrorism, the state is defending law; saving humanity from lapsing back into a state of disorder—into its primitive pre-law past. As we reflect on terrorism, we realize that what is terrifying about terrorists is not that they are law violators, but that they have situated themselves in that impossible place, located somewhere outside of law.

Although the terrorist is imagined as having chosen self-exile, outside the realm of law, he is also paradoxically the perfect subject of international law. Numerous international conventions and resolutions have been adopted condemning specific acts of terrorism.<sup>71</sup> Like the pirate of yore, the terrorist is imagined to be the enemy of all (civilized) mankind and therefore subject to capture by any state and subject to every state's jurisdiction.<sup>72</sup>

"Terrorists deserve no quarter. Terrorists should have no place to hide. We must stamp out terrorist activity . . . These people are not worth the time of day . . . They're not even people, doing what they're doing."<sup>73</sup>

69. "[T]errorists . . . by their very nature ridicule the notion of law." Netanyahu, *supra* note 32, at 48.

70. Hugh Frazer, *The Tyranny of Terrorism*, in INTERNATIONAL TERRORISM, *supra* note 3, at 23.

71. See, e.g., Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, Organization of American States, art. 1, 27 U.S.T. 3957, 15 I.L.M. 1384 (adopting general standards for punishment and prevention of terrorist acts); G.A. Res. 61, U.N. GAOR 40th Sess., Supp. No. 53, U.N. Doc. A/40/1003 (1985).

72. International law, historically, took extreme measures to combat piracy: The judicial power of every State extends to the punishment of certain offenses against the law of nations, among which is piracy.

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Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals.

WHEATON, *supra* note 48, §§ 122, 124, at 192–93.

73. Bernard Gwertzman, *U.S. Backs Raid, Regrets Deaths*, N.Y. TIMES, Nov. 25,

According to this perspective, the terrorist has chosen to become an "other," to act as an "other." The state is therefore justified in treating him as an "other." He is to blame. Counter-terrorism measures are the result of his own actions. The state is blameless. Indeed, at the very moment when the state is applying repressive anti-terrorism measures, the state is imagined to be the innocent victim of terrorism. The state is forced to act contrary to its own inclinations by the force and fundamental nature of the terrorist challenge. It is the state which is thereby harmed—the state which is being induced to commit suicide.<sup>74</sup>

The claim that terrorism causes authoritarianism—that it causes democracies to commit suicide—is popular in terrorist literature.<sup>75</sup> Such a claim posits a direct cause-effect relationship, one very different from the lesser claim that the emergence of a terrorist group is often followed by the enactment of repressive measures or by a military coup. The use of direct cause-effect rhetoric has two interesting effects: first, it has a tendency to obscure that the direct victims of the repressive measures and/or of the military dictatorship are the "terrorists"; second, and perhaps most important, it leads us to by-pass any notion of state responsibility. It tends to make less visible the authoritarian streak that seems to be latent within even the most democratic of democratic societies. Hence, the use of direct cause-effect rhetoric deflects the question of how it is that democratic society after democratic society has so easily fallen prey to these authoritarian strains. It allows us to avoid having to explore the structure of our democratic institutions to see how they might be flawed. It allows us to ignore the contradictory tendencies of democratic ideals and authoritarian urges that seem to be at the core of our societies, our institutions, and our selves. "Increased surveillance and repression may become an irresistible temptation to governments trying to protect their own citizens against violence by a small minority."<sup>76</sup>

Ironically then, the rhetorical transformation of terrorists into frightening, alien outlaws leads inexorably towards a justification of

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1985, at A1 (citing George Shultz, U.S. Secretary of State).

74. "In short, the seventh, and deadliest, sin of terrorism is its attempt to induce civilization to commit suicide." Paul Johnson, *The Seven Deadly Sins of Terrorism*, in *INTERNATIONAL TERRORISM*, *supra* note 3, at 21.

75. "Such violent tactics . . . often can cause democratic governments to overreact by 'tightening security.' . . . The continued escalation of terrorism in Northern Ireland forced the British Parliament to abolish the government of Northern Ireland and to impose direct rule and implement emergency powers." POLAND, *supra* note 22, at 1-2 (emphasis added).

76. Jenkins, *supra* note 52, at 83.

repression by the state, and to excuse authoritarian regimes. In fact, repressive measures short of military dictatorship are virtually recommended by the literature on terrorism, not only because the terrorist has put himself voluntarily outside the protection of the law, but because the failure to use all possible means to combat terrorism is to put society at risk of falling either into chaos or military dictatorship.

The effectiveness of the process of transformation of the terrorist into a terrifying "other," to whom all sorts of violence can legitimately be done, can be gauged only by looking at examples of national anti-terrorist legislations, other legal counter-terrorism measures, and publicly accepted (or implicitly endorsed) extra-legal, counter-terrorism measures. Such an examination is beyond the scope of the present paper. It should be noted, however, that the very application of such measures to combat terrorism assists the transformational process—both in the public mind and in the mind of those charged with carrying out the measures. The whole process is, in other words, self-fulfilling prophecy. To be legitimately available to State violence is to be the very opposite of those of us to whom the State owes a duty of protection. When violence is applied by the State, the terrorist's "other" nature is reaffirmed and confirmed. The terrorist never seems so alien or different as at the moment the violence is applied, and that violence is "legitimate."

#### IV. TERRORISM AND INTERNATIONAL LAW:

##### A CONCLUSION

In thinking about, writing about, or reacting to terrorism and terrorists, we seem to be inexorably drawn to the idea that they are somehow always external to us—somehow always other. They are different. Their difference is manifested as violence. We think of them as boundary crossers—boundary violators. They cross international boundaries. They are uncontainable. They violate the accepted boundary between normal and extra-normal violence. They violate the boundary between appropriate and inappropriate victims. They cross the boundary between acceptable challenge to the system and the unacceptable desire to annihilate it. They cross the boundary between civilization and the barbarous primitive.

By deploying the kind of violence we name "terrorism," the terrorist reveals himself to be other. It is the violence that identifies the perpetrator as other. Once he is identified through his violence as a terrorist, and hence as other, we proceed to hunt for further evidence of otherness. Every indicia of "real" foreignness is then welcomed because it reaffirms our belief that the terrorist really is by definition other. He could not be one of us. The more we can

identify the terrorist with our traditional enemy, the easier it becomes to explain the violence. We are not implicated in the violence, but (of course) we have to respond.

It is because the terrorist is so unremittingly other—so suspiciously foreign—that it seems appropriate that terrorism be treated as a matter for international law. It is almost impossible to treat terrorism as if it were a purely domestic matter.<sup>77</sup> We cannot domesticate terrorism precisely because we need to expel it—to put it back outside where it belongs. The closer we come to admitting that terrorism is an internal domestic problem, the harder it becomes to make a clean break. No longer can we expel what we should never have let in; rather, we will have to extirpate—cut out of ourselves—that which we wish to remove, in order to be rid of it.

From the perspective of the western liberal democracies, it is more acceptable to imagine the terrorist as being fundamentally other, fundamentally alien. Not only does the otherness of the terrorist serve to explain his “violence,” but it is his “otherness,” manifested as violence, which calls forth the violence of the state. The state is not doing violence to itself when it combats terrorism. Instead, it is doing violence to a foreign body which is seeking to destroy the state from within. When it combats terrorism, the state is doing what the state is supposed to do—protecting itself and its citizens from invasion or destruction by forces from without. We are more comfortable with an image of removing a cancerous growth than with an image of self-mutilation.

Placing terrorism as a subject of international law serves a further function. From its earliest manifestations, international law has been self-consciously a universalizing project. In the early days, both peoples and states were understood as being subject to an unchanging and unchangeable law of nature. By extension, all states and peoples were therefore assumed to hold to broadly identical standards and norms. International law, or the law of nations, was viewed as nothing but the codification of the law of nature as it governed inter-sovereign relations. From that perspective, it was self-evident that all states and peoples could be held to the same standards of conduct, since the law of nature was both universal and knowable. Sovereign consent was relevant only to what might be

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77. See, e.g., Douglas Jehl, *Dispute Slows Bid to Track Fugitive*, N.Y. TIMES, July 23, 1993, at A1, concerning a dispute between the Federal Bureau of Investigations and the State Department over which of these agencies should provide the reward of two million dollars offered by the Government for information leading to the capture of a missing suspect in the World Trade Center Bombing. Ultimately it was resolved that the State Department was responsible for making the money available.

thought of as second level rules.

Although international law no longer relies exclusively on a universal law of nature to explain or justify its general applicability, it is still very much concerned with setting universal standards through, in particular, the mechanism of consensus. By framing terrorism as an international rather than a domestic concern, western liberal democracies gain the advantage of establishing universal opprobrium. If terrorism is recognized as an international offense, then, in naming a particular violence terroristic, the labelling state can claim to be making a universal rather than a particularistic claim. The terrorist is thus not only other to the state, but to the international collectivity. Indeed, the labelling state can then imagine the terrorist to be outside of all legitimate boundaries—not just outlaw, but international outlaw. By extension, the labelling state can also label non-conforming states, which support the activity labelled as terrorism, as deviant and illegitimate. Since there is consensus, the norm is universal and failure to conform to a universal norm is a violation of the violator's own norm. The violating state is thus outlaw unto itself.

In this, as in other respects, terrorism turns our categories topsy turvy. Terrorists, whom we imagine as nomadic boundary crossers, do not simply violate boundaries. Rather, terrorism serves to define those boundaries. The boundaries, that is, are drawn in relation to terrorism. We recognize where war ends and terrorism begins only in relation to terrorism. Once we have recognized that the terrorist defines the boundary, the boundary itself is brought into question. Why this line and not some other? How do we distinguish between us and them? The boundary shifts in the wake of these nomads. We cannot hold on to it. Like the terrorists, it is unstable and transient. Yet, we cannot accept a world without clear boundaries, so we continuously redraw them, and place the nomads, these terrorists, firmly outside that perimeter—in a place we cannot really imagine or define—and we patrol that perimeter to make it real.