Looking for Law in the Fog of War

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I. Introduction

Law does not truly apply to war because war is, by its very nature, the abandonment of law. Man turns to war when law fails. War has long been viewed as the antithesis of law. Cicero wrote in 52 B.C., in Pro Milone, *Silent enim leges inter arma* (In times of war the laws fall silent).¹

Nations once fought primarily over territories and resources.² Today, combatants more often fight over ideology. Societies that war upon one another, or more commonly these days, war within themselves, primarily seek to replace one system of law with another.³ How then, may law govern this process?

Nations sustain good relations among themselves, however, through strained politeness and a web of white lies. Referring to the current conflict between America and Islamic extremists as the Global War on Terrorism (GWOT) exemplifies such politeness.⁴ Replacing the enemy’s name with that of a tactic serves to smooth the ruffled feathers of some of America’s Muslim allies.

The international laws regarding war are a fiction of a similar nature. Armed conflict does not lend itself to rules, yet there is an abundance of law governing conflict. The various nations of the world follow these laws only as long as the benefits of doing so outweigh the negative consequences.

The Holmesian view of law through the prism of the bad man best illuminates the real law governing states at war.⁵ Legal realists would argue that what the states do and get away with is the actual law, rather than treaties and statutes.⁶ The law of war is best viewed as a code of manners. It hardly takes much imagination to envision scenarios in which the law would be ignored. A nation would likely break any rule it had to in order to save one of its cities from imminent obliteration by a nuclear device. Laws governing warfare among nations are not backed by credible police or jails. The international courts have no power unless a nation lends

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them its own police or military.\textsuperscript{7}

Defining the real law of war has only grown more complicated in the last few decades as the nature of warfare has changed dramatically. Wars between states are rarely seen now.\textsuperscript{8} Intrastate conflicts (civil war) and stateless terrorists characterize most modern warfare.\textsuperscript{9} Applying law to war has always been difficult. When governments attempt to apply the Geneva Convention and similar treaties to situations outside their design, such as conflict with stateless actors, difficulty can lead to danger.\textsuperscript{10} Even Holmes might struggle to define law in terms of today’s wars, when the bad man is often suicidal and stateless, motivated by religious beliefs not bound by earthly restraints. Consequences do not concern this man. How do we fit such an enemy to the law, the law to this enemy? The argument is not simply theoretical. At least ten prisoners released from Guantanamo, largely because of legal concerns, have been recaptured fighting in the field.\textsuperscript{11} Information, many argue illegally obtained, has proven critical in leading to Osama bin Laden.\textsuperscript{12} Real danger lies in trying to apply outmoded rules of warfare to the war on terrorism.

The loss of bin Laden and so many other leaders may result in a permanent degrading of al Queda’s influence and capabilities, but terrorism will remain a common tactic worldwide.\textsuperscript{13} Stateless actors from Chechnya to Nigeria use it to destabilize governments and strike fear among the populace.\textsuperscript{14} Governments struggle with how to respond. America should lead the way with a new legal approach to the fight, rather than relying on outdated rules.

The American legal realist, Karl Llewellyn, one of the principal authors of the Uniform Commercial Code (UCC), once had a novel idea– make the rules governing commercial transactions reflect the actual practice of businesses.\textsuperscript{15} When legal questions arise today in regards to commercial contracts and other business transactions, the comprehensive UCC generally has the answers.\textsuperscript{16} Such an idea could be extended to the rules governing warfare against stateless actors. Make the rules reflect the actual practice of combating terrorists. Consolidate these rules into a single act and have Congress pass it into law: The Uniform Terror Fighting Act (UTFA).

Whenever a question or controversy arose in dealing with a terrorist, lawyers could simply consult the UTFA to chart a proper course of action, much as lawyers consult the UCC to resolve conflicts in trade and business transactions. The UTFA would apply to combating stateless aggressors only. It would therefore not be subject to the international laws regarding

\textsuperscript{9} PELTON, supra note 3.
\textsuperscript{10} Hoffman, supra note 8.
\textsuperscript{12} Tony Harnden,, Osama bin Laden killed: CIA admits waterboarding yielded vital information, THE LONDON TELEGRAPH (May 4, 2011), www.telegraph.co.uk/new/worldnews.
\textsuperscript{13} PELTON, supra note 3, at 61-62.
\textsuperscript{14} Id.
\textsuperscript{15} BIX, supra note 6, at 197.
\textsuperscript{16} Kevin Mackey, The Triumph of Legal Realism, 23, (Michigan State University College of Law, King Scholar Senior Seminar Papers 2004), www.law.msu.edu.
combat between states. The UTFA would have to comply with the Constitution and other American law such as the Uniform Code of Military Justice. Ideally, a team of legal scholars would craft the UTFA. The UTFA would not be restricted to Al Qaeda as was the Authorization for Use of Military Force Against Terrorists Act, however, but would simply apply to any stateless actors who take up arms against the United States, or aid and abet those who do. 17

This paper will:
(1) explore the mounting confusion and uncertainty about the legality of our actions in the war on terror;
(2) give a brief history of how various societies have historically perpetuated the fiction of warfare being governed by paper laws;
(3) look at the real law of war, through the lens of legal realism;
(4) discuss how warfare has changed, rendering it even less compatible with written law than before;
(5) discuss concerns about morality, savagery, and truth in relation to warfare without rules;
(6) explain how adoption of the UTFA would clarify and codify the real law of war, which is the cost benefit analysis of the participants;
(7) elaborate on the dangers of continuing the fiction of the validity of the current laws of war;
(8) explore what the UTFA might look like.

II. The Legal Questions

The legal questions surrounding the war on terrorism are too numerous and complex to probe in depth in this paper. A quick overview, however, will illustrate the need for a UTFA to clarify these issues. A UTFA would help fill the legal vacuum that those from the political left have tried to fill with peacetime criminal law. 18 Legal questions regarding the war on terrorism have focused largely on three issues: enemies taken prisoner, the killing of enemies, and the torture of enemies. The UTFA will address these issues.

Handling prisoners taken since the attacks of September 11, 2001, has provided the most confusion. Legal questions have arisen regarding how long to hold prisoners without filing charges and where to hold them, as well as what rules of evidence to use in prosecuting them. The UTFA would first define who constitutes an enemy combatant. Next, the UTFA would set a minimum length of pretrial captivity. The UTFA would also establish where captives may be held and how to conduct trials.

Killing enemies has been a less complex issue, but one that still needs some clarification. Osama bin Laden’s death at the hands of Navy SEALS in Pakistan on May 2, 2011, raised two principal questions. The legality of bin Laden’s actual shooting was questioned. 19 Sending the SEALS team into Pakistani territory without first notifying the Pakistanis raised the other question. 20 Existing United States military rules of engagement handle the first issue well

18 Hoffman, supra note 8, at 25.
20 Id.
enough. United States soldiers may kill enemies without first giving them a warning or chance to surrender.\textsuperscript{21} Rules of engagement also allow chasing an enemy across borders.\textsuperscript{22} The UTFA could help further clarify what circumstances allow the killing of enemies, and what protocols need to be followed in killing or capturing enemies in territory outside active theatres of war.

The legal uncertainties regarding killing grew more complex on September 30, 2011, when a drone killed \textit{al Awlaki} in Yemen.\textsuperscript{23} \textit{Al Awlaki} was a United States citizen.\textsuperscript{24} The UTFA would need to resolve issues regarding killing and holding American citizens who take up arms against the United States, or who aid and abet those who do.

Finally, the issue of torture has sown legal confusion in the United States. Controversy has raged over whether the simulated drowning technique known as waterboarding constitutes torture. The Bush administration argued it did not.\textsuperscript{25} The Obama administration argued that it did.\textsuperscript{26} Revelations by the CIA that information obtained by waterboarding \textit{Khali Sheikh Mohammed} helped lead to \textit{Osama bin Laden} in Pakistan has further roiled the issue.\textsuperscript{27} The UTFA would need to clarify what questioning methods are permitted and under what circumstances.

III. The Paper Laws of War

Attempting to apply law to warfare is an old endeavor, despite the observation of Cicero. The ancient Greeks prohibited executing prisoners or attacking civilians.\textsuperscript{28} The Old Testament has numerous references to laws governing warfare. Deuteronomy instructs the Israelites not to needlessly destroy trees that may provide food for the Israelites themselves, and not to sell as slaves female prisoners who were forced to marry them.\textsuperscript{29}

In the seventh century Abu Bakr, the first caliph after Mohammed’s death, established laws of war to govern his Muslim armies.\textsuperscript{30} These included dictates preventing the mutilation of corpses and the killing of women, children, or old men.\textsuperscript{31} The laws also mandated the sparing of trees, especially “those which are fruitful”.\textsuperscript{32} Muslims developed these early laws into an


\textsuperscript{22} \textit{Id}.


\textsuperscript{24} \textit{Id}.

\textsuperscript{25} Harnden, supra note 11.

\textsuperscript{26} \textit{Id}.

\textsuperscript{27} \textit{Id}.


\textsuperscript{29} Deuteronomy 20:19-20.


\textsuperscript{31} \textit{Id}.

\textsuperscript{32} \textit{Id}.
extensive code their armies followed during the Crusades. Western civilization continued to view the application of law to war as an important endeavor, reflected in Hugo Grotius’s *On the Law of War and Peace*, published in 1625.

In modern times, the Hague Conventions of 1899 and 1907 were significant attempts to codify the rules of war. The Geneva Convention of 1949 is now the international standard bearer of these rules. The United States military has its own legal code, The United States Uniform Code of Military Justice. Additionally, the United States will often pass a law clarifying the right to fight in specific instances, such as the Authorization for Use of Military Force Against Terrorists Act, which Congress passed on September 18, 2001, to authorize the military response to al Qaeda’s September 11, 2001, attacks.

With such an abundant history of laws governing war, it would appear at first glance that maybe war and law are not as incompatible as they seem. Although laws on paper regarding war have rarely been in short supply, nations typically follow these laws only when it is convenient to do so. This raises the question—why have them?

A quick answer is that the written laws reflect convenience. Contrary examples exist, but more typically the goal of any warring party is not the wholesale extermination of the enemy. The warring party’s own best interest is rarely to kill everyone or lay waste to the entire area. The laws of war may appear on the surface to demonstrate some underlying sense of morality or compassion, but in fact they more accurately reflect reasons of a practical nature.

When two factions fight over land (and the trees, crops, animals, waterways within it) neither side benefits in capturing a territory only to have it completely ruined in the process. If a faction wants to expand its ideology, indiscriminately killing the people it seeks to convert does not help accomplish that goal. The dead have no ideology. The rule of the ancient Greeks that prohibits executing prisoners may appear compassionate at first glance. The rule benefits Greek armies; it does not demonstrate compassion. Prisoners are useful. They can provide information, free labor, or ransom. It is to the conqueror’s detriment to dispose of a valuable resource such as captives, unless there are no means of feeding or transporting them.

The ban on the use of chemical weapons in warfare serves as another example. At first glance, these laws would seem an obvious instance of nations trying to codify some level of morality or compassion among themselves, almost as if to say, we will not gas one another like insects. Poison gas was a feared weapon in World War I and after the war its use was banned. It was later deemed ineffective as a weapon, however, because of its unpredictability. Once released, the wind could just as likely blow it back over the attacker’s positions. Perhaps the growing reluctance of commanders in the field to use such an unpredictable weapon helped ease passage of the laws banning it.

33 Id.
36 Hoffman, *supra* note 8, at 27.
37 Uniform Code of Military Justice, 10 U.S.C. Chapter 47.
40 Id. at 17
41 Id.
42 Id.
It is difficult to argue biological weapons were banned for moral reasons when a similar blanket ban on nuclear weapons does not exist. It makes little sense to argue dousing a city with mustard gas is less humane than vaporizing it with a nuclear device. Laws on war do not reflect morality, they reflect practicality. The United States maintains stockpiles of biological weapons, which also indicates their use or continued existence hinges more on practicality than morality or law.\(^{43}\) The deterrent value of such weapons typically outweighs any legal concerns.

IV. Legal Realism and the Real Laws of War

Legal realism best exposes the shortcomings of the paper laws on war. A weighing of consequences, not feelings of humanity or morals based on empathy, gives rise to these laws. Where they do not fit with modern warfare they should not be seen as inviolable dictates etched in stone. The Geneva Convention is not some god that must be placated before going into battle.

Legal realism is an umbrella term for a hodgepodge of disparate theories with the unifying belief that humans create law, making it susceptible to all man’s attendant imperfections.\(^{44}\) Legal realists would save notions of a higher law or order for the church, not the courtroom.\(^{45}\) Man alone is the source of his laws.\(^{46}\)

Legal realists did not bind themselves into any orthodox set of ideas or beliefs, but three essential tenets link most legal realists.\(^{47}\) The first is a belief in the indeterminacy of law.\(^{48}\) Not only is the actual law not written in stone, realists such as Roscoe Pound argued it was not necessarily found in books either.\(^{49}\) Oliver Wendell Holmes wrote “if you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.”\(^{50}\) This is nowhere more aptly applied than to the laws of war. Paper laws dictate this or that, but real life consequences will quickly show a nation where the true law lies.

Iraq suffered consequences when it invaded Kuwait in the 1991 Gulf War. Multiple nations, led by the United States, assembled armies against Iraq and quickly booted Iraqi troops from Kuwait, killing between twenty and twenty five thousand Iraqi soldiers in the process.\(^{51}\) In 2008, when Russia invaded Georgia, the consequences were little more than finger wagging from the United States, Georgia’s nominal ally.\(^{52}\) The two actions were markedly similar in some respects; a friend of the United States invaded by a stronger neighbor under drummed up


\(^{44}\) BIX, *supra* note 6, at 189.


\(^{47}\) BIX, *supra* note 6, at 189-190.

\(^{48}\) *Id.* at 193.

\(^{49}\) *Id.* at 190.

\(^{50}\) Holmes, *supra* note 5, at 458.


pretenses. Iraq suffered serious harm quantifiable in treasure and blood. Russia arguably suffered nothing. Why such divergent results, if the same international law governed both actions? The United States was willing to take on Iraq, a puny adversary, over Kuwait, our oil rich friend. The United States was not willing to fight Russia, a far more formidable nuclear-armed foe, over inconsequential Georgia.

Holmes had this to say about the written law, “It is to make the prophecies easier to be remembered and understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form.” Holmes and other realists viewed the written law as a prophecy of future legal outcomes, not as an inviolable dictate of what will or must happen. They viewed the true law as indeterminate. Arguably some (the Russians) read these prophecies better than others (Saddam Hussein).

A second popular tenet among legal realists is a belief in the importance of interdisciplinary approaches to determining the law. Legal realists believed one need not limit oneself to consulting statutes in order to determine the law in a given case. Various factors such as the mood of the people or the state of the economy influence whether or not to go to war more than written statutes or treaties. Consulting old maxims such as “might makes right” can arguably better predict an outcome than a treaty. Written law does not bind stronger countries such as Russia in the same way as weaker nations like Iraq, regardless of what diplomats and ambassadors have signed their names to.

A third important tenet is a belief in legal instrumentalism. Legal realists believe in using the law as a tool to achieve various goals and interests, such as keeping the peace. Paper laws prohibit, therefore, attacking your neighbor without justification. Such laws might seem to prevent bloodshed, but they could lead to more if strictly adhered to. If a treaty dictates one nation must come to the aid of another, then a broader conflagration may occur, such as World War I. In the case of the Russian invasion of Georgia, the best use of the law was not using it at all, except, of course, for the Georgians. Attempts by the United States to interfere could have led to a wider, more dangerous conflict.

Legal realists do not simply claim that the law is indeterminate and then go home, satisfied with the legal vacuum they have revealed. The goal of legal realism is not an anarchist sweeping away of order. One of the points of legal realism is to tease out the real law, in order to find out what one can expect will or will not actually happen in a given situation. Legal realists simply point out that judges decide cases based on more than a simple consultation of

53 Holmes, supra note 5, at 457.
54 Id.
55 Id.
56 BIX, supra note 6, 197.
57 HART, supra note 7, at 204.
59 BIX, supra note 6, at 198.
60 Id.
62 THE MAINSTREAM OF CIVILIZATION, supra note 2, at 839-842.
63 Holmes, supra note 5, at 458.
64 Id.
 statutes and lawbooks. Whatever the final decision, defend your ally or not, throw the man in jail or not, that is the law on a given issue. Everything else, the treaties, the statutes, the rules, constitute signs pointing the way, nothing more. The tracks of a deer are not the hunter’s dinner; they only lead him to it.

In the case of Russia’s invasion of Georgia, one might consider the members of the United Nations Security Council as the judges. With Russia itself a member of the Security Council, one might argue you need not have hired a lawyer to predict the outcome. When trying to determine the law regarding war, it seems apparent that one had better do more than simply read the Geneva Conventions.

V. How War has Changed

Determining the law governing warfare has always been a complex calculation. Changes in warfare in the last half century have added layers of complication to this task. War has changed drastically since the end of World War II. The authors of the Geneva Conventions had conventional state-on-state warfare in mind. Since World War II, such conflict has grown increasingly rare. A primary reason for the decline in large scale combat is the technological advancement of weaponry. Albert Einstein once said, “I know not with what weapons World War III will be fought with, but World War IV will be fought with sticks and stones.” The United States and Soviet Union never allowed the Cold War to escalate into a real war because of MAD – Mutually Assured Destruction. Each nation’s nuclear arsenal and advanced launch capabilities meant that a full scale conflict would obliterate civilization. At the end of World War II the bombing of Nagasaki and Hiroshima gave the whole world a sobering glimpse of future wars. The old Muslim and Greek edicts to protect trees during battle come to mind; an updated version might say protect the world.

The world ending terror of nuclear weapons gives them their ironic power as peacemakers. No paper treaty has ever kept the peace as well as the warheads resting in their silos. Nuclear weapons and other technology have rendered obsolete the type of war the Geneva Conventions sought to govern. Developed nations with large, technological militaries, such as China, Russia and the United States, simply cannot afford to fight one another, even without nuclear weapons. Modern technology in the form of aircraft, drones, submarines and missiles have simply made war too costly to contemplate. It might be possible for one developed nation to subdue another, but not without utterly destroying it, and nearly bleeding oneself to death in the process.

There is another consideration. The various economies of the developed world have become permanently intertwined. As Robert Pelton points out in The World’s Most Dangerous

\footnotesize\textsuperscript{65 Id.}

\footnotesize\textsuperscript{66 KARL LLEWELLYN, THE BRAMBLE BUSH, 5 (Oxford University Press 11th ed., 2008).}

\footnotesize\textsuperscript{67 PELTON, supra note 3, at 38.}

\footnotesize\textsuperscript{68 Hoffman, supra note 9, at 20}

\footnotesize\textsuperscript{69 PELTON, supra note 3, at 38.}

\footnotesize\textsuperscript{70 Posner, supra note 30, at 13.}

\footnotesize\textsuperscript{71 ALBERT EINSTEIN, THE NEW QUOTABLE EINSTEIN 173 (Alice Calaprice, ed., Princeton University Press, 2005).}

\footnotesize\textsuperscript{72 Posner, supra note 30, at 13.}

\footnotesize\textsuperscript{73 Id.}
Places, “The world is too interconnected by commerce to allow a real slam-bang, roll the tanks, toe to toe, do or die war.”74 We are all each other’s customers now. Wars between giants would be too expensive in too many ways.

Two types of peoples generally start wars now. The first are those who have nothing to lose. The second are possessed by ideology or religion that transcends common sense and the survival instinct. Few things are more dangerous than the two combined.

Modern warfare has accordingly morphed into two incarnations. The developing world plays host to the first, low-grade drawn-out conflicts with rebel factions.75 Terrorism is the other. Terrorism has always, but the Palestinians showed the world how to put it to great effect in their struggle against the Israelis.76 The Six Days War demonstrated that the Israelis had developed a military force capable of overwhelming its neighbors.77 Palestinians and their Arab state allies realized they could not accomplish anything against Israel on the open battlefield.

They struck the Israelis the only way they could, with terrorism. The developed world noticed this new tactic. Seemingly invincible nations had a chink in their armor. Revolutionaries and rebels worldwide also took notice. Enough bombs and harassment might exhaust and exasperate a nation’s population into compromising and moving in the desired direction: out of Afghanistan, Chechnya, Lebanon, Somalia, or the Gaza Strip. The tactic does not always work, but it remains the only option for small rebel forces or organizations.

A terrifying reality lurks within modern war. A few years after World War II the world realized that the entire planet was attached to a nuclear fuse. The suicide bomber and Islamic fascism combined with the spread of nuclear weaponry makes for a stark reality. There are an increasing number of fuses, and the world is filled with madmen who would light them. The prospect of Mutually Assured Destruction only stops those with something to lose.

VI. What the Code Might Look Like

What might a law attempting to fill the legal vacuum left by the rules of war look like? It should reflect the cost/benefit analysis which governs United States decision-making regarding stateless aggressors. In dealing with bin Laden, Anwar al Awlaki, and Khalid Sheik Mohammed, the Geneva Convention has served as little more than an inconvenient maze we must pass to reach our goals. It is disingenuous at best to pretend otherwise. The United States engaged in waterboarding because the benefits outweighed the costs. A drone vaporized a United States citizen because the benefit outweighed any legal or political costs. The charade needs to cease that the actions of the United States always fit within the parameters of laws written in 1949. The resulting confusion is dangerous and divisive. The Bush Administration waterboarded prisoners to extract information and claimed it was legal.78 The Obama Administration denounced waterboarding as illegal torture, but then used the extracted information to conduct a raid into the territory of our ally.79 A few months later, a drone killed a United States citizen not known to

74 PELTON, supra note 3, at 38.
75 Id. at 39.
76 Id. at 594-596.
77 Id. at 597.
79 Harnden, supra note 11.
have directly planned any attacks. All of these actions have been deemed legal, depending on which legal expert is asked.

A legal realism view does recognize all of these actions as legal. If lawyers prophesy what judges do, and written statutes and laws are only records we study to improve our prophecies, the law is basically what the final judge decides. The American people judge these cases of war, not the commander in chief. Our outrage or lack of it dictates the final decision. Bush ordered Khalid Sheik Mohhamed waterboarded because Bush likely knew the American people would not riot if he did so. Waterboarding only cost Bush grumbling from the political left, weighed against the benefit of getting the name he wanted. Public opinion remained favorable enough on tough questioning that Bush felt comfortable saying in an interview, “I’d do it again.” Obama gave the order to kill a United States citizen with a drone on September 30, 2011, because a cost/benefit analysis dictated that he do it. The benefits of killing al Awlaki were certain: the loss of a master propagandist and rising figure in one of al Qaeda’s more dangerous offshoots. The costs have been some very minor grumbling indeed, mainly from Ron Paul. Had Obama allowed either bin Laden or al Awlaki to escape because of legal concerns, the public uproar would likely have ensured Obama had no chance of reelection, not to mention the obvious consequences of allowing such dangerous men to live. The war on terrorism is governed by a simple formula of cost/benefit analysis. The UTFA should reflect this.

Would mayhem ensue? No. On the surface nothing would change, because all militaries operate on this basis and always have. Some of the dangers seeded by these legal uncertainties, however, would be halted before they develop any further.

The UTFA should address five principle areas. Part one should consist of definitions, such as who qualifies as a terrorist or stateless enemy combatant. This should include rules on dealing with the citizen terrorist. Citizens who take up arms, or aid and abet enemies, could have citizenship revoked after a hearing. Once the United States has revoked citizenship, that person can qualify as a stateless enemy combatant.

Part two should address torture. Methods that could realistically be accepted by the American people might include waterboarding, sleep deprivation, and use of drugs. The American public would likely not accept anything more stringent. Part two should establish the parameters of when such rough questioning would be appropriate. The ticking bomb scenario or high ranking captives privy to important plans or names would qualify. There would be little need or stomach for torturing hapless Pashtun pressed into service by the Taliban and captured in the field by United States forces.

The third section would deal with captivity. Issues such as who may be held, for how long, and where need resolving. The rights of captive enemy combatants need determining. The third section should establish a pretrial timetable, and rules of evidence. The third section should also resolve whether military tribunals will try captives or regular federal courts.

80 Leger, supra note 19.
81 Holmes, supra note 5, at 457.
The fourth section would address assassination. Several executive orders, the most recent being Ronald Reagan’s, prohibit killing political leaders.84 The UTFA should clarify that stateless terrorists are not political leaders, and therefore will receive no protection from any law banning assassination.

The fifth and shortest section should address where we may fight. The short answer is anywhere. While the Pakistani may howl in outrage, their anger counts for little when weighed against targets as highly valued as bin Laden. The military might of the United States will be severely limited if the there are areas of the globe in which militants may seek sanctuary from it.

The UTFA will not please everyone. Foreign policy hawks will say it does not go far enough. Those of a more dovish bent will insist the Middle Ages have returned. If everyone is a little unhappy with the UTFA, then it has probably been well crafted. If no one is confused by it, that is an even stronger indication of its worth.

VII. Concerns Regarding Morality, Savagery, and Truth

The Lie that Laws of War Keep us from Savagery

Violence makes some innately uncomfortable, others less so. To deal with those others, societies require someone willing to offer violence in return. As George Orwell wrote in his 1945 essay, Notes on Nationalism, “Those who abjure violence can only do so because others are committing violence on their behalf.”85 In order to ensure that danger is met with danger in kind, the United States military and the Central Intelligence Agency dirties their hands, aided by lawyers writing briefs that justify waterboarding and scientists fashioning aerial robots that strike from afar. Those who most abhor violence most need these others able to meet it in kind. A state’s most fundamental duty is protecting its citizenry. States and laws were created originally for protection from our fellow humans.86

Many Americans remain uncomfortable if not hostile to the idea waterboarding, shooting unarmed enemies, or holding prisoners captive indefinitely. There is nothing inherently wrong with such discomfort, except that sometimes, as Justice Scalia wrote in his dissent in Boumediene v Bush, it “will almost certainly cause more Americans to be killed.”87 A law legalizing assassination or waterboarding may evoke some outrage. George Orwell responded to similar concerns in a 1941 essay by writing:

The choice before human beings, is not, as a rule, between good and evil but between two evils. You can let the Nazis rule the world: that is evil; or you can overthrow them by war, which is also evil. There is no other choice before you, and whichever you choose you will not come out with clean hands.88

88 Orwell, No, Not One, ADELPHI (Oct, 1941), available at
A common concern is that without rules against things like assassination or waterboarding, savagery will ensue. Rules maintain discipline, tamp down fear and bloodlust, and keep troops in the field functioning on some coherent level, but they do not prevent savagery. They cannot sterilize war. War is the large scale killing and dismembering of people. General Sherman famously declined to whitewash the reality of warfare in a speech he gave in Columbus, Ohio in 1880, when he said, “There is many a boy here today who looks on war as all glory, but, boys, it is all hell.”

Rules may hasten or prolong it or make the process more or less orderly, but they do not take away the killing and the wounding. Rules that pretend to bring a civility to war for morality’s sake are disingenuous. For those who loathe violence regardless of its direction or reasoning, the fact that killing must take place in order to stop those for whom violence presents no dilemma at all, remains a troubling quandary. As George Orwell wrote about the violence required to destroy the Nazis, “We have become too civilized to grasp the obvious. For the truth is very simple. To survive you often have to fight, and to fight you have to dirty yourself. War is evil, and it is often the lesser evil.”

The discomfort with violence of any sort, even violence used to stop violence, leads to many strange rules and moments in war. Even conflicts such as World War II produced much consternation among pacifists. Few wars have produced such a rich mine of the absurd as the Vietnam War.

In his 1979 film, Apocalypse Now, Francis Ford Coppola gets at the heart of the hypocrisy of attempting to be kind in war. Like Orwell, he recognizes that there is no clean way to do this. In one scene involving a boat captain’s ridiculous attempts to help a woman injured by his crew’s rampage, Lieutenant Willard, the protagonist, interrupts the captain’s quoting from the rulebook by executing the woman with a pistol shot to the head, ending her misery and the crew’s problem. Later he remarked, “It was a way we had over here of living with ourselves. We’d cut them in half with a machine gun and then give them a band aid. It was a lie.”

In one of the film’s final scenes, Willard’s alter ego, Colonel Kurtz, records his thoughts on the rules of war in Vietnam, saying, “They train young men to drop fire on people, but their commanders won’t allow them to write f*** on their airplane, because… it’s obscene.”

The rules may have been intended to help some of those getting their hands dirty feel better about it, but they do nothing for the dead. The men closest to the action were the first to recognize that the rules only benefitted those far from the jungles and fighting.

Coppola set his film, based on Joseph Conrad’s Heart of Darkness, in Vietnam. Trying to keep one’s conscience clean was no less a difficult task during Belgium’s long colonial occupation of the Congo, the setting of Conrad’s novel. In the novel, Kurtz is an ivory trader, http://en.wikiquotes.org/wiki/George_Orwell.

89 THE OXFORD DICTIONARY OF QUOTATIONS, supra note 1, at 506.
89 APOCALYPSE NOW (Paramount Pictures 1979).
92 Id.
93 Id.
94 See generally E.D. Morel, The Black Man’s Burden, Chapter 9 (population of native Congolese reduced from estimated 25 million to 8 million by depredations of Belgian colonials), available at
as unhinged as Coppola’s AWOL American commander. For both men, the attempts by the societies they come from at whitewashing violence do not protect them from it. The efforts at hand cleaning, as Orwell might call it, rather serve to backlight the horror for these men, rather than dim it. In Conrad’s novel, the dying Kurtz wants only the justice of truth, the only remaining good he can see being honesty. The lying to hide the ugliness of Belgium’s actions in the jungle has become for Kurtz an even greater sin. Marlowe (the protagonist/narrator), however, cannot allow the revealing of the truth Kurtz craves. The human impulse to hide the darkness within us leads him to more lies, greater absurdities yet, in what he tells Kurtz’s widow. Marlowe does not tell her that Kurtz succumbed to the depraved instincts that lurk within us. “Hadn’t he said he only wanted justice? But I couldn’t. I could not tell her. It would have been too dark – too dark altogether.”

Sometimes we must obscure the truth. It is a way we have of living with ourselves. When this becomes dangerous, however, we must face reality and do what must be done in order to survive. Laws of war cannot prevent savagery because war is organized savagery. The law of consequences and no other governs the levels of violence in a war.

Becoming Like Them

In America the warning, we will become like them, is often heard in opposition to this or that policy. Hackneyed clichés such as, “if we do X, the terrorists have won”, or talking in grandiose terms about how they want to take away our freedoms, demonstrate a fundamental misunderstanding of the goals of al Qaeda and its offshoots.

Al Qaeda’s original complaint against the United States stemmed from the presence of American troops in Saudi Arabia, there for the purpose of engaging Saddam Hussein in the first Persian Gulf War. Bin Laden had offered his own men to fight Saddam but the Saudis rebuffed him. This initial insult and concern dovetailed nicely with al Qaeda’s ultimate goal of trying to re-establish the old caliphate under sharia and eventually expand it. These ideas of al Qaeda do not merely reflect some fanatical minority within the Islamic world, but in fact reflect a deep rooted despair among Muslims living under poor and repressive dictatorships. The Muslim world’s pains are accentuated by a longing for its former greatness. From the viewpoint of al Qaeda, such greatness could never return with an American presence in the region, often allied with the various Arab dictatorships.

http://www.archive.org/stream/blackmansburden00moreuoft/blackmansburden00moreuoft_djvu.txt.

95 JOSEPH CONRAD, THE HEART OF DARKNESS, 141 (The Perfection Form Company Terrapin ed. 1980).

96 Schmitt, supra note 4, at 4.


100 Id.

101 Laden, supra note 99.
Al Qaeda finds American culture and freedom abhorrent, but that is not their reason for jihad.\textsuperscript{102} Al Qaeda did not declare war against the United States because of the freedoms we enjoy.\textsuperscript{103} Al Qaeda wanted all governments in the region of the historical caliphate overthrown and replaced with sharia law, and they needed America out of Arabia, North Africa, and Central Asia to accomplish this.\textsuperscript{104} If the United States maintains a presence and supports democracy in the region, then the terrorists will lose. Being honest and realistic about what guides our military decisions does not mean they have won.

Measuring Savagery

Only the laws of consequences should measure savagery in warfare, not morality or paper rules. Morality should only influence the use of violence by this simple equation—increase it when fewer deaths will result, decrease it when the reverse is true.

Trying to avoid all civilian deaths can lead to more. Militaries avoid needless brutality because it has bad consequences, but sometimes being brutal can have good consequences.\textsuperscript{105} The United States should divorce morality from it. The misguided and tender notion that all violence is anathema to morality should not bind American military policy. This does not mean that we need to descend to Old Testament style gratuitous butchery of women and children.\textsuperscript{106} It is not difficult to envision, however, situations in which killing one man will save many more. Moral values that preclude killing under any circumstance reveal some inner need for pacifism or groveling subjugation unrecognizable as morals in the Iliad, Old Testament, or other ancient founts of Western Civilization.

Sun Tzu wrote in his famous treatise on war, “There is no instance of a country having benefitted from prolonged warfare.”\textsuperscript{107} Undue caution in avoiding casualties can lengthen the conflict—resulting in more casualties. A ten year, drawn out war will ultimately produce more deaths, more inviolable hatred, and more future conflicts, than a blitzkrieg campaign.

The war in Afghanistan has festered ten years. It should not have lasted more than ten months. The United States certainly had the capability of killing Osama bin Laden and his cohorts while they were surrounded at Tora Bora.\textsuperscript{108} Our concerns about sustaining casualties and killing innocents prevented this.\textsuperscript{109} Such concerns and the laws born of them draw out conflicts that could otherwise end quickly. The result is more casualties sustained and more innocents killed. Added to the absurdity is the idea of nation building. Others before us have tried and failed to remake Afghanistan in their own images. The United States cannot change the character of the place, but it can convince Afghans that allowing al Qaeda, foreigners themselves, to use Afghan territory to launch war against other foreigners comes with too high a

\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{107} SUN TZU, THE ART OF WAR, II. Waging War, 6 (Lionel Giles trans.) available at http://classics.mit.edu/Tzu/artwar.html.
\textsuperscript{109} Id.
cost, an opinion not unknown amongst the Taliban.\textsuperscript{110}

American forces should have gone in fast and brutally, killed Osama bin Laden at Tora Bora, killed anyone who even looked like they might be in the way, and then left. This would have resulted in fewer dead. Ten years of nation building, of trying to have clean hands, has resulted in hundreds more American dead and billions of dollars wasted.\textsuperscript{111} The Taliban remain in the mountains.\textsuperscript{112} Navy SEALS killed Osama bin Laden in another country.\textsuperscript{113} Savagery used correctly stops further savagery. Writing rules that attempt to keep your conscience clean often result in a lot of empty boots and bank accounts. If the true measure of savagery is corpses, then our nation building campaign in Afghanistan has been very savage indeed.

While being overly cautious of civilian deaths can cause problems, having no such concern has practical drawbacks as well. Needless killing of civilians is usually done for one of two reasons. Either the killers seek to exterminate their enemy or they seek to terrorize them into submission. Genocide will almost never succeed because of the attention it will draw. Attempting it, as the Nazis and Hutus found out, will generally arouse some other force to stop you.

Typically then, the deliberate killing of civilians is done to terrorize. Terror can become rage, however. What happened in Iraq in 2006 very clearly demonstrated this.\textsuperscript{114} A low grade sectarian civil war raged in the power vacuum left by Saddam’s fall. Sunnis and Shiites killed each other by the dozen while the American occupiers tried to prevent the country from turning into a Rwanda. Al Qaeda egged on the conflict, hoping to turn Iraq into a bloody vortex that would suck in as many American lives as possible. Nominally a Sunni organization, al Qaeda attacks grew less and less discerning of its victims. Increasingly, the body count from al Qaeda attacks included Sunnis. Finally, the Sunni tribes had enough. No longer seeing the al Qaeda foreigners as allies against the Shiites and Americans, the Sunni turned against them. This awakening of the disenfranchised Sunni tamped down the violence in Iraq more than any efforts of the American forces.\textsuperscript{115} Al Qaeda in Iraq’s indiscriminate killing of civilians turned many Sunni Iraqis against it and its ideas. Al Qaeda in Iraq essentially defeated itself by engaging in needless savagery.

On a broader spectrum, one could point to the September 11, 2001, attacks themselves as overreaching by al Qaeda. Had the organization concentrated on consolidating its hold in Afghanistan with the Taliban against the Northern Alliance, the whole country would have likely soon been under their firm hold. From there, they could have concentrated on taking over a centrally weak, divided, and nuclear-armed Pakistan. Osama bin Laden made a grave miscalculation. The United States was indeed a threat to his plans, but by pulling off a too vicious attack too close to home, bin Laden pushed America past terror and into rage. Had he left


\textsuperscript{112} Id.

\textsuperscript{113} Khatchadourian, \textit{supra} note 21.

\textsuperscript{114} Q&A: \textit{Iraq’s Awakening Councils}, (BBC News Middle East, July 18, 2010), http://www.bbc.co.uk/news/world-middleeast.

\textsuperscript{115} Id.
the United States alone or continued with his small scale attacks in Africa and the Middle East, he might have produced some legitimate, why are we over there anyway, grumbling in Washington that could have led to the United States withdrawing from some areas. The needless killing of civilians will often produce terror at first. Killing too many may ignite a terrible rage.

Too much savagery can also have a quite different, but also problematic, outcome. Both sides may become so inured to the violence that it loses its shock value, and it simply becomes an endless game of brinkmanship that accomplishes nothing. The drug war in Mexico is a prime example. One cartel dumps five heads on the street; the next week another cartel dumps ten. The extreme violence of the cartels leads to the even more extreme Zetas. This, of course, leads to Zeta Killers. Typically this situation develops when all sides begin from a position of nothing to lose, everything to gain. The individual cartels will either control the drug trade in a given area, or they will, quite literally, die out. They engage in savagery, but the opposing cartel in the same position answers in kind. It becomes impossible for either side to frighten or intimidate the other. There comes a time when forty heads do not frighten any more than thirty.

The problem with the growing pile of heads, however, is the same in Rwanda or Mexico. It draws the attention of an outside force determined to stop it. In Rwanda, the Tutsis who survived the initial Hutu onslaught forced the Hutu militants into hiding in the Congo. In Mexico, the army now wages war against the cartels. More astute, long established criminal organizations know to keep violence at a low, acceptable level that does not draw attention. There are many drawbacks to unbridled savagery. Paper rules are not required to corral it.

VIII. Conclusion

It is not immoral for the United States to base its military decisions on a cost/benefit analysis. People use this formula to deal with death all the time. Automobiles worldwide kill half a million and injure another 15 million each year. We have decided we can live with that, because cars are helpful, and we are generally in a hurry. The same formula governs warfare and nearly everything we do.

The UTFA would simply and directly address the legal concerns and scenarios that have festered since September 11, 2001. Few things in war are more dangerous than uncertainty. Americans should not expect their troops to operate in a perpetual grey zone of damned if you do and damned if you don’t. Everyone who dirties their hands in order to protect the rest of us, from lawyers in the Office of Legal Counsel of the White House to Navy SEALs, deserves the protection and clarification a UTFA would provide. The exact provisions of a UTFA will certainly be the subject of vigorous debate. Whether or not we need it seems a foregone conclusion.

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118 Michael Webster, Mexico Federal Troops and police rush into Juarez to try and retake the city, AMERICAN CHRONICLE (March 5, 2009), www.americanchronicle.com/articles/view/9311.
119 PELTON, supra note 3, at 21.