

# American University Washington College of Law

---

From the Selected Works of Kenneth Anderson

---

2013

## Time Out of Joint

Kenneth Anderson



Available at: [https://works.bepress.com/kenneth\\_anderson/134/](https://works.bepress.com/kenneth_anderson/134/)

## Book Reviews

### Time Out of Joint

WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES. By Mary L. Dudziak. New York, New York: Oxford University Press, 2012. 221 pages. \$24.95.

Reviewed by Kenneth Anderson\*

The eminent legal historian Mary L. Dudziak has written a book on the meaning of time in war. The separation of the words as found in the title, *War* and *Time*, appears to be deliberate.<sup>1</sup> Dudziak's essay proposes to isolate and identify the effects of time as it passes during war—particularly when it is a long and indefinite time—upon a society and ultimately upon a culture. Time in the course of war is, in this telling, both jaws and tail of the dragon. It is both cause and effect, within and upon culture and society.<sup>2</sup>

This plays out in a special way for Americans, however. The American cultural conception of “time” in “war” seeks to confine war to a presumably temporary emergency.<sup>3</sup> Policies that would otherwise be legally, politically, socially, and culturally unacceptable—encroachments upon civil rights and liberties, most prominently, but also encroachments upon property rights, and regulatory changes of many kinds from taxation to price controls—become accepted as legitimate, extraordinary measures “for the duration.” An uncertain duration, perhaps, but a duration nonetheless assumed in a culturally deep way to be temporary.<sup>4</sup> The legitimacy of these war measures is accepted not just because they are claimed to be “necessary” in exceptional circumstances. They are also accepted because—independently—American cultural assumptions about the nature of war define them as not merely

---

\* Kenneth Anderson is Professor of Law, Washington College of Law, American University; Visiting Fellow of the Hoover Institution, Stanford University and member of its Task Force on National Security and Law; and nonresident senior fellow of the Brookings Institution. His most recent book, *Living with the UN: American Responsibilities and International Order*, was released by Hoover Institution Press in 2012.

1. See MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 3 (2012) (contrasting wartime as battletime with war “break[ing] time into pieces”).

2. See *id.* at 3–4 (characterizing wartime as “moving and changing society” and as resulting from “the way we think about war”).

3. *Id.* at 4.

4. *Id.* at 3–5.

necessary exceptions, but as temporally confined.<sup>5</sup> War in the American historical imagination is temporary.<sup>6</sup>

Necessity in war, then, is the hard master pressing exceptional measures upon society.<sup>7</sup> Time, and the assumed temporary nature of war as a state of exception, however, soothes their acceptance and helps establish their legitimacy by contrasting them with “normal” times.<sup>8</sup> Peace is defined as normality; it is defined as “normal” time.<sup>9</sup> And yet the rub: the passage of time in war, when it goes on and on (and particularly when it goes on without discernible end or even a way to define an end) tends to harden effects that were supposed to be temporary, confined to the emergency of war, into permanent changes in society and culture.<sup>10</sup> Time in war—the passage of time in war—is an independent social cause with its own social and cultural effects. We should therefore not be comforted quite so much as Americans are by the culturally reinforced belief that war, or at any rate, war’s effects upon the ordinary life of peacetime, is temporary.

In war, Dudziak writes, “regular time” is thought to be “interrupted, and time is out of order.”<sup>11</sup> The distinction between time “out of order,” established by the social condition of war, and regular time, leads to the category of “wartime,” which functions as both a passive historical descriptor and a causal cultural actor.<sup>12</sup> If the book’s title initially deliberately separates the two categories, this is in order to see that their subsequent combination in the text signals a distinct social category of its own, one that is established by the fact of war and the social perception of time, and which has independent effects upon society. At the large historical level, Dudziak notes, war slices “human experience into eras, creating a before and an after”—for example, antebellum and postbellum Civil War America, or the “postwar” after World War II.<sup>13</sup> Yet beyond merely being a way of descriptively periodizing history—a series of convenient before and after signposts—wartime also functions as an “abstract historical actor, moving and changing society and creating particular conditions of governance.”<sup>14</sup>

*War Time* is a fine and excellent book, an ambitious exercise in the genres of cultural critique and the history of ideas. The genre of cultural criticism is often characterized by the use of cultural materials that range across literature and the arts, high and pop culture, tropes of culture offered and interpreted to reveal some deeper perception of culture and society.

---

5. *Id.* at 4.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 4–5.

11. *Id.* at 3.

12. *Id.*

13. *Id.*

14. *Id.*

Dudziak is a distinguished *legal* historian, however, and what she brings specially to this enterprise are both the raw materials of law in time of war and peace and the analytic toolkit of legal academics. The profound contribution of *War Time* to the understanding of society and culture draws upon Dudziak's ability to bridge from the usual materials of cultural criticism and law and legal analysis, melding them into an analytic whole.

The reference to "governance" is fundamental. *War Time* seeks in part to deploy its two terms as abstract analytic categories for interpreting culture and in part to deploy a variety of cultural materials in interpreting those two terms. In that sense it is as much intellectual history as it is cultural criticism. Mostly, however, it seeks to apply those categories to America's experiences following 9/11: the decade of the war on terror.<sup>15</sup> The "governance" to which the book's introduction refers, in other words, is the governance of America *today*, in the time of the war on terror. Dudziak's aim is to illuminate the meaning and effect of wartime in the almost twelve years since 9/11.<sup>16</sup> The attacks by al-Qaeda on 9/11 created wartime for the United States as a social fact, but also as a contested legal categorization.<sup>17</sup> That fact had profound effects on governance.<sup>18</sup> The processes of governance in turn created new effects—triggering, for example, the independent powers of the Commander in Chief and precipitating the authorization of war by Congress and thus the legal ordering of "time out of order"<sup>19</sup>—which is to say, triggering the legal predicates for "wartime."<sup>20</sup>

Commentators across every intellectual discipline have sought since 2001 to illuminate precisely these questions regarding the war on terror and governance, of course. The arguments start with the question of whether it illuminates, obscures, or elides even to refer to the governance of the last eleven years as a "war" at all, let alone a "war on terror."<sup>21</sup> How to characterize the nature of the conflict, the enemy, and America's responses? These unsettled, still-bitter arguments illustrate a point often made by law professors to first-year law students, viz., how a question is framed will largely structure available responses. Were the 9/11 attacks acts of war, of criminality, or both?<sup>22</sup> What fundamental bodies of law apply to what parts

---

15. See *id.* at 7–9 (explaining that the book focuses on the American conception of wartime due to the central role played by the United States in twenty-first-century conflict in the context of the war on terror).

16. *Id.*

17. *Id.* at 103–05, 112–13.

18. See *id.* at 103–05 (describing the expanded executive powers that came with defining the post-9/11 era as an era of war).

19. *Id.* at 3, 103–05.

20. See *id.* (describing efforts to characterize the attacks of 9/11 as an act of war and the necessary response as one of wartime and war powers).

21. See *id.* at 112–14 (describing different approaches to defining the post-9/11 era in legal terms).

22. See John Yoo, *Ten Years Without an Attack*, WALL ST. J., Sept. 7, 2011, <http://online.wsj.com/article/SB10001424053111904332804576538443334834166.html> ("Looking back over the

of the “war” on terror? Where do these bodies of law apply—and where not? These debates have never stopped since 2001 and will not, since many of those arguing do not agree on first framing principles. The principal policies and laws at issue have varied since 9/11. Detention, interrogation, rendition, and Guantanamo dominated in the early years. Targeted killing and drone warfare increasingly dominate today.<sup>23</sup> But the framing categories remain as essential as ever.

More than ten years after 9/11, however, the core issue has gradually shifted from this framing category or that, or this particular policy or that, to a much more fundamental question. Whatever exactly the framing categories are, or whatever key national security policies in this “wartime” might be (keep Guantanamo open or close it, conduct military commissions or civilian trials, etc.), the deeper issue is this: Is the United States, as a society and government, finding “institutional settlement” for post-9/11 national security and law? Is it finding institutional stability of general principles, national security policies that are stable and accepted as broadly legitimate within American society over time, relatively independent and irrespective of particular, changing, and contingent political actors? Is the United States gradually achieving “institutional settlement” that will be stable across changes of presidential administration and political party, changes of party control of Congress, and changes in the composition of the federal courts, with regard to how the United States acts against transnational terrorism and terrorists, in fulfilling a broad public mandate (in language of the AUMF) to “prevent future acts of international terrorism”<sup>24</sup> against America?

\* \* \*

Institutional settlement is a category dependent upon time—stability of law, policy, and social and political legitimacy *across time*. Moreover, as *War Time* teaches us, the experience of the years since 9/11 reflects that the “time” built into institutional settlement is socially, legally, and politically conditioned.<sup>25</sup> Stability is partly a temporal concept, and institutions likewise. The “time” that establishes settlement has to be able to cross the boundaries of party and faction, and reflect internalized acceptance constituting legitimacy among a wide swath of America. Legitimacy is one

---

decade, the first clear lesson is the critical importance of Mr. Bush’s decision to consider the struggle with al Qaeda a war.”); see also DUDZIAK, *supra* note 1, at 113–14 (discussing the debate over whether the “war on terror” was a “war,” “emergency,” “crisis,” or something that fit no existing definition).

23. See generally Abraham D. Sofaer, *Targeted Killings from Many Perspectives*, 91 TEXAS L. REV. 925 (2013) (reviewing TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Claire Finkelstein et al. eds., 2012) and discussing the legal issues surrounding targeted killings in the war on terror).

24. Authorization for Use of Military Force Against September 11 Terrorists, 50 U.S.C. § 1541 (2006).

25. See DUDZIAK, *supra* note 1, at 23 (discussing the importance of wartime and peacetime in international law); *id.* at 17–19 (discussing social, cultural, and economic influences on the definition of time).

of the mechanisms by which governance brings time out of the disorder of wartime and back into longer run conceptions of order—temporally situating it in relation to the legitimacy of the political community over the long run, in peacetime and wartime. After two Bush Administrations, one Obama Administration and the start of another, institutional settlement in national security policy surrounding transnational terrorism carried out by nonstate actors is the fundamental issue. What makes it necessarily—not exclusively by any means, but certainly necessarily—intertwined with time as a social and cultural category is that time is conceptually part of stability and settlement.

Yet much of the analytic framing of the proper response to 9/11 has focused less on time than on *who*, as manifest in categories of legal definition with profound legal consequences: terrorist, enemy combatant, unprivileged belligerent, alien, citizen, and so on.<sup>26</sup> Much of the analytic framing of the proper response to 9/11, too, has focused on *place* and *space*: what is the “legal geography” of war, the geographic reach of the law of war, governance under a legal framing of “war,” the question of *where* war and its law governs and where it does not.<sup>27</sup> Law defined by “person” and “place” has in turn largely framed the received understanding of wartime in the war on terror. If, for example, one is picked up as an unprivileged belligerent and terrorist actor and alien in a certain place (for example, outside of United States territory), then the temporal consequences include the possibility of detention until the end of the conflict, whatever and however long that might mean—including forever.

*War Time* adds something distinctive to the analysis of these categories. Dudziak addresses time as its *own* category, and not merely as a set of temporal consequences of *other* framing governance and legal categories such as person and place (such as how long might a person be detained at Guantanamo).<sup>28</sup> This book teaches us that “time” in war has its own etiology and its own effects.<sup>29</sup> *War Time* seeks to give an account of time’s etiology and effects, and specifically its effects upon governance, in the war on

---

26. See *id.* at 121–22 (describing how the Supreme Court considered the defendant’s enemy combatant status and citizenship in determining due process rights in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Rasul v. Bush*, 542 U.S. 466 (2004)); *id.* at 101 (quoting President Bush’s characterization of the war on terror as “a new kind of war” that required a new kind of response based on the identity of the combatants).

27. See *id.* at 123 (explaining that geography was the “[m]ost important” consideration in determining whether the right of habeas corpus applied outside U.S. borders). For discussion of this perhaps obscure term, see Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a “Legal Geography of War,”* in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed., 2011), available at [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf).

28. See DUDZIAK, *supra* note 1, at 23 (labeling wartime as a “central category” in law and politics).

29. See *id.* at 23–26 (explaining that war time has “force in history, enhancing the power of government” and that this may sometimes restrain civil liberties).

terror.<sup>30</sup> This insight drives the attention the book merits from both legal scholars and readers across the fields of the humanities. *War Time* draws valuable attention to a category that is undertheorized in legal scholarship, and—specifically in the field of national security law and policy—it draws attention to the independent weight of time, as more than merely a collateral effect of other categories such as person and place. If the two rhetorical categories are necessity in war, on the one hand, and time in war, on the other, then nearly all of the arguments over today’s national security policies have run to necessity. Dudziak forces us to take account of the other, time and the independent significance of its passage.

The book is organized in a straightforward fashion. First, *War Time* offers a general framing of time and war as cultural categories.<sup>31</sup> Most of this draws upon traditional methods of cultural criticism, though parts of it reach to specifically legal materials. The book then turns to examine wartime as it was understood in two distinct, and distinctly different, wars—World War II and the Cold War.<sup>32</sup> These are compared and contrasted against each other with respect to the cultural perception of their boundaries, beginnings and endings, and the fixedness and permeability of those temporal markers.

Finally, Dudziak turns to 9/11 and its aftermath, applying insights drawn about time and war from these earlier wars to the war on terror.<sup>33</sup> The burden of her observations across all these wars is one of law and policy: she is always looking, in her choice of cultural tropes and objects of cultural analysis, toward their implications for the war on terror.<sup>34</sup> She aims to show, at bottom, that by comparison to past “wars”—both “real” wars, such as WWII, and the conceptually looser and somewhat metaphorical Cold War—the temporal framing of the war on terror is a legal and policy mistake.<sup>35</sup> It justifies legal and policy measures across time that are driven in part by a conceptual framing based on war, justifying “emergency” temporary

---

30. *Id.* at 3–4, 7.

31. *Id.* at 17, 21–26.

32. *Id.* at 47–48, 61–62 (discussing World War II); *id.* at 68–69, 91–92 (discussing the Cold War).

33. *See id.* at 101–02 (comparing President Bush’s response to 9/11 to the responses in World War II and the Cold War); *id.* at 115–16 (describing attempts to define “wartime” in the context of World War II and the Cold War); *id.* at 123 (comparing the legality of wartime detention post-9/11 to that during World War II).

34. *See id.* at 120–22 (describing the Supreme Court’s attempt at framing the post-9/11 world within the traditional paradigm offered by earlier wars); *id.* at 126–27 (noting that the post-9/11 Supreme Court took a deferential approach to national security questions much like it did during the Cold War).

35. *See id.* at 6–7 (asserting that the “narrative cohesion” of the understanding of wartime that was used in World War II and the Cold War does not apply to the war on terror in framing current law and politics issues).

measures<sup>36</sup> for a “conflict,” however, that lacks temporal specificity even in principle.<sup>37</sup>

Thus, the book argues by its conclusion, the war on terror, as law and policy, assumes without adequate justification notions of temporary measures that are not in fact so, and more than a decade onward after 9/11, quite evidently not so.<sup>38</sup> These temporary measures are what they have been in war after war in American history: restrictions on civil rights and liberties. They result in considerable part, *War Time* urges, from American cultural assumptions about war.<sup>39</sup> And, in turn, these cultural assumptions about war make (and depend upon) further cultural assumptions about time, and the meaning of time in war. But these assumptions are assumed largely without political or legal debate, no matter how much argument there is about specific emergency measures, simply because they are baked into our cultural concepts. As substratum assumptions shared by both American right and left in political and legal battles over national security policy, Dudziak argues by the book’s final chapters, they tacitly structure important terms of the argument, and lead to wrong, or at least unnecessary, policies and laws. To a considerable extent, they are less policies or laws than artifacts of our cultural constructs. Americans “disagreed deeply about this war,” Dudziak says in her conclusion, but “coalesced around the idea that the times were not normal times.”<sup>40</sup> If that is so, then the task of cultural criticism is to strip away the veil of “necessity” covering these measures that are, so to speak, soothed into acceptance by an underlying assumption that, it being wartime, these are “temporary” measures. This is the independent importance of time as a social and cultural category. A cultural framing of wartimes as “discrete and temporary occasions, destined to give way to a state of normality, undermines democratic vigilance.”<sup>41</sup>

This means, however, that *War Time* has a prescriptive character by its end, one that reaches to policy and law in America today. It seeks to draw out of its readings and decodings of cultural and historical materials an argument that is, in its largest reach, an argument from false consciousness. The essential prescription of *War Time* is a call to see whether, if false consciousness is stripped away—once “we understand that political actors help to generate a shared political time”—then are we freed to “see that we are not driven by our times, but instead shape them.”<sup>42</sup> And the book’s prescriptive call is to tell us that we need not “suspend our principles”—

---

36. *See id.* at 4 (explaining that exceptional wartime policies are justified by the assumption embedded in American legal and political thought that war is temporary).

37. *See id.* at 135 (explaining that the war on terror establishes a wartime with no boundaries and may be a perpetual war).

38. *Id.* at 135–36.

39. *Id.* at 4.

40. *Id.* at 135.

41. *Id.* at 136.

42. *Id.*



meaning our principles of civil rights and liberties, particularly—and that the stance ought to be resistance to incursions upon them predicated on the necessities of wartime.<sup>43</sup>

\* \* \*

This prescription involves large claims, both methodological and normative, and it is an equally large question whether they are justified. Have we actually “suspended our principles” or are they simply more capacious than Dudziak believes? Is national security governance today, nearly a dozen years post-9/11, actually driven by some logic of pure, even perhaps Schmittian, necessity?<sup>44</sup> Or have today’s national security responses long since moved beyond “necessitarian” logic, and are they simply part of a normal and ordinary movement back and forth within the eternal tradeoff between liberty and security, *both* of which are highly regarded values of American democracy?

And, finally, *how* would one answer those skeptical questions? Is the method of *War Time*—its admittedly intriguing mix of cultural critique and the history of ideas in culture and society—able to answer these deeply policy and political questions? The traditional skeptical response to a traditional argument from false consciousness, after all, is to ask on what criteria we should conclude that one’s—or, at the society-wide level of something broadly accepted and taken as legitimate, *everyone’s*—consciousness is “false.”<sup>45</sup> How are we supposed to know?

The methods of cultural criticism—the methods, for that matter, of criticism as a genre generally—depend upon assessments, readings, and interpretations of varied cultural materials from which one extracts insights into a larger phenomenon.<sup>46</sup> At the end of this Review, we will look at them from the outside, so to speak, of cultural criticism, and ask whether and to what extent their use is appropriate to the ultimately prescriptive policy agenda of *War Time*. We start in a different way, however—by accepting the methods of cultural critique used in the book and asking to what extent they seem persuasive on their own terms.

This is not, of course, something for which certainty can be offered. There is no QED, because whether one accepts either the relevance, or degree of relevance, of some cultural trope or practice as being able to illuminate a larger cultural or social order is inherently subjective. It depends heavily on inviting the audience to read both critically and sympathetically, with a certain amount of reasoning but a large amount of invitation to “see” that this phenomenon and the interpolation of it is revelatory in some fashion.

---

43. *Id.*

44. *See id.* at 115–17 (discussing German political theorist Carl Schmitt).

45. *See, e.g.,* Nadine Strossen, *A Feminist Critique of “The” Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1140 (1993) (criticizing antipornography arguments based on false consciousness on the grounds of making presumptions about what is in women’s best interests).

46. ARTHUR ASA BERGER, *CULTURAL CRITICISM: A PRIMER OF KEY CONCEPTS* 2–3 (1995).

It is the elaboration of insight rather than derivation, and depends upon apperception far more than deduction. This is not necessarily a familiar or congenial method for many in the legal academy who might encounter this book, as historian Samuel Moyn observed in his own *Lawfare* review of *War Time*.<sup>47</sup> The book, he correctly notes, devotes many pages to the “task of connecting students of the law and students of the humanities, who rarely share one another’s assumptions. Humanists will regard much of Dudziak’s text as an anecdotally rich and sprightly written reestablishment of the threshold claim that culture and society affect temporal categories and experience.”<sup>48</sup>

Intellectually important parts of the legal academy today, however, aspire in large part to social science as Ur-discipline and the methodological starting point for legal scholarship, not to the humanities (and perhaps least of all to the areas of the humanities that produce cultural criticism). The method might therefore be somewhat alien, perhaps off-putting, to some legal academics. Let’s set that external concern aside for now, and take the method on its own terms. How persuasive is Dudziak in her basic claims that WWII is the essence of a discretely bounded war in American imagination, with Pearl Harbor on the one end and VJ Day on the other (but not actually so, if one looks to its history); that the Cold War perturbed but did not ultimately supplant the American sense of war as discretely bounded, but instead seemingly took advantage of that bounded sense to establish temporally unbounded national security structures; and that the war on terror, whatever label is currently put on it, fundamentally misframes “it” as a matter of “temporary” time and temporality?<sup>49</sup>

Dudziak’s account of time and WWII acknowledges that Pearl Harbor looks to be a very concrete beginning and Japan’s final surrender in 1945 a very concrete end.<sup>50</sup> It is embedded that way in American historical imagination, and, she says, it is the modern experience that establishes the American sense of war as a state of exception, with measures of emergency justified in part by a belief that they will be temporary because war is essentially temporary. She says:

The effort to contain World War II within the Pearl Harbor-to-surrender frame reinforces traditional ideas about wartime. This matters because wartime is the occasion for the use of the federal government’s war powers. The assumption that wars are finite

---

47. Samuel Moyn, *War Time: An Idea, Its History, Its Consequences*, LAWFARE (May 24, 2012, 11:10 AM), <http://www.lawfareblog.com/2012/05/war-time-an-idea-its-history-its-consequences/>. Full disclosure: I serve as the Book Review Editor for *Lawfare* and commissioned Moyn’s review.

48. *Id.*

49. DUDZIAK, *supra* note 1, at 35–36, 68–72.

50. *Id.* at 35–36.

legitimizes the exercise of war powers by making it seem that their use is temporary.<sup>51</sup>

One might think that the book's comparison to the Cold War is made in order to suggest that this deeply reinforced cultural assumption by Americans over generations exposes a mismatch between the finite temporal expectations inherited from WWII and the facts of a Cold War of deeply uncertain duration. In part, Dudziak means just that, temporal mismatch—though she also devotes many pages to showing that WWII was far less bounded than the American imagination suggests.<sup>52</sup> Her evidence for this latter proposition is interesting because it raises questions about the methodology at issue here. She walks through a considerable body of material showing that, in fact, the boundaries between war and “not war” are porous, and that Roosevelt had gone most of that distance before Pearl Harbor—so much so that many senior advisors were privately relieved that the Japanese attack took the burden off of uniting the country around a much more diffuse and gradual involvement in the conflict.<sup>53</sup> As a matter of concrete history, this is quite correct and not disputed.

But particularly for evidence of the porousness of WWII at its close, she draws on materials that draw upon both cultural critique and law. She examines in detail the capital murder trial of John Lee, an inmate in the United States Army Disciplinary Barracks in 1949, accused of killing another inmate;<sup>54</sup> the key legal question was whether the court-martial was lawful under a (pre-Uniform Code of Military Justice) statute providing that no person could be tried for “murder or rape committed” within the territorial United States “in time of peace.”<sup>55</sup> Was it “wartime or peacetime”?<sup>56</sup> Dudziak's discussion is fascinating as regards this case and all its precedents stretching back to the U.S. Army's pursuit of Pancho Villa in Mexico.<sup>57</sup> The resolution involves the Supreme Court saying that there can be “war” for some purposes and “peace” for others; John Lee was released on those grounds.<sup>58</sup> One effect is to reinforce Dudziak's observation that even in WWII, the boundary between war and peace was more porous than simply the act of surrender and the formal cessation of hostilities.<sup>59</sup>

But even operating from within a method of cultural critique, I am not so persuaded that these legal cases offer much in the way of evidence about

---

51. *Id.* at 36.

52. *Id.* at 36–52.

53. *Id.* at 48–49.

54. *Id.* at 33–40.

55. *Id.* at 33.

56. *Id.*

57. *Id.* at 36–40.

58. *See id.* at 39 (contending that Justice Douglas used “common sense” to distinguish Lee's capital case, held to occur during peacetime, from contemporaneous rent-control regulations, held to be during wartime).

59. *Id.* at 40.

how the boundaries of war and peace were perceived. Dudziak's more fundamental point—that the perception of a sharply bounded WWII influenced the assumptions framing the Cold War—seems to me more correct. The cases and their legal rules concerning the end of conflict have the air not of deep principles, but merely of the far more routine task of courts giving answers to questions where the answers might just as easily have gone the other way, without very much effect into the future or much root in the past, in large part because it is understood that the decisions are necessarily arbitrary to some degree. This shows something of the subjectivity of materials and conclusions in this kind of cultural interpretation and how reasonable minds, even situating themselves within Dudziak's method, could quite easily disagree as to interpretation and significance.

The same skepticism could be brought to bear, even within the methods of cultural criticism and intellectual history, against another set of cultural artifacts about time and war in the book—the issuance of U.S. military campaign service medals. The text (and full appendix) makes surprisingly large use of these—when, where, and for what wars and campaigns issued—as a way of evidencing what was considered wartime and what not.<sup>60</sup> It is used to stress both the porousness of the beginnings and endings of conflicts, as well as the observation that if one looks to campaign medals and decorations, the United States has been engaged across its history in vastly more years of conflict somewhere, sometime than the public culture recalls.<sup>61</sup> This latter point is well-taken, although in that case the notion of concomitant domestic “emergency,” meriting special measures, is weakened and appears to be dissociated from conflict as such.

Even so, I doubt I am alone among readers in thinking that the evidence gleaned from campaign medals is less than fully persuasive as to the existence and meaning of wartime. Somewhat like the court cases noted above, and perhaps even more so, the circumstances driving the issuance of medals and decorations seem far too contingent on other events—politics, bureaucracy, etc.—to make it into a compelling source of evidence about even the purely cultural significance of wartime. It seems to me puzzling rather than persuasive. Still, other readers might find it both compelling as well as a marvelously indirect method of revealing the cultural subject.

\* \* \*

If reasonable minds can disagree as to the significance of certain of these materials—the legal cases or campaign medals, for example—there is at least one matter on which the internal methodology of the book seems to me distinctly mistaken. The nature of the method involves looking at frequently specific and very concrete cultural or social practices, in order to

---

60. *Id.* at 28–31, 74–76, 137–56.

61. *Id.* at 28–31.

interpolate some higher level meaning for society or the culture more broadly. The text, however, has a tendency to treat matters applicable to *battle* as being applicable to *war* and to use them without discrimination in establishing the concept of “wartime.”

So, for example, the introduction talks about the common psychological phenomenon of battle as suspending time itself in the psychological perception of an individual soldier.<sup>62</sup> Dudziak says that “one meaning of ‘wartime’ is the idea that battle suspends time itself.”<sup>63</sup> That is likely true of battle, as a matter of the psychology and phenomenology of many of its direct individual participants—but in that case this notion of “wartime,” by reference to battle, would not seem to have very much to do with “war” itself. War is more, and bigger, than that. “Battletime,” as we might more correctly call it, is not “wartime,” and is not obviously revelatory as to the nature or perception of war, whereas the notion of wartime that drives the book overall is one that is very much attached to war—war and its cultural assumptions at the level of the nation and society as a whole.

Whether the condition of war has the effect of suspending time in some metaphorical way that could be evidenced and debated is a much more interesting question—and indeed the book does exactly this using a variety of materials. War might be thought of “suspending” social and cultural “time,” for example, in the sense of people’s ordinary lives being put “on hold” by war. Patterns of career, education, marriage and family, and so on, are placed on hold until wartime is over and people return to their civilian lives, careers, occupations, and so on. But that is a very different sense of suspending time than the distinctive psychological phenomenon of time standing still in the heat of battle.

Moreover, at the large national level, a war that mobilizes all of society, as WWII did, was not only, or even mostly, about suspending ordinary life so much as it was about upturning and remixing it thoroughly. Farm boys moved for the first time beyond their villages, where they saw big cities and faraway countries. They were introduced to technologies and ways of thinking and people quite unlike them. Women entered the factories and wage work; the many changes this wrought over the long run for American society have been well-studied. These and so many more were “suspensions” of time in war as measured by life before—but by war’s end, in so many of these things and for many people as well, there was no going home again and no going back. These were permanent changes in the culture, not suspensions of it—and many in ways that were good for the country over the long term, bringing about unprecedented geographic and social movement and mobility. And the permanent nature of many of these

---

62. *Id.* at 3.

63. *Id.*

changes was recognized in WWII; peacetime was going to be peaceable, yes, but it was not going to be picking up merely where things left off.

The bigger lesson out of this is that although the methodology of cultural critique often involves examining some small thing by which to interpolate bigger things, there has to be a commonality between them, and battle and war lack that. One might wonder something like the same in the discussion of the famous early Cold War/Korean War case of *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>64</sup> The case is treated in the text for something it undeniably is—the proposition that there are “limits to presidential power, even during war,” and the Supreme Court’s rejection of the implication of the Truman Administration’s argument that there is no limit to the president’s “inherent power in an emergency.”<sup>65</sup>

But there is another way of seeing the case that seems perhaps more pertinent to an analysis of the structure of time and exception. Precisely because the model of an “emergency” was the monumental emergency of WWII only a few years before, neither the emerging Cold War, nor even the Korean War, seemed to the *Youngstown* Court or, for that matter, to the American public, to constitute an “emergency.” Not, at least, set against the standard of Pearl Harbor. The United States was fighting a war, but it was not remotely like WWII, had not required a congressional declaration even as a legal predicate (being a mere United Nations police action),<sup>66</sup> and no matter how bloody, protracted, or ugly it finally became (though the Korean War was obviously a very nasty war), it was war without an “emergency.”

In that case, however, *Youngstown* itself is less a case about war powers than about recognizing (or not) an emergency. If Truman really thought the steel was so important, then he could have gotten it through ordinary, non-emergency-powers means. He wrapped his claimed emergency powers in the constitutional rubric of war,<sup>67</sup> and the Court’s rejection of it<sup>68</sup> was not so much a limitation upon powers in war as disbelief that this “war” was an emergency which would trigger those powers. In that case, then, Justice Jackson’s famous concurrence—that the “scope of presidential power varied depending on whether the president acted in accordance with or against congressional grants of power”<sup>69</sup>—should be taken at least partly as a proxy

---

64. 343 U.S. 579 (1952); DUDZIAK, *supra* note 1, at 88–89.

65. *Id.*

66. *See id.* at 86 (noting that the United Nations passed a resolution calling for U.S. troops in South Korea to forestall a North Korean and Soviet invasion, which grew into the three-year war).

67. *Youngstown*, 343 U.S. at 582 (explaining that Truman claimed he was “acting within the aggregate of his constitutional powers as the Nation’s Chief Executive and the Commander in Chief of the Armed Forces of the United States”); *see also* DUDZIAK, *supra* note 1, at 89 (describing the Government’s argument that the President has inherent power in an emergency).

68. *See Youngstown*, 343 U.S. at 589 (holding Truman’s seizure order unconstitutional).

69. DUDZIAK, *supra* note 1, at 89; *see also Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring) (laying out a three-part framework for presidential powers based in part on Congress’s approval of the President’s actions).

for understanding when there was a “true” emergency, or at least as a signal for greater deference by the courts. I would have thought that the most interesting reading of *Youngstown* in the context of “wartime” would have been to use it to argue that despite what was happening in Korea, and despite the rhetoric of the 1950s Cold War, it was not really regarded as a “war” in the cultural sense by a nation that had just gone through WWII, and therefore did not merit treatment as an exception.

I do not hold out that this is the correct reading of *Youngstown* or that this is the analytic point on which to claim the case’s historical importance. I mean only to suggest, in the context of *War Time*’s overall argument, that the distinction between war and emergency is central. Dudziak indirectly acknowledges this, to be sure, in her observation of how many conflicts the United States has actually been engaged in throughout its history<sup>70</sup>—most of them not part of the American historical imagination, and few of them treated as “emergency” to the extent they even entered public attention.<sup>71</sup> But though raised elsewhere in the book, it seems to me an important question to address as part of the book’s prescriptive conclusion related to today’s war on terror. Why? The relevance is not only in the general proposition (and at least partly contra the argument of this book) that wartime does not equal emergency. It is *also* to say that this plausibly describes (as Dudziak acknowledges, but also criticizes, by the book’s ending chapters)<sup>72</sup> the current situation of the “conflict” once known as the “war on terror.” It raises a question as to whether an analysis of war and time in assessing whether we have the right tradeoffs between liberty and security in today’s war on terror is as important as an analysis of time and “emergency.”

\* \* \*

The book’s analysis of the cultural understanding of time in the Cold War argues mostly that the perception of the Cold War as a “war” and therefore as sharply and discretely bounded in the American historical imagination, had the effect of abetting a massive overreaction against civil rights and liberties—McCarthyism and all its manifestations.<sup>73</sup> If the underlying assumption, once again, is that of temporally bounded war, then alterations of peacetime understandings can be legitimized as temporary exceptions. Except, Dudziak says, moving from the experience of WWII to the Cold War, the “war” goes on and on.<sup>74</sup> What started as “temporary”

---

70. See DUDZIAK, *supra* note 1, at 28–32 (highlighting small-scale United States military engagements during the twentieth century in China, Haiti, Cuba, Nicaragua, the Philippines, Lebanon, Grenada, and Panama).

71. *Id.* at 32.

72. See *id.* at 112–13 (acknowledging the distinction between war and emergency). But see *id.* at 136 (criticizing our nation’s tendency to divide time into wartime and nonwartime).

73. *Id.* at 76–85.

74. *Id.* at 70–71.

becomes enshrined as permanent—part of a national security state that has come to be built atop the edifice of the New Deal state.<sup>75</sup>

This last point makes a perceptive observation about the nature of the national security state in the Cold War. Many legal scholars, Dudziak says, studying the impact of war and war making in the Cold War, tend to focus on how

this era compares with other war eras, not on the development of the national security state. They measure the domestic consequences, comparing disputes over rights and presidential power during the Korean War and/or the Cold War with other wartimes. But traditional American wartimes don't offer the right kind of comparison. The Cold War is not an impact on American democracy that began with an opening battle and ended with an armistice. Instead it was a period of state-building akin to the New Deal era. During both periods, the United States embraced a new logic of governance.<sup>76</sup>

This is right and important. It *was* a period of “state-building,” both domestically and in America’s relationships abroad. It was about the introduction of new state structures of governance. And Dudziak is shrewd to observe that the structures created had little or no relationship to a concept of a temporal end to the Cold War—even as many of the measures invoked to justify their creation relied tacitly on just such assumptions about the temporally bounded nature of American war.<sup>77</sup>

\* \* \*

That point granted, however, the chapter on the Cold War<sup>78</sup> seems very one-sided in its view of the emergency measures accepted as long-term constraints on what had previously been the peacetime norms. It is essentially a description of overreaction, and one reason seems to be that it focuses almost exclusively on the early Cold War and, curiously, focuses less than one might have thought important on when the Cold War should be understood to have ended. The Cold War chapter does not really grant to policy makers, lawmakers, and courts of the 1950s through early 1960s very much awareness of the need to try and figure out a way to balance liberty and national security in a long-run struggle—or even, for that matter, an awareness of the differences between WWII and its temporally bounded nature as distinct from the Cold War’s much looser, much more porous, and metaphorical nature as war.

It might be I misunderstand the textual move here. It might be that this is precisely the place in the argument where the book’s earlier *counter-reading* of WWII comes into play. The chapter on WWII, that is, offers many reasons to believe that American historical imagination internalized a

---

75. *Id.* at 68–70.

76. *Id.* at 91 (footnote omitted).

77. *Id.*

78. *Id.* ch. 3.



sense of war typified by WWII's sharply marked beginning and ending.<sup>79</sup> Most of *War Time*'s book-long arguments depend upon it, because it says that this was internalized into American cultural consciousness—down to today. But the chapter also turns and offers a counter-reading of WWII, drawn from actual historical facts as well as cultural materials, in which the boundaries of both beginning and ending are understood as porous, cutting against it being understood as having a sharply temporally bounded nature. In that counter-reading of WWII as porous, the Cold War might, like WWII, be porous as to beginnings and endings—analogue to WWII instead of standing in contrast to it. The cultural implication is that the architects of the Cold War, American elites at least, saw the Cold War as being, at least as regards its temporal conception, similar to WWII rather than different. Each, in other words, is indistinct in beginning and end, and yet each presents an obvious emergency for all that. I am unclear, however, as to whether this is an additional argument in the text in this chapter. If something like this is the book's claim, however, it does not seem as if both of those readings could be right.

In any case, it does not seem to me correct to think even of the early Cold War and Americans—particularly American elites assembling the political pieces of the Cold War—as so one-sided and un-self-aware as all that. On the contrary, it seems to me that there was a broad understanding in American society and culture that the Cold War did not have the same specificity as WWII. Part of the difficulty here is that the book focuses on the early Cold War: the 1950s. But the Cold War went on decades longer than that—and if one takes it as a whole, it is hard to see that this is an accurate depiction of its tradeoffs, even in the governance of the national security state. Indeed, I would have said that America across the decades of the Cold War did remarkably well, not badly, at trading off its domestic regime of liberty against security. That is not visible if one sticks with the 1950s.

Moreover, even if confined to the period between, say, 1945 to the early 1960s, there is reason to doubt that the picture is anywhere near as unaware of the tradeoffs being made as the book appears to suggest. On the contrary, a different selection of cultural materials for examination would have shown a deep awareness of the tradeoffs that were being made. Senator McCarthy was not the only influence.<sup>80</sup> Thinking just off the top of my head, I discern

---

79. *Id.* at 61–62.

80. After all, the risks of permanent threat to liberty was on the minds of the Founders—most famously, in *Federalist No. 8*, in which Alexander Hamilton, reflecting upon external security threats and standing armies such as those of Europe, warned:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and

a keen awareness on the part of thinkers and writers in those years of the ways in which a long war, with no discernible end in sight and no clear sense of what “victory” might look like, might impact long-run culture for the worse. The most interesting and important figures in that regard are those such as George Orwell or Albert Camus—men and women of the anti-Stalinist, anti-Communist Left who wrestled with exactly such tradeoffs and anxieties. *1984*, after all, is a Stalinist nightmare, but it is set in Britain, not the Soviet Union.<sup>81</sup> Orwell intended a warning about what our Western society might become, not a fable about someone else’s society.<sup>82</sup> There are other examples from the period. Science fiction writer Robert Heinlein kicked off an entire genre of sci-fi horror fables about how *our* society becomes *their* society with his early-1950s minor classic *The Puppet Masters*.<sup>83</sup> The “institutional settlement” that defined the American Cold War from beginning to end—and which distinguished it so deeply from Western Europe—depended profoundly on the staunchly anti-Communist convictions of America’s labor union leadership, and yet their concerns about the organizing rights and liberties of labor, including powers to strike, assemble, unionize, and so on, were never off the table in the transition from the New Deal state to the national security state.

For that matter, if permitted a personal point, one of the earliest “adult” books I read as a child in the mid-1960s was a science-fiction novel, *They Shall Have Stars*, by James Blish.<sup>84</sup> The premise of the novel is that the sheer effect of time on a Cold War that, in the story, goes on well into the twenty-first century, means that gradually “our” side comes to resemble “their” side, with merely surface differences in form.<sup>85</sup> In this, Blish offered a fictional, mid-Cold War meditation on Spengler’s *Decline of the West*;<sup>86</sup> his tone was somber, elegiac, and anxious. By the novel’s year 2013, the United States is democratically governed in name only, and is run instead, behind the surface democracy, by the hereditary head of the FBI.<sup>87</sup> Deliverance comes through scientific research sponsored by a brave senator, producing a faster-than-light drive that allows whole populations of Earth to depart for

---

political rights. To be more safe, they at length become willing to run the risk of being less free.

THE FEDERALIST NO. 8, at 61–62 (Alexander Hamilton) (Clinton Rossiter ed., rev. ed. 2003).

81. GEORGE ORWELL, *1984*, at 3 (Penguin 1990) (1949).

82. See MICHAEL SHELDEN, *ORWELL: THE AUTHORIZED BIOGRAPHY* 433–35 (1991) (indicating that Orwell thought of *1984* as a warning against totalitarianism in general, regardless of time or place).

83. ROBERT A. HEINLEIN, *THE PUPPET MASTERS* (1951).

84. JAMES BLISH, *THEY SHALL HAVE STARS* (1957), reprinted in *CITIES IN FLIGHT* 1 (1970).

85. *Id.* at 21 (describing the U.S. and U.S.S.R. as “becoming more and more alike in their treatment of ‘security’”).

86. Albert I. Berger, *Science-Fiction Critiques of the American Space Program, 1945–1958*, 5 *SCIENCE-FICTION STUD.* 99, 106 (1978).

87. Blish, *supra* note 84, at 5, 12.

the stars—significantly, escape from *both* “our” society and “theirs.”<sup>88</sup> The novel contains soliloquies on the ways in which the passage of time itself, under the peculiar national security pressures of secrecy, brings about convergence between the societies of the West and the Soviets—or, more precisely, moral collapse of the Western democracies into Soviet-style systems, under the implacable demands of the national security state.

\* \* \*

I digress, but not entirely. The point is, deep self-awareness of the effects of permanent emergency measures in the Cold War were present from the beginning, and informed cultural understanding, at least at the elite levels, was present all the way through. The best reading of the cultural materials reveals deep self-awareness both that the Cold War required serious political and legal tradeoffs and that “time” itself might have a dangerously transforming effect on a culture of liberty in a permanent state of what constituted, if not an emergency, then at least an extended state of exception. The book partly makes note of this awareness. Eisenhower’s famous “military-industrial complex” speech, Dudziak observes, sets out the major concerns about the evolution of democracy into something different.<sup>89</sup> I am unclear as to *War Time*’s argument here, however. It suggests at some points a framing of the Cold War temporally<sup>90</sup>—but on the mistaken assumption that it can recapitulate the bounded temporal framing of WWII. I would say, on the contrary, that Cold War thinkers were well aware of the differences and why the Cold War was temporally not WWII.

But Dudziak’s argument, and its acknowledgment of such materials as Eisenhower’s farewell speech, could be read to say something quite different. Although there are cultural materials of diverse kinds showing that intellectuals, and literary and academic figures were well aware of the problem of decline into permanently illiberal shifts in culture, society, politics, and law in the many ways Orwell or Blish describe (and even if this cultural awareness extended to politicians and even President Eisenhower), the actual facts of policy, politics, and law show serious overreaction predicated on the existence of a temporary emergency—an emergency that would, it was believed as a cultural premise, resolve itself soon enough back into “normality.” Certainly these were *not*, Dudziak might say, calibrated and consciously made tradeoffs between security and liberties, undertaken in a way that would show society’s self-awareness not of a bounded, temporary emergency, but instead gradual, un-self-conscious state-building of the permanent national security state. The permanent national security state was not created, on this telling; over time, it coalesced.

---

88. *Id.* at 11.

89. DUDZIAK, *supra* note 1, at 91–92.

90. *See id.* at 77–80 (noting that the height of anticommunism sentiment and the Cold War were not precisely contemporaneous).

Again, I don't think that is so, not for the Cold War as a whole. Dudziak's national state-building observation is persuasive, but I would add to it genuine self-awareness of the effects of time. That is part of the reason that it was conceived by many of the participants *as* state-building; what Dudziak here calls "state-building,"<sup>91</sup> we might also call "institutional settlement" for which no end is, but also no end need be, in sight. The implications of this for today's war on terror, I should add, probably do not need to be stated. Likewise the reasons why Dudziak would find the essence of this "state-building-institutional settlement" a profound political problem,<sup>92</sup> whereas I find it the basis for comfort: we did not build it thinking it would end, and we knew we were making state-building, institutional settlement tradeoffs and decisions.

To the extent *War Time*'s view of the Cold War as tacitly premised on a temporary condition of wartime is actually true of the 1950s, however, the historical forces driving this are essentially national security arguments from *necessity*, not *time*. That is true of McCarthy's urgent appeals to necessity as a basis for his infamous hearings; it comes close to the famous dictum (which *War Time* mentions in the introduction) that in times of war, law is silent; necessity knows no law other than itself.<sup>93</sup> Eisenhower's framing of the dilemma is genuinely a mixed argument from necessity as well from time: we are "compelled," he says, to create a "permanent" armaments industry of vast proportions, necessary to respond to the security threat, but also "new" in the American experience.<sup>94</sup>

But *War Time* is a book in the first place about time and war, not necessity and war. More precisely, it is a book arguing that oftentimes things that are asserted to be about necessity and war are actually things tacitly taken on an assumption about time and war, and specifically an assumption about the temporary nature of wartime. The arguments writers such as Blish and Orwell make are arguments from the sheer passage of time, the effects of permanent emergency measures on the cultural perception of "normal." They seem to me frankly closer to the kinds of cultural materials that *War Time* ought to want to consider. Moreover, "time" in this sense is more about culture and society and less about actual policy and politics, and so literature and the traditional materials of the humanities have much greater traction in giving insight.

\* \* \*

If that is so, however, then sympathetic as I am to the method of cultural criticism and its materials, there are limits to what one can get from them. It is interpretation, not proof; insight, not deduction; apperception, not

---

91. *Id.* at 91.

92. *See id.* at 93 (citing the national security state as "the most important threat to the survival of what remained of the New Deal in the twenty-first century").

93. *Id.* at 3.

94. *Id.* at 91.

derivation. The selection of anecdotal materials from what is essentially an unlimited cultural pool involves subjective judgments, and likewise the interpretation of what one does select. In some things relevant to this topic one might be able to do quantitative studies of concrete things—the percentage of military-age males who during the Cold War served in the military, for example, or the size of Cold War military budgets as a percentage of GDP. Many things could be counted—and certainly have been, to great profit in our historical understanding—but matters crucial to understanding something as qualitative a phenomenon as “wartime” will not be susceptible of explanation by counting things. This means interpretation has to remain at a level of “plausibility” at most, and also at a level of metadescription that seeks to do no more than capture often elusive, merely glancing, always contestable flashes of “insight” into the culture. It is no less important or useful for that, however; I honor the method and much of *War Time*’s use of it in pursuit of the history of an idea.

When *War Time* turns to the war on terror today,<sup>95</sup> however, it loses sight of the limits of cultural critique. It seeks to turn plausible but contestable cultural and social insights into action-guiding prescriptions for policy, politics, and law.<sup>96</sup> One understands the impulse. After all, why engage in all this subtle cultural decoding only to conclude that in today’s world, it has no actionable implications? The problem, however, is that culture does not answer policy questions; it is the substratum in which possible policies are contained. Cultural criticism, however important, does not drive all the way down to specify very much.

Whereas, by the time *War Time* reaches its prescriptive conclusions, it wants very much to tell us to resist the view that the apparent necessities of war are in fact necessities. That’s no longer an argument about time evidenced by readings of culture; it’s an argument from a policy, and political, view of what is “necessary” and what is not. Dudziak is very concerned for us to see that what look to be inevitable features of our strategic security situation in relation to transnational terrorism are, on the contrary, merely “argument[s], rather than . . . inevitable feature[s] of our world.”<sup>97</sup> This is the argument from false consciousness again—bringing to bear the revelation that apparent immutability and necessity driving our policies are actually constructions of cultural temporality.<sup>98</sup> We mistakenly hold a legitimizing and comforting, but also false, assumption that this antiterror war and its measures are merely temporary, and so we embrace bad arguments from

---

95. *Id.* ch. 4.

96. *See id.* at 103–06 (connecting Bush-era national security policy with the Administration’s characterization of the post-9/11 decade as “wartime”); *id.* at 131–32 (criticizing Congress for remaining in this “wartime” mindset during the recent debt-ceiling debacle).

97. *Id.* at 136.

98. *See id.* (“To take seriously war’s presence as an ongoing feature of American democracy, a starting point is to cease viewing the nation’s history as divided into time zones, and to look instead for war’s enduring mark on American politics and American law.”).

necessity.<sup>99</sup> The materials of cultural criticism and the history of this idea of time in war frees us to see that, faced with these apparently irresistible claims of necessity, we can indeed resist and need not “suspend our principles.”<sup>100</sup>

This kind of prescription seems to me, however, exactly what the kinds of cultural materials that give *War Time* its genuine analytic interest *cannot* do. It can tell us that the passage of time and permanent emergency in a condition of wartime risks permanently altering our society, politics, and culture. It might even be able to tell us that in the past, there has been a tendency to overreach. But this is an argument about the effects of time, and the actual condition of making tradeoffs between liberty and security is not a matter of an argument about time but necessity. The materials required to tell us about that tradeoff are very different from those presented in this book about temporality. They are exactly what one would expect, in fact: considerations of politics, policy, and law, in their concrete manifestations and tradeoffs.

This is one important part of the criticism that has been made of *War Time*—criticism in an “external” sense, from outside of the method of cultural critique that the book employs. It is, for example, an important part of the criticism that Eric Posner levels against the book in a combative review in *The New Republic*:<sup>101</sup>

Dudziak argues that the decision to classify a security threat as a war is a political judgment. It is not driven by—or solely driven by—exogenous events. Since people think that all “wars” are temporally bounded; people willingly suspend their principles and cede their liberties, because they believe that the war will come to an end. Political leaders instinctively understand this cultural feature of wartime, and take advantage of it. . . .

. . . .

. . . [But it] is not clear why a person would willingly yield civil liberties (or some of them) on the understanding that the war will end, but would not do so on the understanding that the war might continue indefinitely. The only reason to accept limitations on civil liberties is to ensure an acceptable level of security, and the validity of that reason does not depend on when one expects the threat to end. . . . Temporality as such plays no obvious role in this analysis.<sup>102</sup>

There is something right about this, but also something that fails to give the method sufficient due. The right part is the shrug of the rational

---

99. *Id.* at 136.

100. *Id.*

101. Eric A. Posner, *The Longest Battle*, NEW REPUBLIC (Feb. 6, 2012, 12:00 AM), <http://www.tnr.com/book/review/mary-dudziak-war-time#>. I borrow Samuel Moyn’s description of Posner’s review as “combative.” See Moyn, *supra* note 47 (reviewing Dudziak’s book and responding to Posner’s critique of it).

102. Posner, *supra* note 101.

shoulders to say, look, the tradeoff between security and liberty is one that exists on account of the threat, how one assesses it, the magnitude and likelihood of the risks it poses. If it is true today, it might be true tomorrow, or next year or ten years after; or it might not. A rational person, or democratic polity, will simply have to assess the risks. An exogenous threat has to be evaluated exogenously. So, as Posner says, temporality, whether a long time or an indefinite time, or for that matter a short time, plays “no obvious role in this analysis.”<sup>103</sup>

Yet while temporality may not play an obvious, or even leading, role in the consideration of exogenous threats in the tradeoffs between security and liberty, it is still possible to see it playing less obvious or central roles. Even within the structure of a rationalist evaluation of the threats stretching out with less and less certainty with the passage of years, I would have thought that there would be enough slippage about an uncertain future for which certain decisions likely have to be taken today, and which have unavoidably long-run implications, that temporality as such *can* play at least an indirect role. The path dependency of security policy, embedded as it is within complex national institutions, budgets, bureaucracies, laws, and regulations, apart from anything else, ought to be enough to warrant a consideration of the impact of the passage of time on what security tradeoffs made today might mean a long time from now.

Consider an uncertain security future, years from now, when there might still be risks of both our current kind but perhaps other kinds, arguably calling for new tradeoffs. Yet path-dependent, largely institutional decisions must be made today that cannot be easily or costlessly altered five years from now, or ten years from now, even if we might agree that the tradeoffs at that point in time are not optimal. There is nothing irrational in asking this as a question about time as such and the pressures it brings to bear. One can redescribe this, if one likes, not as “time,” but instead as simply the long-run accumulation of all those institutional, resource, and other pressures over time—but it does not seem strange to describe that as the passage of time itself, or to treat time itself as a proxy or marker for all those pressures, given that their commonality is what happens to them over time. This does not really seem so different from the picture of institutional investment, the “stickiness” of investments and opportunity costs, the difficulties of easily switching institutional gears, and the long-run effects of transaction costs that run back to Coase and his analysis of institutions in *The Nature of the Firm*.<sup>104</sup> That, combined with a healthy dose of public choice theory,<sup>105</sup>

---

103. *Id.*

104. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), reprinted in R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 33 (1988).

105. See MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 1–6 (2009) (defining public choice theory and explaining the structure of a public choice theory analysis).

would explain the role of time—even if as nothing more than a proxy, for how various interest groups become both invested actors and vested beneficiaries in the national security state, creating a stable but quite possibly suboptimal equilibrium in terms of long-run tradeoffs.

It is true that one might—seeing time in this way, as a proxy or marker—pick a different set of cultural materials to explore than those *War Time* picks. But that will always be a possibility; although some of the materials Dudziak uses do not seem to me revelatory, others do. Where the concern is about the “exogenous” threat that appears to have no bounded nature and no easily discernible end, I would have looked, as indicated, far more to the literature and artistic expression of the Cold War, for example. This is to say that *War Time*’s cultural materials about the quite possibly corrosive effects of time, under conditions of national security emergency, going on for years and decades, *does* have a place in the consideration of policy. It can be seen as a *rational* intervention in a *rational* debate in which time is proxy and marker for accumulated pressures across an uncertain future—path dependency and all that.

The most important role that materials drawn from culture and society about time and war have is not, however, as a rational, if indirect, intervention in the debate over tradeoffs. Coldly rational intervention is not why the novelists, playwrights, poets, historians, moralists, and *moralistes* have so long given voice to the concern about the role of time in war as reshaping society in permanent and perhaps deforming ways. It’s not even obviously why Hamilton in the *Federalist No. 8* or Eisenhower in his Farewell Address expressed their concerns about security not merely in terms of necessity, but in terms of time directly. The concern has always been, rather, to express all this not as rational argument, but to ensure that a democratic public and its leadership and elites have before it an awareness of the effects of permanent war and permanent emergency as *affect*. And, as affect, a very peculiar one: *anxiety*. The literature of the Cold War that I have mentioned is replete with the cultural affect of anxiety—anxiety for who we are and what we might, under the pressure of exogenous necessity, wind up becoming. This is, to be sure, not precisely the cultural material that Dudziak brings to bear—but I wish she had, because a rich cultural and social commonality between the Cold War and today’s war on terror is an abiding anxiety over the reshaping effects of necessity and emergency over time upon a society and a culture.

\* \* \*

Why should a rational actor care about anxiety? Does anxiety yield anything here other than anxiety—affect that at most collaterally accompanies rational calculation or, worse, tends to worsen rational judgments about tradeoffs? Because, of course, it is true that anxiety over the passage of time leading to a “state” (in multiple senses) of war and permanent emergency cannot banish exogenous threats, or the demands of necessity; real threats cannot be wished away. For that matter, perhaps all



that a pervasive sense of anxiety adds to this is a perverse form of self-satisfaction, the narcissism of doing the rational thing, but feeling bad about it. On multiple grounds, then, it might seem clear that anxiety adds nothing and might even detract from rational judgments about difficult tradeoffs.

But this is not how the greatest humanists, writers, and historians have seen as the role of this anxiety. It is hard to read Thucydides on the Peloponnesian War, for example, without sensing a profound anxiety about the corrosive effects of so long a war on the very nature of Athenian governance; it is a moral undercurrent to the whole text and one which he evidently wishes to communicate.<sup>106</sup> Gibbon on Rome likewise communicates a subtext, expressed not so much as anxiety as regret, a moral lesson about collateral effects over time of the exogenous and constant pressures of the barbarian tribes upon Roman governance.<sup>107</sup> With writers of fiction, one can find the same. Brecht's most famous play, *Mother Courage and Her Children*, for example, is set in the Thirty Years' War, and its viciously satirical conceit is that the characters in the play are entirely invested, materially and in every other way, in the war never ending; the inversion of the play is to express deep anxiety that the war *might* end, to the dismay of all.<sup>108</sup> For that matter, this anxiety is even a backdrop in the children's fantasy book, *Ender's Game*.<sup>109</sup>

One could go on and on with examples, I suppose, and whether they are evidence of anything depends in the first place on whether one grants anything to the method. Perhaps the proper rational reaction is merely to say, well, anxiety over all that and five bucks will get you coffee at Starbucks. But I do not think one can dismiss the anxiety expressed by so many writers over so long a time just like that. The great French poet and World War II Resistance commander René Char described the war in his poetic notebook of the war years as "this time of damned algebra."<sup>110</sup> Not merely an algebra of calculation, a calculus of costs and benefits, but instead both a necessary rational calculus—and a necessary source of anxiety.

---

106. THUCYDIDES, *THE PELOPONNESIAN WAR* (P.J. Rhodes ed., Martin Hammond trans., Oxford Univ. Press 2009). For a useful discussion by a modern classicist, see generally VICTOR DAVIS HANSON, *A WAR LIKE NO OTHER* (2005).

107. EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* (David Womersley ed., Penguin Books abr. ed. 2000) (1776).

108. See BERTOLT BRECHT, *Mother Courage and Her Children: A Chronicle of the Thirty Years' War*, in 5 BERTOLT BRECHT: *COLLECTED PLAYS* (Ralph Manheim & John Willet eds., Ralph Manheim trans., Vintage 1972). On the history of the Thirty Years' War, see GEOFFREY PARKER, *THE THIRTY YEARS' WAR* (2d ed. 1997).

109. See ORSON SCOTT CARD, *ENDER'S GAME* 255 (1994).

110. The original French is "ce temps d'algèbre damnée." RENÉ CHAR, *FEUILLETS D'HYPNOS* 14 (Folio Plus Classique 2007) (1946). Char, we should add, was not merely another literary "resister," one of the Parisian writers who occasionally wrote something that disturbed the censors and then counted themselves heroes of the Resistance after the war, but instead someone who spent years fighting the German army and the Gestapo in the forests of Provence. See Carrie Jaurès Noland, *The Performance of Solitude: Baudelaire, Rimbaud, and the Resistance Poetry of René Char*, 70 *FRENCH REV.* 562, 565 (1997) (explaining that Char joined the resistance in 1940).

Char, too, had concerns about time and war and wartime, and identified the important moral role of anxiety and affect in tempering apparently rational judgments about uncertainty and risk into the future. He fought, but he never thought unimportant to the conception of the struggle, a certain existential anxiety about what prolonged conflict would do, as well as prolonged occupation, to undermine, perhaps fatally, *une certaine idée de la France*.<sup>111</sup> It is impossible for me to see, frankly, that these kinds of materials should not have their place, if not in the direct formation of policy and tradeoffs, then as part of the diffuse and indirect influences upon the formation of policy that arise from an understanding of time and culture in war and emergency. But *War Time* makes itself vulnerable to the criticism that Posner launches, precisely because it goes beyond this indirect and diffuse anxiety to believe that these cultural materials and their interpretation can directly inform policy. The arguments of *War Time* cannot drive down so far to policy: in this, the book seriously overreaches.

\* \* \*

I close by noting that this Review has framed the tradeoff as between the *liberties* of a nation at peace and the pressures of *necessity* arising from exterior threats, which might serve to justify policies and governance that have little if any basis in the constitutional order of the American republic: the President will do what he must. Michael Walzer remarked in *Just and Unjust Wars* that an aspect of the nature of necessity and the moral crime of aggression is that external aggression—war—forces people and a society to do things that they would rather not do, and we can add, this includes the risk of becoming people they would rather not become.<sup>112</sup> Moreover, Walzer implies, short of vanquishing the foe quickly and easily, there is not necessarily anything they can do about it.<sup>113</sup> Even the justice of a side's cause cannot make resistance to aggression any less necessary or costly; neither can it make the risk of the transformative pressures of time upon a free society go away. The possible conditions of response to the aggression of 9/11 are, over time, more malleable than might have been thought on 9/12, but they are set even today by conditions of the world, not by a unilateral imagining that the world is as one would like and not as it is. The tradeoffs for our principles, which include both liberty and security, are not necessarily changed on account of being aware of the transformative pressures of time and permanent emergency.

It is not clear to me that *War Time* recognizes this bitter truth. If it did, I do not think it would reach prescriptions about principles that depend upon necessities of force, threat, and security in the world, and not about time.

---

111. CHARLES DE GAULLE, *MÉMOIRES DE GUERRE* 1 (1959).

112. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 53 (1977) ("Aggression is morally as well as physically coercive . . .").

113. *See id.* at 51 (contending that in most cases, fighting, not giving up one's life, is the preferred response to aggression).

What, in that case, do the materials and method of culture, cultural criticism, and intellectual history have to offer? Anxiety, principally—to the end that those who think they are making merely a set of rational tradeoffs between liberty and security be caused to think harder and longer about the full costs and benefits of their policies. Perhaps this causes an alteration in policy, perhaps not; perhaps efforts to find ways to ameliorate effects of policies that one undertakes with regrets, but perhaps not.

Although both the argument of the book and this Review have largely assumed, so to speak, the nature of necessity, it bears noting that we are not in that condition today, at least not insofar as it implies an “emergency,” and not insofar as the leaders of American government today are concerned. On the contrary, whatever one thinks might have been the state of emergency in which American government acted in the days following 9/11, it has been a very, very long time since the justification or public legitimization of the government’s policies have been on the basis of some necessity alone. Officials of government have stressed for many years—not just through the Obama Administration, but back to the Bush Administration—that the tradeoffs that have been made are indeed ones that are contemplated by the constitutional order and not just in a state of emergency or exception.<sup>114</sup> The tradeoffs made today are cabined and blessed by the rule of law; there is nothing ad hoc or nakedly “necessitarian” about them, and there is not even special reason to think that the authors of, say, the *Federalist Papers* would be surprised. That belief might or might not be warranted, of course. Dudziak would certainly not accept it, and of course, it is merely what any public official would say, though my conversations with senior government national security lawyers over several years have convinced me that they believe it deeply. Yet this might be mere self-deception. It might be true, as the conclusion to *War Time* argues, that under the comfort of legal justification and a cultural construction of the nature of wartime we have, in fact, merely suspended our principles and impeded “public engagement and responsibility.”<sup>115</sup>

This serves to point out that what, as a society, we believe to be true as to the nature of the threat and the law-governed nature of our response—including the possibility that it is not actually captured under the rule of law—is at the heart a debate over institutional settlement for national security policies. My experience of officials across two very different administrations

---

114. One can get a sense of the insistence on the rule of law, rather than some rule of emergency necessity, in the series of speeches delivered by senior officials and particularly general counsels of leading national security agencies during the Obama Administration. See Kenneth Anderson, *The Canonical National Security Law Speeches of Obama Administration Senior Officials and General Counsels*, LAWFARE (Aug. 28, 2012, 3:37 P.M.), <http://www.lawfareblog.com/2012/08/readings-the-canonical-national-security-law-speeches-of-obama-administration-senior-officials-and-general-counsels/> (offering a periodically updated list of speeches by senior officials of the Obama Administration on national security law).

115. DUDZIAK, *supra* note 1, at 136.

tells me that they both worry about precisely these policies and their effects upon a free society over time, and that they also believe that the principles of the American constitutional order are sufficiently capacious to allow them to make these tradeoffs within the strictures of the rule of law. Even if one accepts, as I do, that they are fundamentally right about this, it still seems to me that anxiety about these tradeoffs is a virtue—and, for what my experience of these officials is worth, they think so, too. That is so even if, as a public official, one believes one has the constitutional discretion to make these tradeoffs, without invoking any concept of exception or emergency.

Inducing this kind of anxiety has been one of the glories of the humanities when it comes to writing about war and time from Thucydides forward. We *ought* to worry about the effects of endless war upon our culture and understand that time itself is a source of worry; this is Dudziak's contribution through this book. Does this seem like small wages for the effort of this intellectual framing? Anxiety over time seems to me the essential value of *War Time*—there, however, but not further into policy. Still, no one should underestimate the importance of ensuring that those who, upon grounds of rationality, make profound tradeoffs between the liberties of a society and its security, also feel anxiety as to what those tradeoffs today might mean over time.

#### Postscript of Inauguration Day, January 21, 2013

Since this Review was first written, Barack Obama has won a second term in office. In the transition between the first and second term, senior officials—some leaving government, others remaining or shifting to new positions—have begun to address directly the meaning and conditions for the end of the conflict with al Qaeda—as a matter of law and policy, conditions for it, and consequences thereof. The most important public example is a speech delivered on November 30, 2012, at Oxford University by the outgoing DOD General Counsel, Jeh C. Johnson:

But, now that efforts by the U.S. military against al Qaeda are in their 12th year, we must also ask ourselves: how will this conflict end? It is an unconventional conflict, against an unconventional enemy, and will not end in conventional terms.

Conventional conflicts in history tend to have had conventional endings.

. . . .  
. . . .  
. . . .  
. . . .  
. . . .

We cannot and should not expect al Qaeda and its associated forces to all surrender, all lay down their weapons in an open field, or to sign a peace treaty with us. They are terrorist organizations. Nor can we

capture or kill every last terrorist who claims an affiliation with al Qaeda.

I am aware of studies that suggest that many “terrorist” organizations eventually denounce terrorism and violence, and seek to address their grievances through some form of reconciliation or participation in a political process.

Al Qaeda is *not* in that category.

Al Qaeda’s radical and absurd goals have included global domination through a violent Islamic caliphate, terrorizing the United States and other western nations from retreating from the world stage, and the destruction of Israel. There is no compromise or political bargain that can be struck with those who pursue such aims.

In the current conflict with al Qaeda, I can offer no prediction about *when* this conflict will end, or whether we are, as Winston Churchill described it, near the “beginning of the end.”

I do believe that on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.

At that point, we must be able to say to ourselves that our efforts should no longer be considered an “armed conflict” against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community—with our military assets available in reserve to address continuing and imminent terrorist threats.<sup>116</sup>

This is a statement that lays down conditions of military necessity—defeat is a necessary condition; there is no compromise or political bargain to be struck by negotiation; and defeat will be shown, among other things, by the point at which al Qaeda has been effectively destroyed, its and its affiliates’ leaders have been killed or captured, and the group cannot attempt a strategic attack against the United States. These are conditions that define the “necessity” of a nation’s security and safety—and they do not, by themselves, express a temporal dimension. Nonetheless, beyond those elements arising from the nature of necessity, other parts of Johnson’s speech

---

116. Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Defense, *The Conflict Against Al Qaeda and Its Affiliates: How Will It End?* (Nov. 30, 2012) (footnotes omitted), *available at* <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

reveal an acute, even agonized, awareness of time, its passage across twelve years of war.

“War” must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man—if he is a “privileged belligerent,” consistent with the laws of war—to kill another. War violates the natural order of things, in which children bury their parents; in war parents bury their children. In its 12th year, we must not accept the current conflict, and all that it entails, as the “new normal.” Peace must be regarded as the norm toward which the human race continually strives.

. . . [A]nalyzing war in terms of a continuum of armed conflict—where military force is used at various points without a distinct break between war and peace—is counterproductive. Such an approach . . . results in an erosion of “any demarcation between war and peace,” the very effect of which is to create uncertainty about how to define war itself.<sup>117</sup>

This passage from Johnson’s speech captures precisely and eloquently a crucial moral sensibility that the nature of necessity alone cannot. Without in any sense denying the stringent conditions that necessity requires for there to be an end to the conflict, and without offering any prediction when or even if those conditions will be met, Johnson articulates the collateral cultural and moral cost of war that risks permanency—the corrosive, illiberal, anti-democratic effects of permanent emergency and permanent war. Johnson’s speech echoes directly *Federalist No. 8*; it echoes the cultural and political literature of the Cold War; it is above all an expression of anxiety by American political leaders who recognize their responsibilities to address *both* the necessities of national security and the troubling effects of permanent conflict on a democratic society and peacetime culture.

In that regard, it is important to recognize that Dudziak has been both astute and prescient to observe that the sensibility of time in war matters, and the more so the longer things go on. Persuaded or not as one might be with regard to cultural evidence she offers, or for the policy demands she makes upon the nature of necessity, those who think that the cultural fact of time passing in war is irrelevant and that only the harsh evaluation of security and risk matters misapprehend how some of this nation’s most senior leaders regard the collateral harms of permanent wartime. The harms are as much moral and cultural as anything, and Johnson offers recognition of this in a speech that appears to have been cleared in the interagency process as reflecting the view of the Administration as a whole.

This is not to ignore that this same speech lays down markers of American security that practically ensure that even when something called peacetime comes, it will also be accompanied by—Johnson is explicit about

---

117. *Id.*

this—continued precise, contained uses of force aimed to ensure that terrorist groups do not regroup, regather their strength, find safe haven in the weakly governed places of the world, or gain political control over whole zones and populations. Peacetime in the sense that Johnson means it will certainly involve some amount of targeted killing, drone warfare, military and intelligence assistance to governments battling insurgent groups with transnational terrorist aims, covert action and discrete uses of force by special operators and paramilitary forces, and perhaps support to proxy forces in one place or another. Perhaps it is merely a cynical appropriation to declare that peacetime has returned and then continue war unabated. Quite possibly Dudziak, on the strength of her analysis, would say that this is not actually peacetime, but just an appropriation of words. And, ironically, the realist of necessitarian logic, and Dudziak's otherwise combative foil, Eric Posner, just might agree.

For what it's worth, however, I think Johnson is right in understanding genuine peacetime as nonetheless bearing elements of conflict, and right to reject the claim that this is just the "new normal," the cynical continuance of war under a new name. But what he and Dudziak share, any other disagreements aside, is an appreciation that time has its own effects in war, and that even if they cannot take pride of place over the exigencies of safety and security, it is essential that we recognize and seek as best we can to ameliorate those effects, starting with their recognition as cultural, moral, diffuse, and long term. The American way of war is at once sense and sensibility.