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*TRAHISON DES PROFESSEURS:*[†]THE CRITICAL LAW OF ARMED CONFLICT
ACADEMY AS AN ISLAMIST FIFTH COLUMN**William C. Bradford***

Islamist extremists allege law of war violations against the United States to undermine American legitimacy, convince Americans that the United States is an evil regime fighting an illegal and immoral war against Islam, and destroy the political will of the American people. Yet these extremists' own capacity to substantiate their claims is inferior to that of a critical cadre of American law of armed conflict academics whose scholarship and advocacy constitute information warfare that tilts the battlefield against U.S. forces. These academics argue that the Islamist jihad is a response to valid grievances against U.S. foreign policy, that civilian casualties and Abu Ghraib prove the injustice of the U.S. cause, that military action is an aggressive over-reaction, and that the United States is engaged in war crimes that breed terrorists, threaten the rule-of-law, and make us less safe. Rather than lending their prodigious talents to the service of their nation, these legal academics, for reasons ranging from the benign to the malignant, have mustered into the Islamist order of battle to direct their legal expertise against American military forces and American political will. This psychological warfare by American elites against their own people is celebrated by Islamists as a portent of U.S. weakness and the coming triumph of Islamism over the West.

[†] "Trahison des professeurs" (treason of the professors) is an homage to "trahison des clercs," the title of a work decrying early twentieth-century European intellectuals for failing to quash emotional and political arguments and make reasoned judgments about national security. JULIEN BENDA, *TRAHISON DES CLERCS* (1927).

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This Article defends these claims and then calls for a paradigmatic shift in our thoughts about the objects and purposes of the law of armed conflict and about the duties that law professors bear in conjunction with the rights they claim under academic freedom. It then examines the consequences of suffering this trahison des professeurs to exist and sketches key recommendations to attenuate its influence, shore up American political will, and achieve victory over the Islamic State and Islamist extremism more broadly.

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*"[B]ehind every event of Good or Evil there is a piece of writing.
A book, an article, a manifesto, a poem, a song."*[‡]

INTRODUCTION

The *Song of Roland* chronicles the Battle of Roncesvalles, fought on 15 August 778 A.D. between a Christian Frankish army fielded by Charlemagne and an Ibero-Islamic army bent on extending Muslim sovereignty in Europe. Although the medieval epic blames treacherous Christian nobles—who abused positions of

[‡] ORRIANA FALLACI, *THE RAGE AND THE PRIDE* 23 (2002).

trust to pass military secrets to the Islamic invaders—with the near-defeat of the Frankish army, it hails the sacrifice of Roland—the rear-guard commander whose desperate last stand culminated in a timely trumpeted warning that saved Charlemagne from ambush—as exemplar of the valiant defense of Europe against Islamic dominion.¹

Twelve-plus centuries later, the *Song* might seem best heard as a romanticized account of French national origins, or of the genesis of European identity, rather than as the herald of a clash of civilizations.² Although Islam remained ascendant for a millennium, defeating the Crusaders, extending suzerainty into the Balkans, and probing the gates of Vienna, by the early twentieth century, failures to meet Western technological and intellectual challenges left the Islamic realm poor and weak, and European powers had colonized broad swaths of once-Muslim territory.³ By the 1990s, Western alliances shielded Turkey and Pakistan, defended Saudi Arabia and liberated Kuwait, and terminated genocides in Bosnia and Kosovo. As of 2015, no consortium of Islamic states, let alone the fearsome and rapacious Islamic State in Iraq and Syria (“ISIS”),⁴ can hope to stand against, let alone defeat, the West in battle.

¹ THE SONG OF ROLAND (C. K. Moncreiff trans., 1995) (*circa* 1000 A.D.).

² A “clash of civilizations” between Islam and the West references the difficulties of the former in negotiating a coexistence with the secularism, democracy, and human rights defining the latter. SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER*, 36, 70-78 (1996).

³ BERNARD LEWIS, *WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE* 151 (2003). Most etiologies of Islamic decline blame a lack of freedom that is a function of Islam and the cultures in which it took root, stifling innovation. *See id.* at 159 (“[A] lack of freedom underlies . . . [all] the troubles in the Muslim world.”). For Islamic sources, however, Islam is the perfect guide to public administration, and causes are exogenous to the Muslim world. *See generally id.*

⁴ ISIS, a global *jihadi* group, uses armed force, WMD, beheadings, sex slavery, and drug trafficking to extend a “Caliphate” it declared over swaths of Iraq and Syria in 2014. ISIS’ momentum, brutality, *jihadi* alliances, money, recruiting, and operational plans have Western allies scrambling to create and implement a counterstrategy. *See generally* Aaron Y. Zelin, *Colonia Caliphate: The Ambitions of the ‘Islamic State’*, WASHINGTON INST. (July 8, 2014), <http://www.washingtoninstitute.org/policy-analysis/view/colonial-caliphate-the-ambitions-of-the-islamic-state>.

Yet to conclude, based on correlations of military forces, that Islamists⁵ have abandoned an existential struggle they began in 674 A.D., when an Islamist army besieged Constantinople in a bid to subjugate *dar al-Harb* to *dar al-Islam*,⁶ would be a dire strategic error. Rather than adapt to change, Islamism has incubated an obdurate revanchisme, absolving itself of governance failures and faulting instead apostate rulers who “le[ft] Islam vulnerable to encroaching foreign powers eager to steal their land, wealth, and . . . souls”⁷ as well as the West, which “declar[ed] war on God” by “occupying” Muslim lands, establishing the “petty state”⁸ of Israel, “invent[ing] laws . . . rather than ruling by *Shari’a*,” and corrupting Islamic culture.⁹ Too many Muslims, desperate to reclaim their rightful place in God’s order, are receptive to Islamist exhortations to wage jihad until they re-create a Caliphate and impose *Shari’a* over mankind.¹⁰

To achieve this, Islamists must depose secular Arab regimes and evict the Western military forces that back them from the

⁵ The phrase “Islamists” references *only* individuals and groups who use or advocate force to recreate the Caliphate; *it does not denote all Muslims*. “Islamism” is the interpretation of Islam animating Islamists. This Article is otherwise agnostic as to whether Islamists are warriors for the Faith or heretical hijackers of a peaceful religion. See SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* 109 (2004) (“[Islamism is] precisely the vision . . . prescribed to all Muslims in the Koran[.]”). But see RAYMOND BAKER, *ISLAM WITHOUT FEAR* 2 (2003) (rejecting “criminal . . . violence disguised by Islam[.]”).

⁶ Islamic jurisprudence bisects the world into *dar al-Islam* (abode of peace), in which dwell the Muslims, and *dar al-Harb* (abode of war), the realm of unbelievers, with the former sphere commanded to wage perpetual war against the latter to spread the faith. *Dar al-Islam Definition*, ISLAMICUS.ORG, <http://Islamicus.org/dar-al-islam/> (last visited Mar. 2, 2015).

⁷ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 50 (2004).

⁸ Usama bin Ladin, *Fatwa urging Jihad against Americans* (Feb. 23, 1998), in FBIS REPORT COMPILATION OF USAMA BIN LADIN STATEMENTS 1994 – JANUARY 2004, at 56-57 (2004) [hereinafter FBIS REPORT], available at <https://www.fas.org/irp/world/para/ubl-fbis.pdf>.

⁹ *Id.* at 213.

¹⁰ See MUHAMMAD BULANDSHAHRI, *ILLUMINATING DISCOURSES ON THE NOBLE QUR’AN* 235 (1996) (specifying the Islamist goal).

Middle East.¹¹ Next, they must extend *dar al-Islam* to lands once under Islamic rule, including modern-day “Israel, Spain, Southern Italy, the Balkans, [and] southern Russia,” and convert or murder “infidel” populations.¹² Islamists can then use this foothold to project military power and submit the rest of the world. To this end, Osama bin Laden preached that “to kill the Americans and their allies . . . is an individual duty for every Muslim,”¹³ and the 9/11 hijackers were a “vanguard God ha[d] blessed . . . to destroy America.”¹⁴ Very simply, because it blocks a recreated Caliphate and resists God’s laws, the West is an evil civilization Islamists must eradicate.¹⁵

Contemporary Islamists are no less bent upon world conquest than their predecessors who battled Charlemagne, and no less pledged to wage total war than the Nazis or Communists. On 9/11, a quest for global domination begun in the 7th century entered a more violent phase, and Islamists, heartened by U.S. restraint in response to a generation of probing attacks,¹⁶ regained the offensive. All strategies that advance the Islamist goal are divinely sanctioned,¹⁷

¹¹ *A Nation Challenged: Bin Laden’s Statement: ‘The Sword Fell’*, NYTIMES.COM (Oct. 8, 2001), <http://www.nytimes.com/2001/10/08/world/a-nation-challenged-bin-laden-s-statement-the-sword-fell.html> (“I swear to God that America will not live in peace before . . . all the army of infidels depart the land of Muhammad[.]”).

¹² FBIS REPORT, *supra* note 8, at 58. Irredentist Islamist doctrine holds that once territory is governed by Islam it is permanently incorporated within *dar al Harb*, mandating reconquest if ever lost to non-Muslims. *Qur’an* 2:191 (“Slay [infidels] wheresoever ye find them and expel them from whence they have expelled you[.]”).

¹³ FBIS REPORT, *supra* note 8, at 212.

¹⁴ *Statement of Usama bin Ladin on US Strikes* (Oct. 7, 2001) in FBIS REPORT, *supra* note 8, at 183.

¹⁵ RALPH PETERS, BEYOND TERROR: STRATEGY IN A CHANGING WORLD 52 (2002) (“[Islamists must] destroy . . . a civilization [t]he[y] . . . cast as satanic[.]”).

¹⁶ The current phase began in 1979 when Iranian Islamists seized the U.S. Embassy. BERNARD LEWIS, THE CRISIS OF ISLAM: HOLY WAR AND UNHOLY TERROR 162-63 (2002). Failure to respond with overwhelming force to the bombing of the World Trade Center (1993), Al Qaeda attacks in Somalia (1994), and the bombings of Khobar Towers (1996), U.S. embassies in Africa (1998), and USS *Cole* (2000) convinced Islamists the United States had become “degenerate and demoralized, ready to be overthrown.” *Id.*

¹⁷ A goal is “the objective toward which [a strategy] is directed[.]” Strategy is a “program . . . conceived and oriented based on available resources.” ELIYAHU M. GOLDRATT, THE GOAL (1984).

and armed force, which Islamists have employed in various forms for 1400 years on fields of struggle from Roncesvalles to Granada, Jerusalem to Vienna, New York to London, and Baghdad to Kabul, is part of this strategic portfolio. An Al Qaeda training manual boasts that “[t]he confrontation that Islam calls for does not know Socratic debates, Platonic ideals nor Aristotelian diplomacy . . . [b]ut it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun.”¹⁸ ISIS is using armed force, as well as beheadings, sex slavery, narcotrafficking, and chlorine gas, to extend a “Caliphate” it declared over swaths of Iraq and Syria in June 2014, and its ferocious momentum has the West fumbling for a counterstrategy even as ISIS fighters prepare to capture Baghdad and Damascus. Meanwhile, the Taliban gain in Afghanistan and Pakistan, secular regimes tumble in North Africa, and Iran races toward nuclear weapons.

Yet the advance of ISIS and Islamism is attributable less to bullets and bombs than to an incipient strategic adaption. Because application of traditional military power against Western armies would guarantee eradication of their vastly inferior forces,¹⁹ Islamists reconfigured their strategy to emphasize more effective modalities of battling the West that, woven together with insurgencies, maximize utility.²⁰ The analytical construct “Fourth Generation Warfare” (“4GW”), also known as “asymmetric” or “irregular” war,²¹

¹⁸ See THE AL QAEDA MANUAL, <http://www.justice.gov/sites/default/files/ag/legacy/2002/10/08/manualpart1-1.pdf> (last visited Feb. 27, 2015).

¹⁹ Traditional warfare is interstate battle between national armed forces that battle each other with conventional weapons. U.S. AIR FORCE, DOCTRINE DOCUMENT 3-2, IRREGULAR WARFARE 2 (Mar. 13, 2013).

²⁰ Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT’L L. 339, 340 (2009-2010) (noting the Islamist synergy strategy).

²¹ In “asymmetric warfare,” non-state actors shun force-on-force confrontation to direct attacks against cultures, economies, and populations of states that have difficulty identifying targets vulnerable to conventional military force. Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 J. LEGAL STUD. 71, 72 (1997-1998). “Irregular warfare” is a “violent struggle among state and non-state actors for legitimacy and influence over . . . relevant populations.” IRREGULAR WARFARE, *supra* note 19, at 2.

differentiates modern war from previous generations of war²² and describes, in twelve axioms, the war Islamists are waging against the West:

- (1) Violent non-state actors (“VNSAs”) seek to collapse states and impose radically different governance regimes.²³
- (2) In wars between states and VNSAs the first party to (a) eradicate, (b) deter, or (c) defeat its enemy wins.²⁴
- (3) Eradication is unavailable: states are severely constrained in using traditional military power²⁵ and VNSAs lack sufficient military capacity.²⁶
- (4) Deterrence is unavailable: no common interests, no possible *modus vivendi*, and nothing VNSAs fear losing dissuades their attacks on states.²⁷

²² See William S. Lind, *Understanding Fourth Generation War*, 84 MIL. REV. 13 (2004) (describing three previous generations: manpower, firepower, and maneuver).

²³ Timothy J. Junio, *Military History and Fourth Generation Warfare*, 32 J. STRATEGIC STUD. 243, 245-46 (2009).

²⁴ See SUN TZU, *THE ART OF WAR* (“One need not destroy one’s enemy. One need only destroy his willingness to win.”).

²⁵ See THOMAS X. HAMMES, *THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY* 206 (2008) (identifying, locating, and targeting fighters without fixed locations or identifying uniforms, as well as sustaining a politico-legal consensus to use necessary methods and means, are primary constraints).

²⁶ See Ayman al-Zawahiri’s Letter to Abu Musab al-Zarqawi – English Translation (July 9, 2005), available at <https://www.ctc.usma.edu/v2/wp-content/uploads/2013/10/Zawahiris-Letter-to-Zarqawi-Translation.pdf> (“[O]ur capabilities . . . will never be equal to one thousandth of the capabilities of [the United States.]”).

²⁷ The Communist thesis presumed the “badness of capitalism” and its inevitable destruction. “X,” *The Sources of Soviet Conduct*, 25 FOREIGN. AFF. 566, 571 (1947). Yet while Communism built a *modus vivendi* upon residual civilizational values it shared with the West, no common values exist to temper Occident-Islamist relations.

- (5) Political will—belief in the legitimacy of, and commitment to fight for, a cause²⁸—is the “center of gravity”²⁹ that must be broken to defeat an enemy.
- (6) Breaking political will requires undermining the enemy’s willingness to fight for its political-economic system, culture, morals, and laws.³⁰
- (7) Information warfare (“IW”) uses information as a weapon to break adversarial political will.³¹
- (8) Psychological operations (“PSYOPs”) are a form of IW that on offense sow “distrust, dissidence, and disaffection” and “turn[s] a people against the cause for which it fights” and on defense support and defend political will.³²

²⁸ “Political will” is a popular commitment to overcome resistance and secure a goal and a belief in the legitimacy of the goal. Lori Post et al., *Defining Political Will*, 38 POL. & POL’Y 653 (2010). “Legitimacy” is a sense of the “legality, morality, and rightness” of an act by a political community. U.S. DEP’T OF THE ARMY, FIELD MANUAL 3-05.130, ARMY SPECIAL OPERATIONS FORCES UNCONVENTIONAL WARFARE 3-11 (Sept. 2008). Wars perceived as illegitimate erode the political will to prosecute them. E. Margaret Phillips, *National Will from a Threat Perspective*, 84 MIL. REV. 33, 33-34 (2010). Political will to fight “unfair, inhumane, or iniquitous” wars can collapse “no matter how worthy the political objective.” Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 JOINT FORCES Q. 35 (2009).

²⁹ “Center of gravity” (“COG”) is “the hub . . . against which all energies [are] directed” to defeat an enemy. CARL VON CLAUSEWITZ, ON WAR 595-96 (Michael Howard & Peter Paret eds. & trans., 1976) (1832). Whereas in previous generations it was the enemy’s military, economy, or government, in 4GW the COG is political will.

³⁰ Colonel Pat Phelan, *Fourth Generation Warfare and its Challenges for the Military and Society*, DEF. STUD., 11:1, 96, 117 (2011).

³¹ IW consists of operations taken to “affect . . . adversary information, information-based processes, information systems, and computer-based networks” and attack the enemy COG. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, JOINT DOCTRINE FOR COMMAND AND CONTROL WARFARE (C2W) I-3 (Feb. 7, 1996), *available at* http://www.iwar.org.uk/rma/resources/c4i/jp3_13_1.pdf.

³² JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS ix-x (Sept. 5, 2003).

- (9) PSYOPs waged in political, economic, cultural, moral, and legal domains are the primary method of combat between states and VNSAs.³³
- (10) Military operations are combat support efforts that frame, magnify, and potentiate the effects of PSYOPs on adversarial political will.³⁴
- (11) 4GW is total war: the battlespace is everywhere, everyone is a potential combatant, and everything is a target.³⁵
- (12) The first party to make the other unwilling to fight for its political-economic system, culture, values, morals, and laws wins 4GW.³⁶

As of 2015, the West is losing the 4GW Islamism declared for three reasons. First, at the most basic level—understanding what the war is about—Islamists enjoy a near-decisive edge: whereas they are fixed on extending their religious, political, and legal domain across the world, the West quests after a fuzzy vision of a democratic, rule-of-law Islamic world where rights of confessional minorities are respected, goods and ideas are freely exchanged, and incentives to religious radicalism are diminished. Second, the West underestimates Islamist nature and resolve: although some Western leaders recognize Islamism as a vicious ideology that “follow[s] in the path of fascism, Nazism, and totalitarianism,” few publicly acknowledge the threat it poses to Western civilization, and most believe it will follow its ideological predecessors “[in]to history’s

³³ See Colonel T.X. Hammes, *Fourth Generation Warfare Evolves, Fifth Emerges*, MIL. REV. May-June 2007 at 14 (“[4GW] uses all available networks—political, economic, social, and military—to convince the enemy . . . that their . . . goals are either unachievable or too costly for the perceived benefit.”).

³⁴ See *id.* at 14 (describing a shift from “military campaigns supported by [IW] to [PSYOP] campaigns supported by [counter/insurgency].”).

³⁵ See Phelan, *supra* note 30, at 2-3 (describing 4GW as a “war of the people” in which “the distinction between war and peace . . . disappear[s.]”) (emphasis in original).

³⁶ See generally J. Boone Bartholomees, *Theory of Victory*, 38 PARAMETERS 26 (2008) (elaborating 4GW victory conditions).

unmarked grave of discarded lies.”³⁷ Third, the conflict with Islamism became a 4GW in 1979, and Western failure to adapt to the changed nature of the war is magnified by its disadvantage in PSYOP capabilities. Whereas the West remains invested in the defunct proposition that traditional instruments of power, i.e., conventional military force, that carried utility in the previous three generations of war, will suffice, Islamists know victory is political, not martial, and that they must destroy the Western will to fight. Islamists forced U.S. withdrawal without victory from Iraq and Afghanistan³⁸ because they recognized that, although their own forces could never defeat Western troops in battle, Western political will, and in particular its constituents—belief in the legitimacy of a civilization defined by democracy, individual rights, religious pluralism, and the willingness of the Western peoples to fight for the survival of this civilization—was far more vulnerable.³⁹

Islamists have been fighting a total war using information as their primary weapon, intending to destroy Western will and civilization, while the West has been fighting a limited war, primarily with military force, hoping to disrupt Islamist groups and

³⁷ Presidential Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001).

³⁸ The last U.S. forces withdrew from Iraq in 2011, and ISIS appears poised to defeat the Iraqi government. Rick Brennan, *Withdrawal Symptoms*, 93 FOREIGN AFFAIRS 25 (2014), available at <http://www.foreignaffairs.com/articles/142204/rick-brennan/withdrawal-symptoms>. In 2014, the U.S. announced its last combat forces would withdraw from Afghanistan by the end of 2016, despite failure of the Afghan government to develop a sustainable indigenous security capacity and a resurgence of the Taliban. Kenneth Katzman, CONG. RESEARCH SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 22 (2015).

³⁹ For Americans, political will is a collective commitment growing out of considerations of interests and ideals and sustained by the belief that war is “right, necessary, and worth the sacrifice” in lives and treasure. SUSAN A. BREWER, WHY AMERICA FIGHTS 3-4 (2009). Islamists identify U.S. political will as the critically vulnerable Western COG. JOHN A. GENTRY, HOW WARS ARE WON AND LOST: VULNERABILITY AND MILITARY POWER 265 (2102). We “face a foe who knows that war starts with ideas and depends on them[.]” Sebastian L. v. Gorka, *The Age of Irregular Warfare: So What?* 58 JOINT FORCES Q. 32, 38 (2010). “[T]he war on terror cannot be lost on the battlefield; but it can be lost if the will of the American people falters[.]” THOMAS MCINERNEY & PAUL VALLELY, ENDGAME: THE BLUEPRINT FOR VICTORY IN THE WAR ON TERROR 37 (2004).

democratize the Islamic world.⁴⁰ In such a contest, Islamists need not win a single military engagement: they will prevail if they psychologically exhaust the West, inveigle its peoples into doubting the utility and morality of the war, make the price of victory exceed the costs, and compel its peoples to pressure their governments to abandon the fight. To destroy Western political will, Islamists have focused their primary attacks against the military, political, and economic leader of the West—the United States.⁴¹ More pointedly, they have targeted the most fundamental component of the American self-conception as leader of a civilization worth defending: veneration of the rule of law.

If the phrase has been drained of some meaning by “ideological abuse and . . . over-use,”⁴² the expression “rule of law” nevertheless connotes a politico-legal order in which rights are respected in the creation and application of laws; life, liberty, and property are immune from arbitrary deprivation; individuals are formally equal; judges are neutral and redress grievances based on rules and not politics; and laws govern disputes rather than human whim.⁴³ By specifying the refusal of the British monarch to uphold British laws in governing the American colonies as a ground for political separation, and by elaborating explicit constitutional prohibitions against arbitrary government and recognizing the “law of Nations” as part of U.S. law, the Founding Fathers made manifest the respect for the rule of law that is so firmly rooted in the American national character. The decision in 1776 to fight the greatest military

⁴⁰ See Michael J. Mazarr, *The Folly of “Asymmetric War,”* 31 WASH Q. 33, 42 (and *passim*) (2008) (juxtaposing asymmetries of U.S. and Islamist goals and commitments).

⁴¹ Where Western security threats arise, “if the United States is not the solution, there is no solution.” Harold Hongju Koh, *The Law Under Stress After September 11*, 31 INT’L J. LEGAL INFO. 317, 322 (2003). A captured document from bin Ladin’s Abbottabad compound reveals that Islamists conceptualize the United States as the trunk of a tree with NATO and apostate Arab regimes its branches: “[S]aw the American trunk . . . once the tree is down, its branches will die [.]” SOCOM 2012-0000017-HT, at 2, *available at* <https://www.ctc.usma.edu/posts/letter-regarding-al-qaida-strategy-english-translation-2>.

⁴² JUDITH SHKLAR, *POLITICAL THOUGHT AND POLITICAL THINKERS* 21 (Stanley Hoffman ed., 1998).

⁴³ See generally Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 195 (1977).

power on earth to vindicate the principle that “the law is king” rather than “the king is the law”⁴⁴ underscores the centrality of law to American cultural and political identity. Legal consciousness and a predilection for resorting to law to order affairs and resolve disputes have penetrated the American mind so deeply that law influences, even determines, the outcomes of American conflicts political and military.⁴⁵ U.S. foreign policy elites have long championed rule of law as an American export that spreads peace, order, and justice globally,⁴⁶ and it is a desideratum for which Americans have spent blood and treasure from the earliest days of the Republic. Indeed, it is part of U.S. strategy for defeating Islamism; as the National Strategy for Counterterrorism makes manifest, “commitment to the rule of law is fundamental to supporting an international [order]” that can detect, deter, and defeat Islamists.⁴⁷

Thus, for America to be chastised for violations of law, or worse, branded a rogue and anomic regime, threatens the fundament of U.S. legitimacy. Because the United States, like other democratic republics, requires public support to muster, deploy, and sustain military operations, and because allegations of law of armed conflict (“LOAC”) violations lodged against the U.S. strike at the legitimacy of a nation constituted by the rule of law and unwilling to prosecute “illegal” wars, these claims directly assault American political will.⁴⁸

⁴⁴ THOMAS PAINE, THE PROJECT GUTENBERG EBOOK OF COMMON SENSE, BY THOMAS PAINE, <https://www.gutenberg.org/files/147/147-h/147-h.htm> (last visited Feb. 28, 2015).

⁴⁵ See ALEXIS DE TOCQUEVILLE, THE PROJECT GUTENBERG EBOOK OF DEMOCRACY IN AMERICA, VOLUME 1, BY ALEXIS DE TOCQUEVILLE, ch. 16, <http://www.gutenberg.org/files/815/815-h/815-h.htm#link2HCH0038> (last visited Feb. 28, 2015) (observing that U.S. political issues are invariably framed as legal questions).

⁴⁶ See, e.g., THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 36 (2006), available at <http://nssarchive.us/NSSR/2006.pdf>.

⁴⁷ NATIONAL STRATEGY FOR COUNTERTERRORISM 6 (2011) [hereinafter USNSCT], available at http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf.

⁴⁸ CHARLES J. DUNLAP, JR., LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS 4 (2001), available at <http://people.duke.edu/~pfeaver/dunlap.pdf> (suggesting that U.S. opponents frequently try to undermine public support by making it appear that the United States is waging war in violation of the laws of war); see Thomas B. Nachbar, *Counterinsurgency, Legitimacy, and the Rule of Law*, 42 PARAMETERS 27, 37 (Spring

It matters not that Islamists repudiate all obligations to observe LOAC; what is necessary is that the U.S. will to fight them withers under allegations of American lawlessness. This is precisely why Islamist strategists have orchestrated a two-dimensioned operational plan consisting of an information element—a PSYOP campaign—supported by a military element—the unlawful use of armed force—to convince Americans that the United States is an evil regime that elected to fight an illegal war against Islam, that the United States systematically commits violations of law in prosecuting this war, that U.S. crimes erode national security and destroy core values, and that the only way the United States can restore its moral virtue, recommit to the rule of law, and protect itself, is to withdraw in defeat.

Islamists are militarily self-reliant, prosecuting jihad with methods universally regarded as grave breaches of LOAC.⁴⁹ The “Islamist Way of War”⁵⁰ uses feigned surrender and murder of

2012) (“[L]aw and legitimacy figure prominently as a means to defeat [America’s] enemies” because “legitimacy [helps] convinc[e] the population . . . to . . . sacrifice to preserve the government” and the lawfulness of U.S. policies reinforces American legitimacy); Dunlap, *supra* note 28, at 35 (“[A]ccounting for law, and . . . the fact and perception of adherence to it, in the planning and conduct of [war]” is necessary to accomplish military missions.).

⁴⁹ LOAC, or international humanitarian law [“IHL”], the norms, customs, and rules that structure legal relations during war, is distillable into basic principles: (1) noncombatants and combatants rendered *hors de combat* by wounds or surrender are immune from attack; (2) medical assistance to the wounded and sick does not violate neutrality, and the state must ensure the protection of persons in its power; (3) all persons are entitled to be free from torture; (4) methods of war are limited, and means which cause unnecessary suffering are prohibited; and (5) civilian and military targets are distinct, with only the latter subject to attack. JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 61-78 (1985).

⁵⁰ An “Islamist way of war” presupposes a distinct, articulable way Islamists do battle. Adam Oler, *An Islamic Way of War*, 62 *JOINT FORCES Q.* 81, 82 (2011) (contains re-classified information and is now only available directly from the National Defense University Press). The “Verse of the Sword” commands Muslims to “kill [infidels] wheresoever ye find them; seize them, encompass them, and ambush them[.]” *Qur’an* 9:5. Islamism treats noncombatant immunity as “a defeasible principle . . . discarded . . . where the enemy bears moral guilt for the grievances that constitute [its] *casus belli*.” Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 *MICH L. REV.* 443, 452 (2007). Central to the “Islami[st] way of war” is leveraging asymmetry by “terrorism[,] propaganda, [and] subversion[.]” Andrew J. Bacevich, *The Islamic Way of War: Muslims Have Stopped Fighting on Western Terms and Have Started Winning*, *AM. CONSERVATIVE* (Sept. 11,

prisoners,⁵¹ suicide bombings,⁵² mosques and schools as combat platforms,⁵³ and civilians as human shields.⁵⁴ If Islamists have

2006), <http://www.theamericanconservative.com/articles/the-islamic-way-of-war/>. Whether *Islam* and LOAC are commensurable, and only *Islamism* is at war with LOAC, is a question this Article leaves open. See Abdulaziz A. Sachedina, *From Defensive to Offensive Warfare: The Use and Abuse of Jihad in the Muslim World*, in RELIGION, LAW AND THE ROLE OF FORCE 23, 30 (J.I. Coffey & Charles T. Mathewes eds., 2003) (Islam commands unrestricted war against infidels). But see Ma'n Abdul Rahman, Book Notes, *Untying the Gordian Knot: Is Jihad the Bellum Justum of Islam?* 18 EMORY INT'L L. REV. 493 (2004) (reviewing HILMI M. ZAWATI, IS JIHAD A JUST WAR? WAR, PEACE AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW (2002) (Islamists violate Islam and LOAC)).

⁵¹ Stephanie Nebehay, *Islamic State Committing 'Staggering' Crimes in Iraq: U.N. Report*, REUTERS (Oct. 2, 2014 1:24 PM), <http://www.reuters.com/article/2014/10/02/us-mideast-crisis-un-idUSKCN0HR0R120141002>. Feigning surrender to gain advantage constitutes “perfidy” because it raises doubt in a capturing force about the sincerity of a surrender offer. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1), *opened for signature* Dec. 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. This discourages acceptance of offers to surrender, triggering the denial of quarter—another war crime. *Id.* at art. 40. Murdering prisoners is a routine Islamist practice. See Kashmira Gander, *Isis [sic] ‘Executes Hundreds of Iraqi Prisoners’ in Horrific War Crime, UN Claims*, THE INDEPENDENT (Aug. 25, 2014), <http://www.independent.co.uk/news/world/middle-east/isis-execution-of-hundreds-of-shia-prisoners-amounts-to-war-crimes-un-claims-9690176.html>.

⁵² In addition to 9/11, Islamists have conducted suicide attacks in Madrid, London, Mumbai, Tel Aviv, Baghdad, Kabul, Bali, Damascus, Sana’a, and elsewhere. See e.g., Ewen MacAskill, *Fivefold increase in terrorism fatalities since 9/11, says report*, THE GUARDIAN (Nov. 17, 2014), <http://www.theguardian.com/uk-news/2014/nov/18/fivefold-increase-terrorism-fatalities-global-index>.

⁵³ See, e.g., Mark Mazzetti & Kevin Whitelaw, *Into the Thick of Things*, U.S. NEWS & WORLD REPORT, Nov. 5, 2001, at 24 (reporting Afghan Islamists taking shelter and storing weaponry in mosques and schools); Dexter Filkins, *The Conflict in Iraq: With the Eighth Marines*, N.Y. TIMES, Nov. 10, 2004, at A1 (same by Iraqi Islamists); Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT’L L. 279, 287 (2011) (same by Gazan Islamists).

⁵⁴ Islamists practice human shielding, defined as the “use of . . . civilians, or captured members of the adversary’s forces . . . placed . . . in a way meant to deter an attack against the forces using the[m],” in every theater in which they fight. See H. VICTOR CONDE, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 114 (2d ed. 2004) (defining human shielding); Anne Barnard & Jodi Rudoren, *Israel Says Hamas Uses Civilian Shields, Reviving Debate*, N.Y. TIMES, July 23, 2014, available at <http://www.nytimes.com/2014/07/24/world/middleeast/israel-says-hamas-is-using-civilians-as-shields-in-gaza.html>; Gianluca Mezzofiore, *Pentagon: Isis [sic] Using Local Population in Syria as Human Shields*, INT’L BUS. TIMES, Sept. 23, 2014,

achieved no major *military* objectives since 9/11, they have inflicted casualties, fractured alliances, broken budgets, and saddled Americans with fatigue and doubt.⁵⁵

Still, fatigue and doubt do not spell defeat. Islamists must overcome Americans' residual support for the war to prevail, and thus it is the informational dimension that receives their main combat effort. Yet Islamists have assayed their capabilities and realize that destruction of U.S. political will—historically the hardest of targets, as triumphs in the Revolutionary War, Civil War, World War II, and Cold War made manifest—requires infliction of cognitive effects more destructive of American faith in the legitimacy of their government than Islamists' own ideological, cultural, and intellectual resources can generate. Of their own accord, Islamists lack the skill to navigate the information battlespace, employ PSYOPs, and beguile Americans into hostile judgments regarding the legitimacy of their cause. Destruction of American political will thus requires indigenous collaboration: Islamists' "work in America . . . in destroying Western Civilization from within" necessitates "sabotaging' its miserable house by their [own] hands."⁵⁶

Accordingly, Islamists have identified strongpoints and force multipliers with cultural knowledge of, social proximity to, and

available at <http://www.ibtimes.co.uk/pentagon-isis-using-local-population-syria-human-shields-1466869>.

⁵⁵ Americans are sensitive to the human costs of war. See Christopher Gelpi & John Mueller, *The Cost of War*, FOREIGN AFF. (Jan./Feb. 2006), <http://www.foreignaffairs.com/articles/61222/christopher-gelpi-and-john-mueller/the-cost-of-war> (noting Islamists inflict casualties to induce the U.S. to withdraw troops). Since 9/11, U.S. operations have cost \$1.6 trillion and 52,311 U.S. military casualties including 6,839 of whom have been killed. Nese F. DeBruyne & Anne Leland, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS (2015); Amy Belasco, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 (2014). Many doubt accomplishments justify these sacrifices. See also *War and Sacrifice in the Post-9/11 Era*, PEW RESEARCH CTR. (Oct. 5, 2011), <http://www.pewsocialtrends.org/2011/10/05/war-and-sacrifice-in-the-post-911-era/>.

⁵⁶ Mohamed Akram, *An Explanatory Memorandum on the General Strategic Goal for the Brotherhood in North America*, THE INVESTIGATIVE PROJECT ON TERRORISM (May 19, 1991), <http://www.investigativeproject.org/documents/misc/20.pdf>.

institutional capacity to attrit American political will.⁵⁷ These critical nodes form an interconnected “government-media-academic complex” (“GMAC”) of public officials, media, and academics who mould mass opinion on legal and security issues,⁵⁸ and, for Islamists, are sources of combat power that must be infiltrated and co-opted to shatter American perceptions of the legal and moral rectitude of the war. Whereas these institutions and intellectuals once embraced values consonant with the society in which they root, over the past half-century they have sharply diverged. Thus, Islamist PSYOPs require the capture of the triumvirate of GMAC nodes—media, government, and the academy—and the recruitment of the wielders of combat power within these nodes—journalists, officials, and law professors—who form the clerisy that alone possesses the ideological power to defend or destroy American political will.

The most transparent example of the power of elite institutions to shape popular opinion as to the legitimacy of U.S. participation in wars is the traditional media. During the Vietnam War, despite an unbroken series of U.S. battlefield victories, the media first surrendered itself over to a foreign enemy for use as a psychological weapon against Americans, not only expressing criticism of U.S. purpose and conduct but adopting an “antagonistic attitude toward everything America was and represented” and “spinning” U.S. military success to convince Americans that they

⁵⁷ Islamists apply the insights of Gramscian cultural hegemony theory, which posits that collapsing an existing political order requires gaining control not of the means of *material* production as in classical Marxism but of the “means of cultural production.” See generally Major Paul E. Swenson, *Al Qaeda, Caliphate and Antonio Gramsci: One State, One Region, Then One World?* (Apr. 2009) (unpublished Research Report, Air Command & Staff College, Air University).

⁵⁸ The Government-media-academic complex (“GMAC”) describes an information aristocracy of senior government officials, elite media members, and university faculty, which squeezes non-members from public colloquy and shapes opinion on security, military, and legal issues. See Ed Lasky, *The academic/media complex*, AM. THINKER (Sept. 8, 2004), http://www.americanthinker.com/articles/2004/09/the_academicmedia_complex.html. Entry barriers create social capital for entrants, and in exchange for commitment to its “(postulated) consensus” GMAC offers “[p]olitical, commercial, academic, and journalistic prestige and advancement[.]” George Will, *The Climate Change Travesty*, Dec. 6, 2009. GMAC squeezes non-members from public colloquy and shapes opinion on security, military, and legal issues. Lasky, *supra* this note, at 3.

were losing, and should quit, the war.⁵⁹ Subordinating reality to a “narrative,” journalistic alchemists converted victory into defeat simply by pronouncing it; Americans, sitting rapt at their televisions but lacking facts to gainsay the media version of events and as yet unaccustomed to doubting media personalities, accepted the verdict. When CBS Evening News anchor Walter Cronkite misrepresented the failed North Vietnamese Tet Offensive of January 1968—an operational win for the United States—as a Communist “victory,” the imprimatur of the “most trusted man in America” made it so.⁶⁰

Defeatism, instinctive antipathy to war, and empathy for American adversaries persist within media. Compliant journalists grant extensive coverage to Western attacks resulting in civilian casualties, but ignore terrorists’ use of those very civilians as human shields in parroting allegations of war crimes. During the Iraq War, despite historically low collateral damage and military losses, the media exaggerated civilian casualties and fixated upon military casualties to the exclusion of favorable coverage regarding mission accomplishment, creating the impression that the war was analogous to Vietnam in its (alleged) illegality, immorality, and futility.⁶¹ Rather than frame detainee abuse at Abu Ghraib as unauthorized acts of criminals judicially punished for their crimes, and contrasting it with the vastly more egregious beheadings of Westerner captives to the approbation of Islamist clerics, media coverage almost entirely centered upon the former, creating a narrative of brutish American lawlessness.⁶² Ideological proclivities of the omnipresent media are a

⁵⁹ NORMAN PODHORETZ, *WORLD WAR IV: THE LONG STRUGGLE AGAINST ISLAMOFASCISM* 84-86 (2007).

⁶⁰ For a discussion of ideological defeatism in the media, see Franz Michael, *Ideological Guerrillas*, 21 *SOC’Y* 27 (1983).

⁶¹ PODHORETZ, *supra* note 59, at 116.

⁶² Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006 *ARMY LAWYER* 1, 3 (“It is apparent after any cursory review of national news that . . . the popular media have exhaustively discussed and dissected issues as disparate as prosecution of military personnel for abuses at Abu Ghairb, the legal status of detainees, the legal status of terrorists, the legality of preemptive war, and the prosecution of alleged war crimes . . .”).

crucial force multiplier, and tasking them as a weapon against U.S. political will is an Islamist operational imperative.⁶³

Government elites also occupy “high ground” for Islamists, as they set national strategy, commit U.S. forces, and bear responsibility for LOAC compliance. How agents and guardians of the people make and defend policies and decisions that implicate LOAC is influential in determining whether Americans perceive a resort to force and subsequent conduct in battle as consistent with LOAC and, in turn, legitimate. The integrity of U.S. political will is thus a function not only of objective battlefield success but also of subjective perceptions of LOAC compliance, both of which are shaped by the pronouncements of senior officials. Affirmations of LOAC fidelity reinforce American political will; accusations of U.S. military infidelity, as Senator Richard Durbin (D-IL) leveled, claiming a description of alleged mistreatment of Islamist detainees would cause a listener to “believe this must have been done by Nazis, Soviets[,] or some mad regime,”⁶⁴ and as Senator Patrick Leahy (D-VT) charged, claiming only a “truth commission” akin to the South African investigation of apartheid could uncover “U.S. crimes” in Iraq and Afghanistan,⁶⁵ effectuates Islamist ends.

The third element in the triumvirate—the academy—tills and fertilizes the intellectual soil from whence sprout crops of graduates who internalize and recycle claims that oppressive U.S.

⁶³ Letter from Zawahiri, *supra* note 26 (“[M]ore than half of this battle is taking place in the . . . media. And we are in a media battle in a race for hearts and minds of our Umma.”).

⁶⁴ 151 CONG. REC. S6594 (June 14, 2005).

⁶⁵ See Senator Patrick Leahy, Restoring Trust in the Justice System: The Senate Judiciary Committee’s Agenda in the 111th Congress, Remarks at the Marver H. Bernstein Symposium on Governmental Reform at Georgetown University (Feb. 9, 2009), *available at* <http://www.truthout.org/021009K> (invoking the South African experience); see also George D. Brown, *Accountability, Liability, and the Use of Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 195-98 (2011). In 2005, Secretary of State John Kerry thundered that “[t]here is no reason young American soldiers need to be going into the homes of Iraqis in the dead of night, terrorizing kids and . . . you know, women.” FACE THE NATION (CBS), Dec. 4, 2005. Rep. John Murtha (D-Pa.) went further, accusing U.S. Marines of “killing innocent civilians in cold blood.” Jim Miklaszewski & Mike Viqueira, *Lawmaker: Marines Killed Iraqis “In Cold Blood,”* MSNBC, May 17, 2006.

institutions and policies cause the conflicts enmeshing the nation.⁶⁶ Because academic proponents of these arguments are widely, if mistakenly, regarded as neutral arbiters of truth dedicated to the pursuit of knowledge and above the American political and cultural fray, their pronouncements on all manner of subjects, including U.S. conduct in the war with Islamism, are received by the lay public as the essence of wisdom itself.

The power of GMAC is difficult to overstate: imputation of illegality to U.S. intervention in Iraq, Afghanistan, and elsewhere, and to America's conduct of military operations in these theaters, by media, government officials, and academics, is a potent source of force multiplication and combat power for Islamist PSYOP attacks against American political will.⁶⁷ Still, as influential as these organizations and institutions are, their synchronized claims are less destructive of American political will than those leveled by the GMAC cohort that possesses the greatest substantive LOAC expertise, along with the unconstrained freedom to make authoritative judgments, in highly visible traditional and new media, on the legality of every issue across the full spectrum of U.S. military operations in the war against Islamism: specifically, lawyers, and more particularly, the legal academy.

Lawyers, by dint of formal training, the centrality of law in American public life, and heavy reliance on their counsel in navigating a regulatory behemoth, reign as an intellectual aristocracy,⁶⁸ with a special warrant to "say what the law is."⁶⁹ Their

⁶⁶ Candace de Russy, *The Academy and Fourth Generation Warfare*, EDUC. MATTERS (Ass'n of Am. Educators, Cal.), Jan. 2004, at 1, *available at* <https://www.aetteachers.org/newsletters/jannews04.pdf>.

⁶⁷ See Kenneth W. Anderson, *Predators Over Pakistan*, THE WEEKLY STANDARD, Mar. 8, 2010, *available at* <http://www.weeklystandard.com/articles/predators-over-pakistan> (presenting examples).

⁶⁸ Lawyers constitute a professional caste, organizational culture, and intellectual "clique" with a seat at every table where economic, political, and military affairs are conducted. Anthony Paik, Ann Southworth & John P. Heinz, *Lawyers of the Right: Networks and Organization*, 32 L. & SOC. INQUIRY 883, 883, 885 (2007). Consequently, lawyers wield "enormous influence" in American society. MARK C. MILLER, THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN

social power and status garners them “special opportunities to articulate, and . . . implement, solutions to the problems they perceiv[e,]”⁷⁰ and lay persons are ill-equipped to challenge their pronouncements. The strength of a claim regarding law is, if not a simple function of expertise, correlated to the base of knowledge underlying it and the (perceived) neutrality of the claimant; non-lawyers are typically deferential before superior, putatively-neutral knowledge.

Within an already exalted profession, professors of law are an aristocracy with special influence over the theorization and transformation of law: by design, their ideas exert *force majeure*.⁷¹ In the late 19th century, elite U.S. law schools sent out evangelists as faculty to lesser law schools, and encouraged them to exercise “more freedom . . . than even judges did to shape the law,” and to be the “bold and ingenious theorist[s]” who would establish the legal academy as the site of intellectual leadership and change within the legal profession.⁷² Law professors “hid . . . their elitist claims in [a] mysterious science which . . . remained unfathomable to the uninitiated,” thereby reinforcing the image of law as a rarified field inhospitable to the unlearned, and of legal faculty as the font of recondite knowledge. Legal academics styled themselves as “scientists” disinterested in partisan disputes and committed only to solving “social malfunctions[,] reduc[ing] practicing lawyers to the status of special pleaders for the parochial interests of their clients.”⁷³ By providing pedagogical leadership, leveraging academic freedom,

AMERICAN POLITICAL INSTITUTIONS 17, (1995). For a theorization of the power of lawyers in the United States, see *id.* at 2, 174.

⁶⁹ See *Marbury v. Madison*, 5 U.S. 137, 138 (1803) (Marshall, C.J.) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁷⁰ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 3 (1977).

⁷¹ See John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1168 (2005) (“[L]awyers are the ‘aristocrats’ of American democracy—far more politically influential than any other profession. Law professors play an important role . . . acting as both its gatekeepers and its ‘theorists.’”).

⁷² See AUERBACH, *supra* note 70, at 74-75, 83 (discussing the causes behind rise of the legal professoriate as the elite among elites within the legal profession).

⁷³ *Id.* at 77, 85.

and cultivating a professional problem-solving approach while appearing above the fray, the legal academy crowned itself the intellectual royalty of the legal profession.

The influence of the legal academy is also a function of the centrality of the rule of law to American political institutions, coupled with the rise of the mass media. Because, as de Tocqueville discerned, every political question in America ultimately becomes a legal question, legal academics, as the class best endowed to offer opinions grounded in expert knowledge without being colored by obligations arising out of the representation of a party to a dispute, are sought out by Congress and the media for their input, a process that connects theory with practice and reinforces their status as intellectual elites. Moreover, through media appearances, op-ed articles, blogs, open letters, and amicus briefs, law professors place their *savoir faire* behind particular viewpoints to influence contentious legal and political issues, including the “impeachment of President Clinton, . . . the 2000 presidential election, affirmative action, terrorism . . . and homosexual rights,” all the while broadening and deepening their influence over other lawyers and judges in molding the law.⁷⁴ Media forays produce effects that percolate down, influencing attitudes and beliefs regarding the subjects upon which law professors pontificate in government, schools, churches, and entertainment.⁷⁵

Thus, the capacity of the legal academy to exert influence is a function of its supremacy atop a stratified profession central to the administration of a rule-of-law republic, its expertise, and its free access to media that transmit their ideas.⁷⁶ However, when legal scholars enter the battlefield of ideas, although far better armed than most, they are not neutrals, and they carry political, ideological, and psychological dispositions that color their interpretations of what law is, and give wings to their aspirations for what law should be. Legal

⁷⁴ McGinnis et al., *supra* note 71, at 1167-68, 1190-98.

⁷⁵ See, e.g., de Russy, *supra* note 66, at 55 (arguing that academia shapes “popular culture . . . , our schools and churches, and government.”).

⁷⁶ See Richard H. Pildes, *The Legal Academy and the Temptations of Power*, in *DISSENTING VOICES IN AMERICAN SOCIETY* (Austin Sarat ed., 2013) (theorizing the political power of the American legal academy).

scholarship, although invested with authorial expertise, is, like all scholarship, advocacy—even militancy:

Pure scholarly agnosticism is not conceivable. . . . We all take part in the . . . critique of any conflict we comment upon. . . . We have dreams [that] cannot be entirely refrained. Because law is not fully determinate, we cannot help project our political views in the interpretation thereof.⁷⁷

Still, because the legal academy has an official “answer” to so many questions, and can credibly offer it as dispassionate analysis free from ideological taint—the work of reason itself—rather than as but one of a number of views with which reasonable people can and do disagree, the impression of unassailable legal wisdom that must be heeded by faithful adherents to the rule of law is chiseled still deeper into the American consciousness. By asserting expertise as an excuse for collapsing positive and normative claims about law, the legal academy abuses the freedom that attends the scholarly enterprise. Worse, because the cost of disagreement with this cadre of experts is banishment from GMAC and the forums in which law and policy are made and interpreted, law professors have seized the power to draw the boundaries of what legal interpretations and conclusions may be expressed without committing the mortal civic sin of transgressing the rule of law. Most crucially, they have converted the U.S. legal academy into a cohort whose vituperative pronouncements on the illegality of the U.S. resort to force and subsequent conduct in the war against Islamism—rendered in publications, briefs *amicus curiae*, and media appearances—are a super-weapon that supports Islamist military operations by loading combat power into a PSYOP campaign against American political will. While this claim applies broadly across the legal academy, a cadre of perhaps two hundred U.S. and allied experts in LOAC—the LOAC Academy (“LOACA”)⁷⁸—possess the authority and influence as learned and

⁷⁷ Jean D’Aspremont, *The International Legal Scholar in Palestine: Hurling Stones Under the Guise of Legal Forms?*, 14 MELB. J. INT’L L. 1, 16 (2013).

⁷⁸ Before 9/11, LOAC was confined to a niche inhabited by handfuls of professors, mostly former JAG officers, at perhaps ten U.S. law schools. After 9/11, the number of legal scholars writing about, teaching, and claiming expertise in LOAC has exploded. Most lack military service but possess expertise in human rights, criminal law, international law, or other subjects with a nexus to issues arising in the 4GW

indigenous members of the civilization under assault to validate or invalidate Islamist claims about LOAC and to multiply or denature the combat power of Islamist PSYOPs.

Most pointedly, this charge is aimed at a clique of about forty contemptuously critical LOACA scholars (“CLOACA”)⁷⁹ who, by proposing that LOAC restrictions on Islamists be waived to provide unilateral advantage, that Western states face more rigorous compliance standards, and that captured Islamist militants be restored to the battlefield, effectively tilt the battlefield against U.S. forces, contribute to timorousness and lethargy in U.S. military commanders, constrain U.S. military power, enhance the danger to U.S. troops, and potentiate the cognitive effects of Islamist military operations.⁸⁰ Moreover, CLOACA, rather than make good-faith legal arguments as to what LOAC does, does not, should, and should not require, offers up politicized arguments—against evidence and reason—that the Islamist jihad is a reaction to valid grievances against U.S. foreign policy, that civilian casualties and Abu Ghraib prove the injustice of the Western cause, that law enforcement suffices and military action is a gross over-reaction, that U.S.-led interventions in Iraq and Afghanistan are illegal aggression *per se*, that the United States is engaged in a pattern of war crimes *à la* Nazi Germany, that U.S. criminality breeds more terrorists and threatens

against Islamism. The exact number is hard to fix, but perhaps two hundred U.S. professors who regularly publish or teach in LOAC, and another thirty from allied nations—Israel, EU, Australia, New Zealand, Canada, and Japan—constitute LOACA.

⁷⁹ This Article emphatically *does not* regard all LOACA scholarship critical of U.S. 4GW policies as *per se* offerings to Islamism or its authors as *ipso facto* state enemies. LOAC is susceptible to interpretation, and much conduct in war is addressed with flexible standards and not rigid rules. See D’Aspremont, *supra* note 77, at 3-6 (recognizing that all parties “[p]lay[] within the . . . windows left open by [LOAC]’s indeterminacy[.]”). Yet when a contemptuous LOACA minority systematically interprets LOAC in its scholarship in a way that aids Islamists in securing their goal and “convince[s] third parties . . . that [the Islamist] fight is just and legitimate” the inference that *these specific scholars*—“CLOACA”—abjure all pretense to truth to commend their knowledge into the service of Islamism—follows ineluctably. *Id.* Moreover, entry into and exit from CLOACA is open: LOACA academic scholars, through their scholarship, make choices that self-determine their exclusion or inclusion.

⁸⁰ See *infra* part I.

the rule of law, that U.S. leaders should be prosecuted for crimes that make Americans less safe, and that dissenters merit professional condemnation and prosecution to shame or compel them into silence.⁸¹

Thus, rather than committing its prodigious talents into the service of its nation of birth or employment, or at least serving as a dispassionate, neutral seeker of truth, CLOACA has mustered into the Islamist order of battle as a Fifth Column⁸² to direct its combat power against American military power and American political will. This radical development—employment of PSYOPs by American elites against Americans—is celebrated in the Islamic world as a portent of U.S. weakness and the coming triumph of Islamism. That a *trahison des professeurs* is responsible for the creation of the most important strategic weapon in the Islamist arsenal is a serious charge that must be developed and defended, and one at which previous scholarship has barely hinted.

Although a polylogue on the weaponization of law under the rubric of “lawfare” has emerged in the fields of strategy and LOAC, nothing in this literature connects the Islamist drive to global hegemony with the strategy of attacking American political will via a PSYOP campaign led by American legal academics. Legal literature conceives of disagreements over LOAC as internal disciplinary debates externalized into the fields of human rights and rule of law. The seriousness of the Islamist threat, the extent to which American political will is under attack, and the possibility that members of LOACA may now be *de facto* combatants are beyond its conception. At the same time, whereas politico-military scholars understand the stakes over which the war is being fought, and that PSYOPs have displaced conventional military operations as the primary

⁸¹ *Id.*

⁸² “Fifth Column,” a reference to a seditious organization within a population working on behalf of the political and military objectives of an enemy of that population, was coined by a Nationalist general during the Spanish Civil War who claimed the four columns of his forces outside the besieged city of Madrid would be augmented by a “Fifth Column” of his supporters within the city who would overthrow the government from within. FRANCIS MACDONNELL, *INSIDIOUS FOES: THE AXIS FIFTH COLUMN AND THE AMERICAN HOME FRONT* 3-4 (1995).

mechanism for securing strategic objectives, their analysis neither provides an enriched account of the origins and employment of Islamist combat power nor traces them to CLOACA.

Part I of this Article develops the claim that CLOACA is waging a PSYOP campaign to break American political will by convincing Americans their nation is fighting an illegal and unnecessary war against Islam that it must abandon to reclaim moral legitimacy. Part II offers explanations as to why this is so. Part III examines consequences of suffering this *trahison des professeurs* to exist. Part IV sketches recommendations to mitigate this “Fifth Column” and defeat Islamism. Part V anticipates and addresses criticisms. Part VI concludes by warning that, without a loyal and intellectually honest law of armed conflict academy, the West is imperiled and faces defeat in the ongoing Fourth Generation War against Islamism.

I. CLOACA AND ITS PSYOP CAMPAIGN AGAINST AMERICAN POLITICAL WILL

The strategic success of the Islamist PSYOP campaign is measured quite simply by whether it induces Americans to compel their government to withdraw combat forces and abandon a conflict short of victory. Thus, operational employment of PSYOPs by CLOACA consists of two aspects. The first is shaped to augment Islamist military operations against U.S. targets—the combat support function—and thereby instill doubt, temerity, and cost-consciousness, while the second—the direct application of combat power in Fourth Generation Warfare—is designed to leverage these cognitive effects, attack American legitimacy as a rule-of-law nation, and collapse American citizens’ willingness to continue to support what they are led to believe is an unlawful and unwinnable war.

A. *Combat Support: Augmentation of Islamist Military Operations*

The first attack in the PSYOP campaign is waged through *jus in bello* scholarship advocating that reciprocity is defunct and Islamist forces, by virtue of the justice of their cause or their inability

to stand in battle against U.S. forces while adhering to LOAC, are entitled to self-serving interpretations, wholesale rewriting, *ad hoc* waivers, and even unilateral disregard of the rules as necessary to gain military advantage. Meanwhile, CLOACA contends that U.S. forces are not only strictly bound by the standards specified in settled canons of LOAC, but also that by virtue of their resources and capacities they should be, and in some instances are, constrained by more rigorous strictures in issue areas such as permissible methods or means of war, who may be targeted and when, and what process and treatment are due enemy detainees. As a result, not only are the military and cognitive effects of Islamist military operations magnified, but U.S. troops and innocent civilians are subject to increased risks as the utility of U.S. counterforce is attenuated.

The following are seven tactics, in order of increasing departure from traditional conceptions of the scholarly enterprise, whereby CLOACA conducts PSYOP attacks to support Islamist military operations. The first is promotion of more rigorous rules and compliance standards for Western militaries. The second is distortion of LOAC principles to immunize Islamist combatants and render counterforce more operationally complex and legally risky. Third, CLOACA misrepresents aspirations for what LOAC *should be* as statements of fact as to what LOAC *already is*. Fourth, CLOACA degrades U.S. intelligence collection and exploitation. Fifth, it advocates restoration of Islamist detainees to the battle, and sixth, it calls for prosecution of U.S. troops for alleged LOAC violations to cause hesitancy, indecision, and reduction in military vigor. Finally, it encourages execution of direct action missions, including material support of Islamists and treasonous conduct.

1. Promotion of Differential Legal Standards

Reciprocity, a foundational principle of LOAC, specifies that belligerents are formally equal and bound to compliance with identical legal obligations; considerations as to the goals for which they fight and their relative capacities for war and compliance are irrelevant. Islamists, however, refuse to acknowledge the binding force of LOAC, and observe no limits in fighting against Western forces. Orthodox commentators in LOAC maintain that Islamists'

failure to reciprocate Western compliance should strip the former of the protection of the substantive rules of the regime and relieve the United States of obligations to continue unreciprocated compliance, or at least permit the United States to assert that its compliance is a matter of policy rather than legal obligation.⁸³ By contrast, rather than concede that Islamists' failure to reciprocate LOAC compliance strips them of protections under that regime, CLOACA contends that the United States should be obligated to observe LOAC unilaterally, and even to adhere to *more* rigorous legal standards than their Islamist foe.

One CLOACA cohort packages differential obligations as "exemplarism," premising U.S. unilateral compliance with LOAC on the assumption noncompliance will cause Islamists to "act even more ruthlessly [against U.S. prisoners of war (POWs)]" while undermining efforts to win over civilian populations in battle theaters; by this view, the U.S. exemplar gains legitimacy and influence—strategic benefits—even as unilateral compliance imposes operational disadvantages.⁸⁴ Another cadre eschews any appeal to self-interest; rather, in light of gross power disparities and near-complete compliance asymmetry, it proposes an equitable approach that reduces legal obligations to correspond with the limited capacities of have-not belligerents.⁸⁵ Both require Western forces to assume more rigorous obligations and choose tactics that shift risks onto themselves.⁸⁶ More radical ideas would grant "material assistance"⁸⁷ to Islamists. The most radical would require the United States to abjure its air power and transfer weapons and intelligence to

⁸³ See Eric Posner, Editorial, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9 (rejecting arguments favoring unilateral LOAC compliance).

⁸⁴ See Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1827-28 (2009) (making this argument).

⁸⁵ David Rodin, *The Ethics of Asymmetric Warfare*, in THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS (Richard Sorabji & David Rodin eds., 2006), 153-56.

⁸⁶ One would oblige the U.S. to "employ more precise . . . weapons [to] minimize civilian casualties[.]" Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L. J. 164, 64 (2011). Another would require U.S. forces to "assume greater risk [than LOAC requires].". *Id.* Both tacitly accept increased *American* casualties.

⁸⁷ *Id.* at 187-88 (describing aid potentially due from the West to Islamists and civilian populations that harbor them as including "food, healthcare, or shelter[.]").

Islamists who, exempted from compliance, could eschew insignia, use prohibited weapons, and hide among civilians.⁸⁸

These differential obligations scholars claim their proposals would provide more noncombatant protection, induce some quantum of Islamist compliance, and yield strategic gains to compensate for operational disadvantages.⁸⁹ However, schemes to “harmonize” capacity and obligation would reward noncompliant Islamists with better weaponry and information, expose civilians to greater risks of collateral damage, require U.S. troops to face greater combat and criminal exposure, increase the material and cognitive burdens of military operations on Americans, and undermine the principle of reciprocity and with it the legitimacy of LOAC, since Islamists would be held to a necessarily lower standard.

2. Distortion of Distinction and Proportionality

Many LOAC rules are expressed as absolute prohibitions, *e.g.*, those forbidding the intentional killing of civilians, use of biological weapons, and refusal to accept surrender.⁹⁰ Adjudging compliance with such imperatives is an empirical inquiry. Most rules, however, present as standards: for example, the unintended killing of civilians is not illegal provided it is not “excessive in relation to the concrete and direct military advantage anticipated,” or in executing an attack it is necessary to “take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”⁹¹ Evaluating compliance with standards allows observers,

⁸⁸ See *id.* at 164 (“[Is the] U.S. obliged to transfer . . . expensive weapons technologies to . . . Al Qaeda?”); *id.* at 188 (weighing prohibitions on state air power); *id.* at 194 (suggesting states must “share intelligence or . . . targeting technologies.”); Sitaraman, *supra* note 84, at 1832 (waiving Islamist wearing of distinguishing insignia).

⁸⁹ Blum, *supra* note 86, at 196, 209 (claiming proposal will yield greater compliance by weaker parties and “increased humanitarian welfare of [their citizens].”).

⁹⁰ API, *supra* note 51, at Art. 51(2) (forbidding intentional killing of civilians); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, April 10, 1972, 1015 U.N.T.S. 164 (1972) (prohibiting biological weapons); Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T.S. 3317 [“GCIII”], at Art. 3(1) (forbidding denial of quarter).

⁹¹ API, *supra* note 51, at arts. 51(5)(b), 57(4).

interpreting in good faith the provisions of treaties and statements of custom, to reach different conclusions about what LOAC permits or prohibits. While there is broad theoretical agreement as to the existence of a core set of principles—distinction, proportionality, necessity, and humanity⁹²—that arise from customary practice and, taken together, constitute the normative basis for LOAC standards and rules, there is sharp disagreement as to what these principles require and prohibit in specific applications. Further, CLOACA—directly or obliquely—suggests that interpretations of these principles, the obligations that arise therefrom, and alleged violations thereof, should depend upon the relative capacity of belligerents. This gambit is most pronounced in regard to distinction and proportionality.

a. Distinction

The principle of “distinction,” which maintains that the only legitimate targets are enemy armed forces and military objects, imposes a categorical prohibition against deliberately targeting noncombatant personnel and civilian objects. However, while an attacker must differentiate noncombatants from combatants and civilian from military objects, the defender is additionally obliged to ensure that its combatants differentiate themselves from noncombatants in order to protect civilians and combatants *hors de combat*.⁹³ Consonant with distinction, combatants must wear uniforms or distinctive insignia and carry weapons openly, and may not use noncombatants to shield themselves from attack. In exchange for marking themselves to the enemy as persons who may lawfully be targeted, combatants earn “combatant immunity,” which insures them against prosecution for belligerent acts otherwise

⁹² Military “necessity” permits all non-prohibited actions that tend directly toward defeating an enemy. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 5 (1996).

“Humanity” requires that belligerent actions not cause unnecessary suffering and that military forces conduct themselves with compassion, fidelity, mercy, and justice. *Id.* at 3, 7. “Distinction” prohibits direct targeting of civilian personnel or objects. API, *supra* note 51, at art. 51(2). “Proportionality” provides that attacking parties ensure unintended civilian casualties are “not excessive in relation to the concrete and direct military advantage anticipated.” *Id.* at art. 57(4).

⁹³ Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765 (2012).

consistent with LOAC.⁹⁴ Thus, distinction allows all parties to know who is and is not a target, granting some protection to innocent civilians.

Still, distinction does not absolutely prohibit civilian casualties.⁹⁵ Civilians may lawfully be killed provided attacks do not deliberately target them and are not disproportionate, defined as “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁹⁶ Moreover, the protections afforded civilians by distinction are defeasible: civilians lose protection against being targeted for so long as they take a direct part in hostilities,⁹⁷ and are subject to prosecution for unlawful combatancy upon capture.⁹⁸ Similarly, when combatants cease distinguishing themselves from civilians—by failing to wear uniforms, refusing to carry weapons openly, or mingling within civilian populations⁹⁹—they lose combatant immunity, and acts once lawful can be prosecuted.¹⁰⁰

Ascertaining compliance with distinction is thus highly dependent upon a definition of “combatants,” the status of persons and objects targeted based on this definition, and an examination of

⁹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 125 U.N.T.S. 4 (1977) at art. 44. By wearing uniform or insignia, combatants distinguish themselves from noncombatants and earn combatant immunity on capture. William H. Ferrell, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 105-09 (2003).

⁹⁵ See Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT’L L. 255, 261-62 (2010).

⁹⁶ API, *supra* note 51, at art. 57(2)(a)(iii)-(2)(b).

⁹⁷ See *id.* at art. 51(3) (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”).

⁹⁸ See *The Relevance of IHL in the Context of Terrorism*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (last visited Feb. 14, 2015) (elaborating on the regime governing the prosecution of unprivileged combatancy).

⁹⁹ See Peter Margulies, *The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11*, 95 MARQ. L. REV. 1417, 1421-27 (2012).

¹⁰⁰ YORAM DINSTEN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-30 (2004).

the conduct of persons claiming status-based privileges. It is in these domains that CLOACA distorts the meaning of and facilitates derogation from distinction, particularly as it concerns U.S. military operations to capture and detain, and/or target and kill Islamist combatants.

i. Capture and Detention

Military forces use two methods to neutralize enemy combatants: (1) capture and detain, and (2) target and kill. Western troops have captured thousands of Islamists and detained them to “[p]revent them from returning to the battlefield and engaging in further . . . attacks.”¹⁰¹ Detention, a “fundamental incident” of waging war,¹⁰² incapacitates enemy combatants¹⁰³ while facilitating interrogations that wrest away intelligence used to prevent belligerent acts by other Islamists. The United States may detain enemy combatants without trial until “cessation of active hostilities,”¹⁰⁴ and longer in cases where detainees are subject to prosecution for, or serving a sentence imposed after conviction of, a criminal offense, whether pre- or post-capture.¹⁰⁵ Detention is meant

¹⁰¹ Matthew C. Waxman, *XII The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 INT’L L. STUD. 343, 344 (2009).

¹⁰² *Hamdi v. Rumsfeld*, 542 U.S. 518, 519 (2004).

¹⁰³ Preventive detention is used to protect the public against dangerous individuals—the mentally ill, sex predators, and POWs—not convicted of crimes but predisposed to commit them, or to harm others, if released. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781, 785 (2011). If these individuals can be indefinitely detained, “locking up [Islamists] against whom Congress . . . authorized military force based on their dangerousness should not be forbidden[.]” BENJAMIN WITTES, *LAW AND THE LONG WAR* 35 (2009).

¹⁰⁴ GCIII, *supra* note 90, at Art. 118. The U.S. asserts Art. 118 as a well-settled rule supporting detention of Islamists for the duration of the 4GW. See United Nations Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, June 29, 2005, Addendum (USA) Annex I, at 47, UN Doc. CAT/C/48/Add.3 (“[U]nder [Art. 118], the [U.S.] has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities.”), available at <http://www.state.gov/documents/organization/62175.pdf>.

¹⁰⁵ GCIII, *supra* note 90, at Art. 118 (“Prisoners of war who are subject to criminal proceedings for a crime or offence at common law may . . . be detained until the end of the proceedings, and, if need be, until the expiration of the sentence.”). Under

to incapacitate rather than punish. However, should hostilities persist, a detainee can lawfully be held until the expiration of his natural life simply by virtue of his status as a combatant loyal to an opposing belligerent whom the detaining party is entitled to prevent from returning to battle. This indefinite detention authority is independent of whether the detained enemy is a lawful combatant—a uniformed member of the organized forces of a lawful belligerent who carries arms openly under responsible chain-of-command¹⁰⁶—or an unlawful combatant—an individual who fails to meet all of these criteria and is thus disentitled to combatant immunity.¹⁰⁷

Lawful combatants are immune for pre-capture belligerent acts conforming to LOAC and, as POWs, enjoy a broad set of negative and positive rights, including retention of personal items, quarters and food equivalent to detaining party personnel, pay, recreation, and correspondence; apart from names, ages, ranks, and identification numbers, POWs may not be compelled to provide

this provision, POWs have been detained for decades. See Chris Jenks & Eric Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41 (2011) (identifying long-term detention by the United States, Israel, Malaysia, Algeria, and Morocco).

¹⁰⁶ Captured combatants are detained as POWs if they earn the combatant privilege. See GCIII, *supra* note 90, at art. 4(a)(1)-(2) (POWs are detainees who are “members of the armed forces of a Party to the conflict” who “fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with [LOAC].”).

¹⁰⁷ “Unlawful combatants” are, by Article 4(a)(1)-(2) of GCIII, civilians who engage in belligerent acts without meeting the criteria for combatant immunity. The “armed forces of a Party to a conflict” include “all organized . . . groups and units” under responsible command with an internal discipline system that enforces “compliance with [LOAC].” API, *supra* note 51, at art. 43(1). Article 43(2) declares these persons “have the right to participate directly in hostilities[.]” Article 44(1) states that “[a]ny combatant . . . in . . . the power of an adverse Party shall be a [POW].” *Id.* at arts. 43(2) & 44(1). Combatants who do not govern themselves as to be so defined under Article 43 are not entitled to POW designation as their combatancy is unlawful. DINSTEIN, *supra* note 100, at 33. The status category of unlawful combatant is incorporated in U.S. law as “unprivileged belligerent” which the statute defines as “an individual (other than a [lawful combatant]) who (A) has engaged in hostilities against the [U.S.]; (B) has purposefully and materially supported hostilities against the [U.S.]; or (C) was a part of al Qaeda at the time of the alleged offense[.]” National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 948a(7)(A)-(C), 2010.

information.¹⁰⁸ By contrast, unlawful combatants are *not* POWs and can be prosecuted for belligerent acts;¹⁰⁹ a sparse set of negative rights spares them only “cruel treatment and torture,” “humiliating and degrading treatment,” and extrajudicial punishment.¹¹⁰ Despite efforts to expand their rights,¹¹¹ unlawful combatants may be vigorously interrogated, denied privileges for failing to provide

¹⁰⁸ See generally GCIII, *supra* note 90, at sec. VI, ch. III (outlining penal and disciplinary sanctions); *id.* at art. 17 (limiting information that must be provided to captors).

¹⁰⁹ See API, *supra* note 51, at art. 44. The foregoing applies not only to soldiers who doff uniforms but to civilians who take up arms without ever donning a uniform: the latter lose their protected status under LOAC and become unlawful combatants and legitimate targets, and subjects of post-capture judicial proceedings. Convention relative to the Protection of Civilian Persons in Time of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV] (stripping protections from civilians who take up arms); API, *supra* note 51, at art. 51(3) (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”). The doctrine is firmly ensconced in the law of major military powers and writings of eminent jurists. *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“[T]he law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants,” and allows military prosecution of the latter).

¹¹⁰ See GCIII, *supra* note 90, at art. 3(1)(a)-(d) [“CA3”] (listing rights to which captured individuals not POWs are entitled). Unlawful combatants benefit from the protections of CA3. See *Military & Paramilitary Activities in & Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27) (holding that CA3 rules “in the event of international armed conflicts . . . constitute a minimum yardstick”); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006). However, they are not entitled to protections afforded POWs, nor to those granted civilians. Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 849 INT’L REV. RED CROSS 45, 45 (2003), available at <https://www.icrc.org/eng/resources/documents/misc/5lphbv.htm>.

¹¹¹ Concerted post-World War II efforts by CLOACA and NGOs to immunize broad categories of belligerents who do not meet requirements of combatant immunity led to inclusion of provisions in API purporting to confer additional protections upon these actors. See API, *supra* note 51, at Art. 44(3)-(4); see also Commentary on API, art. 44, available at <https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/d04a6a9cbbf8b28cc12563cd00433946>. Few Western states, however, allow that these instruments modify customary LOAC, and unlawful combatants remain disentitled to treatment as POWs and liable to prosecution on capture.

information, and compelled to provide information in negotiated plea agreements.¹¹²

After 9/11, the United States determined that Islamist detainees were unlawful combatants as neither Al Qaeda nor the Taliban was party to the Geneva Conventions and neither wears identifying insignia, carries arms openly, or observes LOAC.¹¹³ Thus, although the United States directs its forces as a policy matter to “treat detainees humanely” and “consistent with the [Geneva Conventions,]”¹¹⁴ it has maintained the legal right to detain indefinitely and interrogate Islamists to the limits of prohibitions on cruel and degrading treatment, and in exercising this right has developed intelligence that has disrupted Islamist operations and enabled the killing and capture of senior Islamists, including Osama bin Laden.¹¹⁵ In sum, the United States lawfully structured detainee operations to deny Islamists the benefits of their unlawful combatancy.

Despite (or because of) this, CLOACA thunders that U.S. treatment of Islamist detainees is illegal because they are immune from coercive interrogation, notwithstanding that these detainees did not meet the criteria for lawful combatancy.¹¹⁶ While some make the

¹¹² Unclassified interrogation methods have included, *inter alia*, sleep deprivation, noise stress, temperature extremes, dietary manipulation, prolonged nudity, prolonged standing, and simulated drowning. See, e.g., STAFF OF S. COMM. ON ARMED SERVICES, 110TH CONG., REP. ON THE TREATMENT OF DETAINEES IN U.S. CUSTODY, vii (Comm. Print 2008).

¹¹³ See Memorandum from President George W. Bush to Vice President et al., Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002) (elaborating U.S. detainee policy).

¹¹⁴ FINAL REPORT, GUANTANAMO REVIEW TASK FORCE (Jan. 22, 2010), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>. Since 2006, as a matter of policy, the U.S. has treated Islamist detainees treatment as *de facto* POWs, despite maintaining that those who do not meet the requirements for combatant immunity are unlawful combatants who may be detained indefinitely and subjected to interrogation by methods that do not constitute cruel, inhuman, or degrading treatment because they are not *de jure* POWs. *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Margulies, *supra* note 99, at 12 (describing indefinite detention and coercive interrogation of suspected terrorist detainees as an “effort to change [LOAC]”).

narrower claim that detainees are entitled to Article 75 protections, including release from noncriminal detention “with the minimum delay possible” and significant due process if tried,¹¹⁷ for other CLOACA scholars any military detention can be *per se* unlawful regardless of the pre-capture conduct of detainees or their LOAC status, whom they assert are entitled to the full protections of the civilian criminal justice system—including rights against self-incrimination and immediate release should the United States elect not to prosecute or otherwise fail to secure a conviction.¹¹⁸ The prospect that Islamists might never go free leads some to view LOAC, and not detainees, as the enemy; one huffs that “[LOAC] simply cannot be invoked to justify these detentions when the war could go on forever.”¹¹⁹ One CLOACA bloc, misreading LOAC and the Constitution, emphatically denies that Islamists are “unlawful [enemy] combatants” and brands the designation an “illegitimate term” created solely to “mistreat” . . . detainees.¹²⁰ This school

¹¹⁷ See, e.g., David Glazier, *Playing by the Rules: Combatting al-Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1007-09 (2009). Article 75 establishes a minimum floor of protections to persons not otherwise benefiting from more favorable rules under the GCs; and provides that unlawful combatants are entitled to humane treatment, freedom from torture, and freedom from outrages upon personal dignity. API, *supra* note 51, at Art. 75.

¹¹⁸ See, e.g., Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants,”* 10 Y.B. INT’L HUM. L. 32 (2009) (contending Islamist detainees “can and should face trial” or they must be released even during the pendency of the conflict); Alec Walen, *Transcending, But Not Abandoning, the Combatant-Civilian Distinction*, 63 RUTGERS L. REV. 1149 (2010) (“[A suspected terrorist] must be released and policed like any criminal defendant who is acquitted at trial, if he is not tried and convicted of a crime.”).

¹¹⁹ Mark S. Kende, *The U.S. Supreme Court, the War on Terror, and the Need for Thick Constitutional Review*, 80 MISS. L.J. 1539, 1558 (2011). By this view, detention unlawfully segregates “unlawful enemy combatants from citizens” and leaves them “in a tomb-like, 9.5 x 5.5 foot cell until the forever war ends.” Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL’Y 299, 361 (2007).

¹²⁰ Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L. J. 82, 84 (2009). Emotion dominates reason in this skein of claims. See, e.g., Glazier, *supra* note 117, at 1007 (claiming “universal agreement on . . . [lawful] combatant and civilian categories” to the exclusion of all others); Wayne McCormack, *The War on the Rule of Law*, 36 J. NAT’L. SEC. F. 101, 108 (2010) (describing the unlawful combatant status category as contrary to LOAC because it ensures that the detainee “cease[s] to be a person within international law.”); Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT’L L. 435, 436 (2005)

contends there is no such status under LOAC, and detainees are either POWs who may not be coercively interrogated, or civilians whose indefinite detention is a serious LOAC violation,¹²¹ the remedies for which are judicially-ordered release and compensation.¹²²

Three logical inferences follow from interrelated CLOACA arguments asserting that there is no such status category as unlawful enemy combatants, that Islamist detainees are entitled to combatant immunity even when they hide weapons and wear civilian clothing before and during attacks, and that the U.S. lacks legal authority to detain and interrogate Islamists. The first is that Islamists should not observe the principle of distinction because, by wearing civilian clothing and hiding weapons until the moment of attack, they can avail themselves of the defensive advantage of blending in with civilian populations to mask their movements and gain additional protection. Additionally, Islamists acquire the offensive advantage of achieving greater surprise against U.S. forces that do not appreciate the threat posed by unmarked Islamist fighters masquerading as civilians until after the attack has commenced.

Second, to borrow Supreme Court dictum penned generations ago in response to an argument very similar to those made by CLOACA, these interpretations of distinction “put [enemy aliens] in a more protected position than our own soldiers.”¹²³ Implementing their proposals would result in a regime in which one rule would govern the conduct of honorable U.S. troops, who must wear uniforms and insignia, carry arms openly, and distinguish between combatants and noncombatants only to be detained,

(decrying the U.S. decision to label Islamist detainees “[unlawful] enemy combatants” as “puzzling” on the view that this status does not exist).

¹²¹ See, e.g., Allen & Laudan, *supra* note 103, at 1 (citing sources which claim that preventive detention is “un-American and “caustic . . . to our legal and moral values.”); Meyerstein, *supra* note 119, at 361 (describing U.S. policy as creating a “simplistic apartheid of rights-bearing and non-rights bearing individuals[.]”); Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L REV. RED CROSS 857 (2005) (claiming “unlawful combatant” detention violates human rights).

¹²² For a discussion of habeas actions to achieve the release of Islamist detainees, see *infra* part I.A.2.

¹²³ *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950).

interrogated, and worse, by barbaric Islamist captors whose treatment of POWs notoriously includes beheading and death. By contrast, a second rule would govern Islamist detainees, who—no matter how perfidiously they behave in battle—would be entitled to all the benefits of POW status on capture *at the very least*, and perhaps even to release from captivity *prior* to cessation of hostilities, not to mention the prospect of financial compensation for “damages” arising out of their detention.

Third, CLOACA arguments do more than simply create the legal predicate for premature release and unjust enrichment of unlawful enemy combatants. In conjunction with arguments in support of habeas litigation discussed *infra*, they also support the return of dangerous Islamists to the fight where they are free once again to target Americans.

ii. *Target and Kill*

Targeting and killing is the second method of preventing enemy combatants from engaging in future attacks. Distinction sets limits on an attacking party by categorically prohibiting the deliberate targeting of civilian personnel and objects, yet provides that enemy combatants may be targeted and killed wherever and whenever they can be found so long as attacks against them are otherwise consistent with LOAC.¹²⁴ Distinction further requires the defending party to differentiate combatant personnel from noncombatants at all times to protect the latter by clearly indicating who may and may not be targeted, and to this end prohibits defending combatants from intermingling with civilians to make it impossible for attackers to determine who fits into which status category.¹²⁵ Differentiating civilians from combatants was once a

¹²⁴ See Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145,168 (2010) (“[A]ny [enemy combatant] may be targeted anytime and anywhere plausibly considered ‘a battlefield[.]’”); Jens David Ohlin, *Targeting Co-Belligerents*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (C. Finkelstein ed., 2012) (“[A]ll bona fide combatants are . . . targetable with lethal force . . .” wherever they present themselves).

¹²⁵ See API, *supra* note 51, at art. 51(7) (“The presence or movement of the civilian population . . . shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from

simple task because most combat took place outside of heavily populated areas and warring parties, motivated by the hope for reciprocity and a mutual desire to shield civilian populations from the destructive effects of war, generally limited their attacks to military targets. In Fourth Generation War, however, Islamists deliberately attack civilians and mingle with them to shield themselves. Two skeins of scholarship would narrow—or even foreclose—the legal authority of West to target and kill Islamist fighters while making it much more difficult to distinguish them from civilians, thereby enabling Islamists to enhance their own survivability relative to allied troops at the expense of the civilian populations among whom they seek shelter.

The first concerns use of deadly force. Enemy combatants may be targeted and killed wherever they can be found if otherwise consistent with LOAC. Designation of an individual to be targeted and killed is a command decision predicated upon a factual determination that the target is a member of an enemy armed force or that his killing will reduce a threat.¹²⁶ This determination can be made instantaneously through a uniform or insignia worn by the potential target, or by prior identification through intelligence operations, or conduct past or present that establishes the potential target as allied or auxiliary to the enemy armed force. Targeting and killing uniformed members of armed forces has been a noncontroversial proposition since the origin of war. Yet Islamist combatants do not wear uniforms and purposefully intermingle within urban civilian populations, frustrating their identification and elimination.

In response, the United States turned to intelligence and unmanned aerial vehicles (“UAVs”) to find and eliminate Islamist

attacks or to shield, favor or impede military operations[.]”).

¹²⁶ See Sascha-Dominik Bachmann & Ulf Haeussler, *Targeted Killing as a Means of Asymmetric Warfare: A Provocative View and an Invitation to Debate*, 1 L., CRIME & HIST. 9, 12 (2011) (describing the legal bases for a decision to target and kill in combat or self-defense).

unlawful combatants.¹²⁷ “Targeted killing is the premeditated use of lethal force by states “against a specific individual . . . not in . . . physical custody[.]”¹²⁸ Some LOACA scholars laud this tactical approach for its efficiency in degrading Islamist violent non-state actors without risking innocent civilians or compromising sovereignty as overtly as other uses of force.¹²⁹ UAVs, though unmanned, are just a weapon system governed by “the same general principles that condition the use of armed force in self defense or conduct during war . . . ”¹³⁰ Furor over the use of UAVs in war or in self-defense in peace thus stems from policy and not legal disputes.¹³¹ Finally, UAVs, as with other weapons systems, do not require that targets of targeted killing be afforded a warning or judicial process before use.¹³² To require either, or to insist that less harmful means be employed, would create hesitancy and additional risk to U.S. forces.¹³³

Predictably, CLOACA charges that targeted killing is “no different from ‘extrajudicial killing,’ ‘assassination,’ and the use of

¹²⁷ See, e.g., JAMES IGOE WALSH, U.S. ARMY WAR COLLEGE STRATEGIC STUDIES INSTITUTE, *THE EFFECTIVENESS OF DRONE STRIKES IN COUNTERINSURGENCY AND COUNTERTERRORISM CAMPAIGNS passim* (2013).

¹²⁸ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, UN Doc. A/HRC/14/24/Add.6 (May 28, 2010). Targeted killing is a lawful exercise of belligerent rights in war and self-defense in peace. See *Rise of the Drones II: Hearing Before the H. Comm. on Oversight and Government Reform Subcomm. on Nat’l Sec. and Foreign Affairs*, 111th Cong. 3, n.6 (2010) (written testimony submitted by Kenneth Anderson); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 334 (2004).

¹²⁹ See E. Walker Nordan, Jr., *The Best Defense is a Good Offense: The Necessity of Targeted Killing*, SMALL WARS J., Aug. 24, 2010, at 1, 5, 10 (targeted killing reduces breaches of sovereignty occasioned by invasion); Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT’L L. POL’Y 569, 572-73 (2011) (targeted killing limits civilian death and injury).

¹³⁰ Paust, *supra* note 129, at 572.

¹³¹ Anderson, *supra* note 67, at 26.

¹³² See Harold Hongju Koh, *The Obama Administration and International Law*, Speech Delivered to the American Society of International Law, U.S. DEP’T OF STATE (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> (denying any obligation to provide targets with “process” prior to striking).

¹³³ Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT’L L. STUD. 536, 613-14 (2013).

‘death squads’.”¹³⁴ To this cohort targeted killing denies process due even foreigners in wartime; if Islamists are denied the opportunity to surrender, their killings compromise the “values, goals, and purposes of the liberal state itself.”¹³⁵ Only a criminal justice paradigm requiring warranted arrests and trials of Islamists¹³⁶ will satisfy critics whose scholarship and litigation campaigns¹³⁷ castigate U.S. personnel who order and use UAVs as suborning “wickedness[,] cowardice and . . . perfidy.”¹³⁸ Some imply that Americans engaged

¹³⁴ See e.g., Jeremy Waldron, *Can Targeted Killing Work as a Neutral Principle?*, *passim* (N.Y.L. Sch. Law & Legal Theory Res. Paper Series, Working Paper No. 11-20, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788226. This view is endemic in CLOACA. See also Mary Ellen O’Connell, *Re-Leashing the Dogs of War*, 97 AM. J. INT’L L. 446, 454 (2003) (calling Targeted Killing “extrajudicial execution”). Yet when UAVs supported a humanitarian intervention in Libya—a mission CLOACA favored—a *volte face* occurred and an unwavering hostility toward UAVs softened. See Ken 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. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783.

¹³⁵ Fernando Teson, *Targeted Killing in War and Peace: A Philosophical Analysis*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 591 (A. Altman, C. Finkelstein, & J. Ohlin eds., 2011), available at <http://www.elac.ox.ac.uk/downloads/TK%20Teson%F3n%20OUP.pdf>.

¹³⁶ CLOACA argues Islamists should be entitled to warranted arrests and trials or, if infeasible, prior judicial scrutiny and international supervision before targeted killing may be employed. See, e.g., Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT’L L. 819, 819-20 (2013); Kevin H. Govern, *Warrant-Based Targeting: Prosecution-Oriented Capture and Detention as Legal and Moral Alternatives to Targeted Killing*, 29 ARIZ. J. INT’L & COMP. L. 477, 516 (2012) (“Warrant-based targeting will . . . yield more transparent government[], while advancing the . . . rule of law . . . and promoting . . . human rights.”); Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1269-70 (2013) (“[T]he duty to attempt capture prior to [targeted killing] . . . is systematically violated[.]”).

¹³⁷ See Anderson, *supra* note 134, at 15-16 (noting lawsuits demanding classified information on targeted killing to erect prudential obstacles to its use). Emblematic of these is a suit filed by NGOs on behalf of Anwar al-Aulaqi, a U.S. citizen and Islamist cleric killed in a UAV strike in Yemen. See *Nasser Al-Aulaqi v. Barack H. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010). Despite intelligence that al-Aulaqi was part of Islamist operational networks that included the Fort Hood shooter, the Christmas Day bomber, and the 9/11 hijackers, the lawsuit, mooted by his death, alleged he was on a U.S. “kill list” and in jeopardy of an “extrajudicial targeted killing.” *Id.*

¹³⁸ Anderson, *supra* note 67, at 26.

in targeted killing are themselves unlawful combatants¹³⁹ and the killing of Osama bin Laden by Naval Special Warfare teams was illegal.¹⁴⁰

Others, while acknowledging that distinction permits use of UAVs against combatants, disrupt settled law governing whom to include in this status category. Clearly, uniformed members of state armed forces are combatants and lawful targets at all times, but in Fourth Generation War the prohibited yet routine involvement of ununiformed civilians in combat or combat support on behalf of Islamist VNSAs clouds the task of distinguishing who may and may not be targeted and killed. Although civilians lose noncombatant immunity when they undertake “direct participation in hostilities,” (“DPH”) ¹⁴¹ a precise definition of DPH does not exist. ¹⁴² Determinations as to who may lawfully be targeted hinge upon this definition, which rests upon a judgment of when a civilian should be stripped of combatant immunity and on the basis of what acts. This judgment is invested with political considerations and unguided by settled law.

Under traditional interpretations, DPH encompasses not only uniformed military personnel and civilians carrying weapons but their entire chains-of-command and those who offer material or moral support—planners, propagandists, logisticians, and

¹³⁹ See *Rise of the Drones II*, *supra* note 128; see also Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT’L L. 122, 131-32 (2010) (“[CLOACA] seem[s] fixated on the idea that there must be something illicit about combatants who . . . employ weapons that outrange those of their enemy[,]” and thus “suggests that the activities of the CIA operating drones . . . in . . . AfPak constitutes unlawful combatancy[.]”).

¹⁴⁰ See Kai Ambos & Josef Alkatout, *Has “Justice Been Done”? The Legality of Bin Laden’s Killing Under International Law*, 45 ISRAEL L. REV. 341, 341-66 (2012) (“The killing of . . . bin Laden . . . [was only] lawful if he was . . . taking a direct part in hostilities [or] in . . . self-defence[.] As [neither] situation . . . exist[ed], [it was] extrajudicial execution.”); Geoffrey S. Corn, *Self-Defense Targeting: Conflict Classification or Willful Blindness?*, 88 NAVAL WAR C. INT’L L. STUD. 57, 69 (2012) (examining similar claims).

¹⁴¹ API, *supra* note 51, at art. 51(3).

¹⁴² See, e.g., David W. Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration*, LOY. L.A. LEGAL STUD. PAPER NO. 2010-32, available at <http://ssrn.com/abstract=1658590>.

financiers.¹⁴³ Moreover, such individuals are subject to targeting not merely during the attack phase but at all times on the ground that their unlawful combatancy or support thereof is an ongoing, comprehensive enterprise, in which attacks are episodic but recurring, and are preceded and followed by cycles of recruitment, planning, preparation, and movement directly connected to and productive of military consequences. Thus, direct participants, their chains-of-command, and combat support personnel “are directly, continuously, and actively taking part in hostilities . . . whether or not they . . . take up the gun.”¹⁴⁴ Extension of the DPH construct to “passive supporters” hinges upon the meaning of “passive;” those who merely condone or applaud unlawful combatancy might not qualify as lawful targets whereas, under the broad reading of DPH best suited to eradicating Islamist combat power, “bankers, propagandists, even farmers and cooks, c[an] be targeted . . . regardless of whether they ever held a weapon.”¹⁴⁵ In any case, DPH incorporates not only those who bear weapons but those who support and sustain them, and denies civilian immunity to those whose contributions to the generation of unlawful combat power are intermittent and furtive:¹⁴⁶ they are *de facto* members of a hostile

¹⁴³ See Faculty, The Judge Advocate General’s School, *United Nations Convention on the Safety of United Nations (UN) and Associated Personnel Enters Into Force*, 1999 ARMY LAWYER 21, 27 (civilians forfeit immunity “whenever they take *any action* intended to cause actual harm to . . . an armed force.”) (emphasis added).

¹⁴⁴ Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 271 (2010). This interpretation addresses the revolving door problem, whereby some civilians work in civilian occupations by day but become unlawful combatants by night and would otherwise be able to claim combatant immunity some or all of the time. See *id.*

¹⁴⁵ Sitaraman, *supra* note 84, at 1788. States read DPH broadly as “[t]he only way to [eradicate Islamism] is to eliminate . . . financial support, the training bases, the safehouses.” Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT’L & COMP. L. 851, 861-62 (2004). Israel holds that “DPH” includes support personnel and voluntary human shields. See *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 (2006). The United States requires only “a direct causal relationship between the activity engaged in and the harm done to the enemy[.]” MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING TWO OPTIONAL PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, S. Treaty Doc. No. 106-37, at VII (2000).

¹⁴⁶ See, e.g., *Rise of the Drones II*, *supra* note 128 (describing the standard as not just the degree of participation “but the threat posed, immanence, and other traditional

armed force who may be targeted and killed at all times until they permanently cease hostile activities or surrender into captivity.¹⁴⁷

This traditional conception has been under assault for decades. The first wave centered upon the temporal dimension of DPH. Upon its opening for signature in 1977, Additional Protocol I included controversial provisions purporting to shield VNSA forces against targeting until they have “engaged in a military deployment preceding . . . an attack.”¹⁴⁸ Although the drafters may have intended to incentivize VNSAs to distinguish themselves in small measure from civilians, in practice this relaxed obligation has failed, predictably, to motivate even minimal adherence.¹⁴⁹ Given the right to target state armed forces at any time, these provisions, when interpreted to preclude targeting VNSAs’ fighters until “moments immediately prior to an attack” as many do, would warp the rules in VNSAs’ favor and obligate states to absorb their attacks before responding¹⁵⁰—to the detriment of the civilians distinction is meant to protect.¹⁵¹ Thus they are not widely accepted as customary LOAC

factors—including . . . ‘active self-defense,’ meaning that a threat can be assessed on the basis of a pattern of activity . . . without having to wait until a target is on the verge of acting.”); Koh, *supra* note 132 (explaining U.S. policy that, even without regard to DPH, self-defense permits killing those who afford material support to Islamists).

¹⁴⁷ See Paust, *supra* note 144, at 269 (specifying that the human right to freedom from arbitrary deprivation of life is applicable only with respect to those “within the jurisdiction, actual power or effective control of the state” and does not protect Islamist combatants against Targeted Killing unless captured and detained).

¹⁴⁸ API, *supra* note 51, at art. 44(3)(b). Further, because “there are situations in armed conflicts where . . . an armed combatant cannot so distinguish himself” from the civilian population, fighters are entitled to protection as POWs even if they do not meet any of the criteria entitling them to that status. *Id.* at art. 44(3)-(4).

¹⁴⁹ See, e.g., W. Michael Reisman, *Editorial Comment: Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT’L L. 852, 858 (2006) (describing the “incentive argument” as “doubtful logic”); see Margulies, *supra* note 99, at 1441 (describing it as “quixotic”).

¹⁵⁰ See Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy* 33, n. 135 (Harvard Program on Humanitarian Pol’y and Conflict Res.: Occasional Paper Series, Winter 2005).

¹⁵¹ See Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. J. NAT’L SEC. 45, 64 (2010) (“[E]rr[ing] heavily on the side of civilian status” in deciding if a

by leading military states, which chose either not to ratify API or to enter reservations to these provisions on the ground they would erode distinction and decriminalize unlawful combatancy.¹⁵²

Post-9/11, renewed efforts began to undermine the traditional approach, consistent with the view that even combatants have a right to life necessitating capture rather than killing if possible¹⁵³ and that targeting unlawful combatants on a broad definition of DPH “justif[ies] the eradication of entire populations.”¹⁵⁴ In 2003, the International Committee of the Red Cross convened fifty LOAC scholars to determine (1) who is a civilian, (2) what conduct amounts to DPH, and (3) what divests immunity against direct attack. In 2008 the Interpretive Guidance on the Notion of Direct Participation in Hostilities¹⁵⁵ proposed answers that sparked intense criticism.¹⁵⁶

Per the Guidance, “[a]ll persons . . . not members of State armed forces . . . of a party to the conflict are civilians and entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”¹⁵⁷ Further, although they are not civilians, “[members of] the armed forces of a [violent non-state actor] . . . consist only of individuals whose continuous function is to take a direct part in hostilities,” with DPH defined narrowly as the commission of acts designed to and likely to cause direct harm to an

potential target is a combatant affords ununiformed enemy combatants a “free pass”).

¹⁵² See generally George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1 (1991).

¹⁵³ See, e.g., NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* *passim* (2008) (contending, under LOAC, states must capture rather than kill if possible).

¹⁵⁴ Sitaraman, *supra* note 84, at 1788.

¹⁵⁵ See *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, at 994 (2008) [hereinafter *Interpretive Guidance*].

¹⁵⁶ See Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L. & POL. 637, 638-40 (21010) (critiquing *Guidance* on four grounds); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 698 (2010) (“[K]ey features of the *Guidance* [are] highly controversial.”).

¹⁵⁷ *Interpretive Guidance*, *supra* note 155, at 1002.

enemy.¹⁵⁸ It denies altogether the possibility that combat support or service personnel can be lawfully targeted; further, it countenances the prospect that an individual can shift from civilian to combatant status and back through a “revolving door” without shedding noncombatant immunity and becoming a lawful target save “for such time as [he or she] take[s] a direct part in hostilities.” Although the Guidance suggests that while senior commanders of VNSAs do not reacquire noncombatant immunity during the period between attacks on the ground that command implies a continuous combat function committing them to perpetual DPH, their subordinates are not in continuous combat roles and thus return to civilian status with immunity from targeting once an attack concludes.¹⁵⁹ In short, it immunizes all but those in combat arms roles while ratifying the revolving door concept that partially immunizes all but the most senior Islamists. Again, asymmetrical legal obligations arise: whereas members of state armed forces are continuously vulnerable to targeting, Islamists, *per* the Guidance, are, if targetable at all, free to “choose the time and place of their vulnerability.”¹⁶⁰

A second line of scholarship would bolster the defense of unlawful combatants. Ununiformed Islamists, rejecting distinction entirely, site command and control infrastructure in civilian residential areas to frustrate efforts to identify, target, and kill them.¹⁶¹ Then, rather than eschew combatant acts while in civilian

¹⁵⁸ See *id.* at 1016 (“1. the act must be likely to adversely affect the military operations or . . . capacity of a party[;] 2. there must be a direct casual link between the act and the operation[; and] 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party[.]”).

¹⁵⁹ The *Interpretive Guidance* suggests VNSA armed forces can be targeted when taking “measures preparatory to the execution of a specific act of [DPH], as well as . . . deployment to and the return from . . . its execution,” and thus grants them civilian immunity during some band of time surrounding their combatant acts. *Id.* at 1031.

¹⁶⁰ Margulies, *supra* note 99, at 1435. LOACA scholars criticize the Guidance on this basis. See, e.g., Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 693 (2010) (criticizing this imposition award of asymmetric obligation).

¹⁶¹ See Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War*, 86 CALIF. L. REV. 939, 988 (1998) (noting Islamists routinely site weapons and forces in protected areas “precisely to make . . . charges of indiscriminate use of

guise and in proximity to protected persons, Islamist combatants unlawfully execute military operations from the cover of hospitals, schools, and mosques.¹⁶² Worse, Islamists use human shields—forced and voluntary—in and around concentrations of Islamist fighters, rendering it near-certain that state military operations will, even when painstakingly conducted to mitigate casualties and distinguish civilians from combatants, kill and injure the former.¹⁶³ Although Islamist conduct in siting operations and shielding themselves converts civilian objects into military targets,¹⁶⁴ deaths in putatively civilian areas are publicized to prove U.S. iniquity.¹⁶⁵

force[.]”). This practice is categorically prohibited. GCIII art. 28.

¹⁶² Defenders have affirmative duties to “remove . . . civilian[s] . . . from the vicinity of military objectives, avoid locating military objectives within or near densely populated areas, [and take] necessary precautions to protect the civilian population” Additional Protocol I, *supra* note 51, at art. 58. More pointedly, LOAC prohibits using civilians to shield military objectives. *Id.* at art. 51(7). When defenders breach these obligations, they fail to remove civilians from the area of military objectives; resulting civilian casualties are attributable to this breach, which converts erstwhile civilian objects into lawful military targets. JEAN DE PICTET ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 579 (1987).

¹⁶³ Minimization requires complex legal and moral calculus regarding how many casualties are acceptable, and when and how to strike legitimate targets; the result is fewer targets are engaged than LOAC permits. *See* Blank, *supra* note 53, at 286 (“[Western] forces . . . wrestl[e] with difficult legal and moral questions . . . about who to target, how to target and when to target.”); *see* F.M. Lorenz, *Law and Anarchy in Somalia*, 23 *PARAMETERS* 27, 39 (1993) (describing great reluctance of U.S. to engage armed women and children). Even when U.S. military operations are conducted with such precision as to avoid civilian casualties altogether, Islamist defenders have dragged civilians killed elsewhere to attack sites to falsely claimed the deaths were the result of the U.S. attack. Wheaton, *supra* note 62, at 8.

¹⁶⁴ *See* Additional Protocol I, *supra* note 51, art. 52(2)-(3) (limiting attacks to “military objectives,” defined as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose . . . destruction . . . offers a definite military advantage” and requiring that doubts be resolved in favor of civilian status). However, defenders who convert civilian objects to a military use or purpose divest civilian immunity from these sites. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague art. 27, Oct. 18, 1907, 187 CTS 227.

¹⁶⁵ Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionality*, 43 *CASE W. RES. J. INT’L L.* 707, 710 (2010-2011).

Thus, Islamists convert U.S. LOAC compliance into a defensive weapon.¹⁶⁶

Because “existing legal constraints make lawful fighting much easier for the powerful” and Islamists “do not always have the option of engaging in combat in unpopulated areas,” CLOACA argues that distinction should be reinterpreted to impose higher legal obligations on attackers and more relaxed requirements on defenders regarding human shielding.¹⁶⁷ Some argue that to contextualize distinction when civilians and military targets are interwoven requires that proportionality be construed against states to create a rebuttable presumption that resulting civilian casualties from attacks on such targets are by definition excessive and thus unlawful.¹⁶⁸ Others go further, insisting that the presence of civilians intermingled with Islamist combatants at an intended military target renders any use of force against it *per se* excessive in relation to anticipated military advantage, and thus disproportionate and prohibited.¹⁶⁹ Unilateral constraints inconsistent with LOAC but foisted upon states by CLOACA find favor with non-governmental organizations (“NGOs”), which condemn state attackers when

¹⁶⁶ Perversion of distinction by unlawful combatants to their strategic advantage can be expressed as follows: “If you want to fight against us . . . you are going to have to fight civilians[.] Therefore, you should not fight at all, and if you do, you are the barbarians[.]”). MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 180 (4th ed. 2006).

¹⁶⁷ Blum, *supra* note 86, at 171.

¹⁶⁸ See, e.g., Valerie Epps, *The Death of the Collateral Damage Rule in Modern Warfare*, 41 GA. J. INT’L & COMP. L. REV. 307, 335-36 (2013). Whereas distinction traditionally imposed a strict prohibition against *deliberate* targeting of noncombatant, implying that *specific intent* to target either is required to prove criminal liability, CLOACA argues that the standard for criminal liability when an attacker causes collateral damage should be mere negligence, which is to be presumed a matter-of-law. See *id.* at 353.

¹⁶⁹ See Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL’Y REV. 93, 95 (2011) (citing sources).

human shields are killed but withhold criticism of Islamist defenders who employ them.¹⁷⁰

An untenable choice confronts states facing Islamists using human shields: violate distinction (and perhaps proportionality), or refrain from attacking. In the main, they choose the latter:¹⁷¹ in 2007, NATO announced it “would not fire on positions if it knew there were civilians nearby,”¹⁷² and “[i]f there is the likelihood of even one civilian casualty, we will not strike.”¹⁷³ Taken together, these unilateral constraints encourage four related consequences: (1) Islamists use human shields as a defensive tactic,¹⁷⁴ (2) fewer opportunities to target and kill Islamists present, (3) fewer still are seized, and (4) lawful attacks against Islamists kill civilians.

iii. Summary of Distinction

With arguments contrary to precedent that increase the risks to U.S. forces and to civilians, CLOACA abuses distinction to the benefit of Islamists by relieving them of the legal burden of their unlawful combatancy. It releases them from a regime of detention

¹⁷⁰ See, e.g., G.A. Res. S-9/1, ¶¶ 1-3, U.N. Doc. A/HRC/RES/S-9/1 (Jan. 12, 2009) (condemning alleged Israeli LOAC violations in Gaza but utterly disregarding human shielding by Hamas).

¹⁷¹ States fighting Islamists mingled with civilian populations “struggle between the requirements of . . . protect[ing] noncombatants, and . . . protecting their force[s].” Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT’L L. & POL’Y 241, 243 (2006-2007). Although LOAC permits them to attack even those Islamists who deliberately violate distinction, many states refrain, creating a *de facto* “sanctuary that the bad guys are not entitled to enjoy” under LOAC. Orde F. Kittrie, *Lawfare and U.S. National Security*, 43 CASE W. RES. J. INT’L L. 393, 400 (2010-2011).

¹⁷² Noor Khan, *Afghan Civilians Said Killed in Clash*, WASH. POST (June 30, 2007, 4:46 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR2007063000028_pf.html.

¹⁷³ Pamela Constable, *NATO Hopes to Undercut Taliban With “Surge” of Projects*, WASH. POST (Sept. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452.html>.

¹⁷⁴ See Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT’L L. 122, 134 (2010-2011) (“[I]t is [un]necessary for [Islamists] to build . . . air defenses[.] [O]perating amidst civilians, they enjoy a legal sanctuary created by [attacker]-imposed restrictions . . . secure as [a] fortress bristling with anti-aircraft guns.”).

and interrogation instrumental in preventing future attacks, confers operational advantages upon them relative to U.S. troops whom they surprise and elude in battle, speeds their return to the fight, and denies the lawfulness of efficient and discriminating technology to dispatch them. It also affords absolute immunity from attack to many of their combat support personnel and significant immunity to their front-line fighters, and incentivizes them to mingle with and endanger civilians to blunt—even prevent—U.S. attacks.

b. Proportionality

The principle of “proportionality,” which derives from the Mosaic *Lex Talionis* and prescribes that an injury be requited reciprocally but not with greater injury,¹⁷⁵ does not establish a zero-tolerance or strict liability standard for civilian casualties, but requires that parties attacking military targets take “all reasonable precautions to avoid losses of civilian lives” and ensure that unintended civilian casualties are “not excessive in relation to the concrete and direct military advantage anticipated.”¹⁷⁶ The greater the concrete and direct military advantage anticipated, the more civilian casualties proportionality tolerates.¹⁷⁷

Defining exactly what proportionality requires occurs on contested legal terrain. Deciding how many civilian casualties are permitted in any given attack before the balance has tipped too far towards necessity, whether a method and means of attack are likely to cause civilian casualties in excess of that number, and whether an otherwise lawful target is immune from attack by virtue of the number of expected civilian casualties are judgments dependent on value systems that are difficult to capture and express in formal rules.¹⁷⁸ Determining whether to make allowance for defects in

¹⁷⁵ See *Exodus* 21:23-25 (King James) (“[A]n eye for an eye, a tooth for a tooth[.]”).

¹⁷⁶ Additional Protocol I, *supra* note 51, at art. 51(5), 57(4).

¹⁷⁷ SEARCHING FOR A ‘PRINCIPLE OF HUMANITY’ IN INTERNATIONAL HUMANITARIAN LAW 76 (Kjetil Mujezinovic, et al., eds., 2013) (“[E]xtensive civilian casualties may be acceptable, if they are not “excessive” in light of the . . . military advantage anticipated[.]”).

¹⁷⁸ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 273 (2010) (describing the impossibility of balancing life against necessity as the “terrible and impossible problem of proportionality.”). The malleability of proportionality is “reason to be

weather prediction, communications and intelligence failures, and mechanical malfunctions in evaluating military advantage and excessiveness, and whether to differentiate in the application of the principle as between preplanned targets and targets of opportunity are further considerations for which rules provide no answers. Moreover, these decisions are based on a weighing of costs and benefits immediate and future, and rely on assumptions, incomplete information, and guesswork. Thus, there is space to find a breach of proportionality, if one is so determined, under any circumstances.

The United States is committed “to minimizing civilian casualties.”¹⁷⁹ However, this does not imply an absolute aversion. The utilitarian interpretation reflected in state practice deems a military attack consistent with proportionality even if it causes foreseen but unintended noncombatant deaths so long as the military benefit of that attack exceeds the quantum of unintended harm it visits upon noncombatants.¹⁸⁰ The idea that some “collateral damage” is acceptable is a fixture in Western law and morality, and rests upon the belief in a profound moral difference between intended and unintended but foreseeable consequences:

To deny the distinction means that you either accept that . . . nonviolence is the only tenable position or that you are indifferent to the lives of civilians, since you are guilty of anything that happens anyway . . . [Proportionality is] the only principled way of steering between a pacifism that few of us . . . would accept, and a brutal realism that denies the . . . necessity

concerned over the . . . incipient legalization of the use of . . . force in response to [Islamist] attacks.” Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of International Legal Order*, 81 N.C. L. REV. 1, 48 (2002-2003). Because indeterminacy and interests muddy proportionality, some scholars advocate jettisoning the principle from LOAC altogether. See Jonathan F. Keiler, *The End of Proportionality*, 39 PARAMETERS 53, 63 (2009) (making this argument).

¹⁷⁹ Letter from John D. Negroponte, to the President of the U.N. Security Council (Oct. 7, 2001) (on file with the U.N. Security Council as S/2001/946), available at http://avalon.law.yale.edu/sept11/un_006.asp.

¹⁸⁰ See Gil Meron, *Israel's National Security and the Myth of Exceptionalism*, 114 POL. SCI. Q. 409, 425 (explaining the traditional interpretation of proportionality).

of even trying to distinguish between combatants and noncombatants.¹⁸¹

In keeping with Western interpretations that regard intent as a critical inquiry, the United States requires that strikes against Islamist targets be painstakingly calibrated to achieve concrete and direct military advantage such that when civilian casualties inevitably occur they are the unfortunate outcome of proportionate attacks. The plight of civilians has improved in recent years,¹⁸² substantiating U.S. arguments that intent matters and that has earned a margin of appreciation—meaning its attacks should be immune from legal challenge unless willful, wanton, or gross negligence can be proven. Such proof, by this view, requires evidence of deliberate indifference to civilian life and not merely disturbing evidence of civilian death as “[t]here is no moral equivalence between stray missiles aimed in good faith . . . and deliberate violation of the categorical rules . . . like using human shields.”¹⁸³

Further, proportionality requires more than an inquiry into the objective acts and subjective intent of an attacker. Collateral damage is also a function of where a defender situates military assets; defenders must remove civilians from the area of military objectives, locate such objectives away from densely populated areas, and take other precautions to protect civilians.¹⁸⁴ Failure to discharge these duties does not immunize an otherwise lawful military target. Further, the defender’s failure to honor its obligations does not establish that an attack was disproportionate, nor does it prove the attacker’s intent to cause resulting civilian destruction. When a defender fails to segregate civilians and military objectives, the ultimate author of civilian casualties is the defender who has greater knowledge about the nature and character of the target, greater capacity to protect, and greater responsibility under LOAC to

¹⁸¹ Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES MAG. (Apr. 13, 2003), <http://www.nytimes.com/2003/04/13/magazine/who-owns-the-rules-of-war.html>.

¹⁸² See, e.g., Taylor Seybolt, *Significant Numbers: Civilian Casualties and Strategic Peacebuilding* 3-4, available at <http://ssrn.com/abstract=1877268>.

¹⁸³ Anderson, *supra* note 181, at 6.

¹⁸⁴ API, *supra* note 51, at art. 58.

minimize civilian casualties.¹⁸⁵ *Post hoc* attack analysis that ignores defender obligations encourages legal mischaracterizations.

Despite this, CLOACA holds that (1) states must provide extensive warnings to civilians near intended targets even at the cost of mission accomplishment, (2) some mathematical formula relating military and civilian casualties is dispositive of whether an attacker has violated proportionality, (3) absolute liability rather than specific intent or culpable negligence is the standard for determining criminal breaches, and (4) disproportionate attacks are evidence of the illegality of the resort to force in the first instance.

i. Duty to Warn

States must warn of an impending attack so the enemy civilian population at an intended target can be evacuated “unless circumstances do not permit.”¹⁸⁶ The duty to warn balances necessity and humanity; attackers need not provide a warning that “seriously compromis[es] the [attack]’s chances of success.”¹⁸⁷ State practice confirms that necessity may allow unwarned attack.¹⁸⁸ The United States and NATO have withheld warnings when issuing them would have increased casualties to attacking and defending forces and to civilians.¹⁸⁹ In other operations, air superiority and poor enemy air defenses attenuated the need for surprise and enabled warnings without cost to mission accomplishment.¹⁹⁰ Israel, as a policy, warns out of humanitarian, rather than legal, obligation.¹⁹¹

¹⁸⁵ William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639 (2004).

¹⁸⁶ API, *supra* note 51, art. 57(2)(c) (“[E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”).

¹⁸⁷ Jean-Francois Queguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT’L REV. RED CROSS 793, 806-07 (2006).

¹⁸⁸ See L. OPENHEIM, *INTERNATIONAL LAW: A TREATISE* 312 (1912) (approving state derogations where “circumstances do not permit advanced warning”).

¹⁸⁹ John Embry Parkerson, *U.S. Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 48-50 (1991).

¹⁹⁰ See Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 837 INT’L REV. RED CROSS 154 (2000)

LOAC offers no concrete guidance as to the form warnings must take.¹⁹² The Goldstone Report¹⁹³ responding to alleged Israeli war crimes in Gaza, crafted a prospective standard, insisting, without referencing LOAC, that warnings must “reach those . . . in danger[,] give them sufficient time to react[,] explain what they should do to avoid harm[,] and be . . . credible and clear.”¹⁹⁴ The Report concluded that multimodal Israeli warnings were noncompliant because Israel presumably could have issued more effective warnings, Gazan civilians were uncertain as to how to seek shelter, and some shelters were struck subsequently.¹⁹⁵ The Goldstone Report is remarkable for its lack of any mooring to law, its refusal to concede the extensiveness of Israeli warnings, and its failure to credit the difference between deliberate targeting of civilians and unintended consequences of lawful attacks.

Capitalizing upon the Report’s departure from law to establish asymmetric obligations disfavoring Western states, CLOACA insists that the duty to warn is nonderogable, that it applies where *any* (rather than merely “excessive”) civilian casualties are anticipated, and that if necessity cannot be reconciled with this duty regarding a proposed target, that target must be rejected altogether.¹⁹⁶ Thus, under the grossly expanded duty advanced within CLOACA, investment of a potential target with civilians and creation of the virtual certainty that in any attack at least one civilian will be killed allows an Islamist defender to immunize that target or

(describing the rationale for U.S. and NATO warnings to Serbia in 1999 as based in allied air superiority, which dispensed with concern over forfeiting surprise).

¹⁹¹ See generally Blank, *supra* note 53, at 296-97 (characterizing Israeli warnings to Gazan civilians during Operation Cast Lead made to satisfy humanitarian, not legal, obligations).

¹⁹² A UN study concluded that a state must “take into account how [it] expect[s] the civilian population to carry out the [warning] instruction[.]” Report of Commission of Inquiry on Lebanon, S-2/1, A/HR/3/2, 23 Nov. 2006, para. 156. However, it offers nothing as to the requisite substance or process required of a compliant warning.

¹⁹³ U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter Goldstone Report].

¹⁹⁴ Newton, *supra* note 95, at 273 (citing Goldstone Report, *supra* note 193, at para. 528).

¹⁹⁵ See generally Goldstone Report, *supra* note 193.

¹⁹⁶ See, e.g., Epps, *supra* note 168, at 30.

to level a prefabricated indictment of the disproportionality of any subsequent attack even if preceded by a long symphony of warnings. This expanded duty encourages human shielding and discourages states from providing warnings sure to be deemed inadequate, with the result that civilians are subjected to increased danger and states (as well as their leaders) to more claims of disproportionate conduct.

*ii. Mathematical Formula Relating Civilian and
Military Casualties*

Determining whether a particular attack was proportional is a subjective inquiry.¹⁹⁷ Some in CLOACA decry proportionality as “an organized deceit to persuade us that . . . permitting soldiers to kill enemy combatants” is “signing the death warrant for civilians, except ‘incidentally.’”¹⁹⁸ If attackers can invoke proportionality to immunize themselves, then, by this view, the principle needs to be narrowed by the introduction of more stringent and quantifiable standards as to just how many civilian casualties can accompany an attack before the principle is violated. The drive to develop a mathematical proportionality formula intimates that the proportionality of an attack is inferable by comparing the number of civilian dead to the number of attackers killed.¹⁹⁹ For CLOACA, “body counts” promote transparency and objectify proportionality: “[W]e need . . . a clear rule requiring states and . . . organized fighting groups to keep body counts of . . . dead and injured . . . These figures should be kept both for the injuries to the state’s (or fighting group’s) own civilian personnel . . . and also for the adversary’s [and] made public.”²⁰⁰

Evangelists of this method assume two things. First, some formula of military to civilian casualties exists against which attacks can be assessed for compliance with LOAC. Second, insufficient military deaths establish that an attack was inadequately protective of

¹⁹⁷ See Parkerson, *supra* note 189, at 59 (assessing proportionality is highly subjective and even “an . . . impossible task[.]”).

¹⁹⁸ Epps, *supra* note 168, at 309.

¹⁹⁹ See Parkerson, *supra* note 189, at 61 n.155 (decrying the use of this protocol as a “macabre and distorted method of viewing proportionality[.]”).

²⁰⁰ Epps, *supra* note 168, at 354.

civilians.²⁰¹ In short, because proportionality does not define “excessive” or provide metrics to quantify the concrete and direct military advantage anticipated in an attack that produces civilian casualties, this “body count” methodology reduces the determination of whether an attack is proportional to the answers one reaches to two questions: (1) how much, if any, force protection can an attacker employ, and (2) how much is an attacker permitted to prefer its own citizens to those of the enemy?²⁰²

Traditionally, in assessing how much force is necessary to accomplish a legitimate military objective, states, based on nationalism and necessity, may consider not only the force needed to subdue the enemy but the danger their troops face in achieving the mission, and may privilege force over civilian protection.²⁰³ Protecting one’s troops at the risk of killing enemy civilians,²⁰⁴ who by aiding and “cheer[ing] for the militants lose their mantle of innocence” and “ha[ve] it coming,”²⁰⁵ is unabashedly asserted as moral by traditional LOAC. Traditionalists further condone force

²⁰¹ See Anderson, *supra* note 67, at 33 (“[T]here is no fixed legal standard[,], no mathematical formulas, and it is disingenuous . . . to suggest . . . that . . . [there] is.”).

²⁰² See David Luban, *Risk Taking and Force Protection*, Georgetown Law Faculty Publications and Other Works, Paper 654 at 8, (2011), <http://scholarship.law.georgetown.edu/facpub/654> (“What are the . . . precautions soldiers must take to spare [enemy] civilians[?]”); Reuven Ziegler & Shai Oztari, *Do Soldiers’ Lives Matter? A View from Proportionality*, 45 ISR. L. REV. 53, 53 (2012) (“Does the principle of proportionality in IHL require an attacking state to expose its soldiers to life-threatening risks in order to minimise risks of incidental damage to enemy civilians? If such a duty exists, is it absolute or qualified?”).

²⁰³ U.N. International Criminal Tribunal for the former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 I.L.M. 1257, 1306 (June 13, 2000) [hereinafter *Final Report*].

²⁰⁴ See Asa Kasher & Amos Yadlin, *Assassinations and Preventive Killing*, 25 SAIS REV. 49, 49-51 (2005) (arguing a “combatant is a citizen in uniform” to whom his state’s obligation is greater than to enemy civilians); Iddo Porat, *Preferring One’s Own Civilians: Can Soldiers Endanger Enemy Civilians More Than They Would Endanger Their Own Civilians?* (U. San Diego Sch. of Law, Pub. L. & Legal Theory Research Paper Series, 2009), available at http://ssrn.com/abstract_id=1445509 (finding soldiers are entitled to employ force protection even at cost to enemy civilians).

²⁰⁵ David Luban, *War as Punishment* 4-5 (Georgetown Pub. L., Research Paper No. 11-71, 2011), available at <http://ssrn.com/abstract=1855283>.

protection on the ground that soldiers' lives are intrinsically more valuable than civilians' because the mission depends on the survival of the former—not the latter.²⁰⁶ Some demand that soldiers accept risks to benefit enemy civilians but maintain that LOAC does not compel this;²⁰⁷ risk and force protection are balanced casuistically.²⁰⁸

CLOACA scholars disagree. Some advocate “risk egalitarianism” in which civilian and military lives are equally valuable but soldiers assume significant risks to protect civilians.²⁰⁹ More “nationality-blind” members would require soldiers to assume extraordinary risks to save enemy civilians up to “the point where any further risk-taking would almost certainly doom the military venture.”²¹⁰ Some claim “soldiers’ lives . . . are irrelevant” as “a soldier [is] an instrument of military policy, whose personhood and . . . rights are suspended.”²¹¹ One scholar laments weapons and tactics that reduce the risk of “[U.S.] citizens coming home in body bags;”²¹² by inference, unless the United States risks and loses enough troops in an attack on Islamists, that attack is perfidious. Carried to its logical conclusion, CLOACA fetishism for protecting enemy civilians at the expense of compatriot soldiers, coupled with body count methodology, seems to require that either that zero enemy

²⁰⁶ See W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT’L L. 381 (1997) (supporting whatever force protection is necessary to preserve military strength and public morale); Benvenisti, *supra* note 20, at 354-55 (allowing considerations of “political and social accountability” to enhance force protection).

²⁰⁷ See Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT’L L. 339, 356 (2010) (finding “no legal basis for the obligation to consider other-regarding considerations in the absence of reciprocity[.]”); Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152, 166 (2007).

²⁰⁸ See Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J.L.A. 115, 120-121 (2010) (proposing this balance of risk and force protection).

²⁰⁹ See Luban, *supra* note 202, at 7, 12, 44 (“If the . . . advantage anticipated by choosing one tactic over another . . . is saving x soldier lives, it cannot be pursued by causing more than x anticipated but unintended civilian deaths.”).

²¹⁰ WALZER, *supra* note 166, at 156-57.

²¹¹ Thomas W. Smith, *Protecting Civilians . . . or Soldiers? Humanitarian Law and the Economy of Risk in Iraq*, 9 INT’L STUD. PERSP. 146 (2008).

²¹² Mary Ellen O’Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, J. L. INFO. & SCI. 1, 21, 26-27 (2011).

civilians or all attacking military personnel perish for an attack to be proportional.²¹³

iii. Absolute Liability

An attacker bears no legal responsibility for unintended civilian casualties resulting from otherwise lawful attacks provided it attempted in good faith to balance these deaths against the military advantage anticipated.²¹⁴ Even those operations where an attacker expects a great many civilian casualties are justifiable by the expectation they will confer great military advantages providing the requisite balance. The test is not merely whether the loss of civilian life is “excessive,” but rather whether it was “clearly excessive;” thus, specific intent to target civilians, or at least some degree of culpable negligence, is required to prove disproportionality.²¹⁵

As a result, the macabre resort to counting the dead is a blatant attempt to convert proportionality from a customary requirement that military planners make good-faith judgments in balancing necessity and humanity, into a punitive rule imposing *per se*, or absolute, criminal liability upon all those who inadvertently cause *any* civilian casualties. With all civilian casualties adduced as the foreseeable result of an intentional failure to protect them, and with any attack using sophisticated weapons against Islamists hiding among civilians likely to produce *some* civilian casualties, attackers are *ipso facto* violators of proportionality merely for the fact that they engage in attacks. Such a rule would disregard their intent and

²¹³ See generally Epps, *supra* note 168, at 345-46 (positing a number “n” of civilian casualties above which an attack violates proportionality no matter how great the advantage gained).

²¹⁴ See William J. Fenrick, *Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia*, 12 EUR. J. INT’L L. 489, 501 (2001), available at <http://www.ejil.org/pdfs/12/3/1529.pdf>.

²¹⁵ See Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 1, 2002, 2187 U.N.T.S. 90 (operationalizing proportionality in criminal law), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

ignore how diligently and in good faith they attempt to prevent civilian casualties.²¹⁶

iv. Evidence of Illegal War

CLOACA extrapolates allegations of disproportional attacks to impugn the legality of the initial resort to force. A staged process unfolds: “1) an attack leads to civilian deaths; 2) claims are . . . made that the attack was disproportionate because civilians died[;] and 3) . . . this disproportionate attack . . . automatically means that the entire military operation is a disproportionate use of force [and therefore unlawful].”²¹⁷ This maneuver misrepresents the law of proportionality and deliberately collapses the boundary between *jus ad bellum* and *jus in bello* to support a spurious accusation of aggressive war based solely on unintended civilian deaths.

v. Summary of Consequences to Proportionality

Proportionality is an amorphous, politically-charged construct and a legal morass. LOAC balances necessity and humanity but interpretive gambits by CLOACA destabilize this, encouraging Islamists to employ human shields and discouraging states from launching attacks that, while permissible under LOAC, would be deemed disproportionate and in bad faith. CLOACA has conferred unilateral advantage upon Islamists and induced the West to make prophylactic decisions to adhere to more onerous standards than LOAC requires, as well as to refrain from striking certain targets to guard against spurious allegations of disproportionality lodged against attacks that, had they transpired, would have been lawful notwithstanding that some civilians would have died.

²¹⁶ See, e.g., Jack M. Beard, *Law and War in the Virtual Era*, 103 AM. J. INT’L L. 409, 438-39 (2009) (“[C]ivilian deaths . . . may be incidental but no longer . . . accidental”).

²¹⁷ See Blank, *supra* note 165, at 727.

3. Misrepresentation of Aspiration as Law

International law consists of treaty-based and customary sources.²¹⁸ Treaties are express agreements manifesting state consent to be bound, while customary international law (“CIL”) evolves from state practice consistent with subjective understandings that such practice is legally obligatory.²¹⁹ Practice must be consistent, settled, and uniform to create CIL.²²⁰ LOAC has developed largely by codification of military custom, but because most hortatory declarations purporting to create or modify LOAC do not reflect state practice and no authoritative judicial pronouncement delineates its boundaries, customary LOAC is a hotly contested zone.²²¹

Misrepresentation of LOAC as CLOACA would like it to be for LOAC as it currently is disconnects LOAC from state practice.²²² CLOACA, bent on withdrawing LOAC from the reach of states, insist that an ever-expanding body of principles they “restate” constitutes binding CIL directly applicable to the battlefield.²²³ Others reinterpret existing CIL rules regarding LOAC to create more restrictive definitions rather than cut new ones from whole cloth. Yet most states have elected to incorporate, in military manuals and other sources of domestic law, only those CIL rules for which there is evidence of widespread practice; notwithstanding CLOACA pressures, states are chary of interpretations that might constrain

²¹⁸ See generally U.N. Charter.

²¹⁹ See *North Sea Continental Shelf Cases* (F.R.G. v. Neth. & Den.), 1969 I.C.J. 4, 44-45 (Feb. 20).

²²⁰ See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 434 (1983).

²²¹ See Stuart Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 145-46 (2000).

²²² See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 540 (2002) (describing this process as a conversion of LOAC into a “decaying *de jure* catechism”).

²²³ See Kenneth W. Abbott, *Commentary: Privately Generated Soft Law in International Governance*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 166, 168-69 (Thomas J. Biersteker et al eds., 2006) (describing this process).

their behavior in war.²²⁴ The question of whether and to what extent CLOACA should be able to create and interpret LOAC without state consent, and without representing their work as aspiration rather than description, remains open. What is certain is that confusion of the “ought” for the “is” renders LOAC fuzzier and more political.

4. Degradation of Intelligence Collection and Exploitation

The universe of interrogation techniques spans a coerciveness continuum from flattery and other rapport-building measures to torture. Whether or not more coercive techniques—sleep deprivation, stress positions, temperature regulation, and waterboarding—yield more or better information from detainees, “the optimal level of coercion . . . is [not] zero.”²²⁵ Coercive interrogation can protect states by developing information to interdict future VNSA attacks and conspiracies, and should arguably be available to interrogators in situations where failure to secure information might enable an attack with weapons of mass destruction. In fact, “[i]f the stakes are high enough, torture is [morally] permissible [and] [i]f torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used—and will be used—to obtain the information.”²²⁶

Even more so than the Soviets, Islamists are an “implacable enemy whose avowed objectives” may compel the abandonment of “[h]itherto accepted norms of human conduct” to defeat them.²²⁷

²²⁴ See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 244 (2000) (noting human rights NGOs take “idealistic” positions on customary LOAC that LOAC experts and states find “problematic”).

²²⁵ See WITTES, *supra* note 103, at 196.

²²⁶ Richard A. Posner, *The Best Offense*, NEW REPUBLIC (Sept. 2, 2002), <http://www.newrepublic.com/article/the-best-offense> (reviewing ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002)). Others concur that torture, under extreme circumstances, is permissible. ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 144-45 (2002) (advocating judicially sanctioned torture of terrorists in extremis).

²²⁷ CENTRAL INTELLIGENCE AGENCY, REPORT # 15B, HR70-14(N), REPORT ON THE COVERT ACTIVITIES OF THE CENTRAL INTELLIGENCE AGENCY

Islamist detainees are entitled to fewer protections under LOAC than POWs, and thus the U.S. government instructed interrogators to employ coercive techniques against them—a decision which yielded timely information not otherwise likely to have been divulged.²²⁸ Yet these techniques did not approach the legal term-of-art “torture” which is legally and morally distinct from “coercive interrogation.”²²⁹ The U.S. statute incorporating the Torture Convention prohibits only “intentional infliction . . . of severe physical [or mental] pain or suffering[,] administration . . . of mind-altering substances . . . calculated to disrupt profoundly the senses or the personality[,] [or] the threat of imminent death.”²³⁰ Although the military and CIA employed drugs and physical coercion in post-9/11 interrogation, no technique clearly violated the law.²³¹

Obsessed with a presidential request for guidance as to whether coercion might lawfully be used to interrogate Islamist detainees,²³² however, CLOACA alleged the Office of Legal Counsel response, which it branded the “Torture Memorandum,” employed “unprofessional legal reasoning”²³³ to “dodge criminal liability”²³⁴ for

(1954) [hereinafter Doolittle Committee] (advocating extraordinary measures to defeat the Soviets).

²²⁸ See WITTES, *supra* note 103, at 196; Dormann, *supra* note 110, at 51 (differentiating treatment due unlawful combatants from POWs).

²²⁹ See Ellen Yaroshesky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law*, 36 HOFSTRA L. REV. 563, 583-84 (2007) (finding no definitional consensus as to “torture”).

²³⁰ 18 U.S.C. § 2340(1) (2004) (“Torture” means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession[.]”). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 18 U.S.C. § 2340(1), 1465 U.N.T.S. 85.

²³¹ See WITTES, *supra* note 103, at 29-30 (concluding both techniques fell “short of overt torture” and noting both were “approved post 9/11 for military interrogations of unlawful combatants”); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 1, at 35, 59, 86 (1978) (stress positions, sleep deprivation, and other environmental modifications are not torture).

²³² See Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), NAT’L SEC. ARCHIVE, <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> (last visited Feb. 10, 2015).

²³³ See, e.g., Jose Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 (2005); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 76-77 (2008) (charging

using techniques that were “*ipso facto* torture”²³⁵ and birthing a “murky world of disappearances” and “secret prisons.”²³⁶ For the “choir of condemners”²³⁷ the so-called “Torture Memorandum” served up a smorgasbord of legal sins, including bad-faith definitional narrowing of torture, and failure to consider cruelty and degradation short of torture.²³⁸ That the Bush administration adamantly denied implementing the “Torture Memorandum,” that its successor denied that any post-9/11 interrogation pursuant to U.S. policy approached torture,²³⁹ and that treatment at the Guantanamo

disregard of CIL and caselaw); Milan Markovic, *Advising Clients: After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109, 110 (2011) (castigating “one-sided legal advice[.]”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1231 (2006) (charging poor legal analysis); Cassandra Burke Robertson, *Beyond the Torture Memos*, 42 CASE W. RES. J. INT’L L. 389, 390 (2010) (describing analysis as “preposterous, even spectacularly bizarre.”); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT’L L. 389 (2009); Jeremy Waldron, *Torture and Positive Law*, 105 COLUM. L. REV. 1681, 1703-1709 (2005).

²³⁴ David Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT’L SEC. L. & POL’Y 455, 458 (2010).

²³⁵ THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE 1 (Majorie Cohn ed., 2012). The summary conclusion of a CLOACA member represents many: “[W]aterboarding is torture and . . . torture is illegal and wrong.” M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo “Torture and Power” Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 638, 639 (2009).

²³⁶ Margulies, *supra* note 233, at 6. One CLOACA scholar claims the Torture Memo “toppled the traditional constraints on prisoner treatment[.]” McCormack, *supra* note 120, at 111.

²³⁷ See Darmer, *supra* note 235, at 2 (coining the phrase to describe a uniform, concerted, and coordinated CLOACA outcry against the TM).

²³⁸ Robertson, *supra* note 233, at 390. One excoriated Torture Memo claims that torture entails “death, organ failure, or . . . loss of significant body function” and is justifiable by necessity. Yaroshefsky, *supra* note 229, at 584. Another blasted assertions regarding the level of pain or injury associated with torture. Cole, *supra* note 234, at 457-58.

²³⁹ ANDREW C. MCCARTHY, THE GRAND JIHAD: HOW ISLAM AND THE LEFT SABOTAGE AMERICA 241 (2010)). Senator Obama campaigned on the argument that coercive interrogation constituted torture, and waterboarding senior Al Qaeda members in CIA custody under the Bush administration should be so regarded. President Obama refused to charge those who authorized or executed the technique. Charlie Savage, *Barack Obama’s Q&A*, BOSTON.COM (Dec. 20, 2007), <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>; CIA Employees Won’t Be Tried for Waterboarding, NBC.COM (Apr. 17, 2009),

Bay detention facility in Cuba (“GTMO”) was so superior to other federal prisons that detainees preferred detention there, were irrelevant.²⁴⁰ the politico-legal spell cast by CLOACA invocation of “torture” scuttled U.S. intelligence exploitation of detainees.

In a manual used to train Islamists in the entire spectrum of unlawful combatancy from deployment through detention, Al Qaeda teaches that at the beginning of legal proceedings “the brothers must insist on proving that torture was inflicted on them.”²⁴¹ Defense lawyers—including CLOACA scholars—launched media campaigns to reinforce the torture narrative and, under the guise of attorney-client privilege, provided clients detained at GTMO with literature that recapitulated portions of the manual training clients in this tactic.²⁴² By alleging torture as their commanders and lawyers instructed, detainees triggered a barrage of academic hand-wringing, media scrutiny, and litigation that “paralyz[ed] international intelligence services and military operations much more effective[ly] than bombs and rifles” even as their claims were proven factually false.²⁴³

Academic torture allegations were consequential. While appeals were pending, Congress passed the Detainee Treatment Act, obligating the Defense Department to use only the techniques delineated in Army Field Manual 2-22.3 and establishing Article 3,

http://www.nbcnews.com/id/3024987/ns/politics-white_house/t/cia-employees-wont-be-tred-waterboarding/#.VN3sKXbu5pk. He either elected to violate international law, which required the U.S. to prosecute or extradite alleged torturers, or accepted—freed from campaign hyperbole—that waterboarding was not torture.

²⁴⁰ See Michael J. Lebowitz, *The Value of Claiming Torture: An Analysis of Al-Qaeda’s Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. RES. J. INT’L L. 357, 384-88 (2011) (reporting that a Guantanamo lawyer admitted clients received CA3 treatment in conditions far superior to supermax prison—the likely alternative).

²⁴¹ See AQ Manual, *supra* note 18 (instructing detained Al Qaeda members to make false claims of torture).

²⁴² Debra Burlingame & Thomas Joscelyn, *Gitmo’s Indefensible Lawyers*, WALL ST. J. (Mar. 15, 2010), <http://www.wsj.com/articles/SB10001424052748704131404575117611125872740>.

²⁴³ Lebowitz, *supra* note 240, at 358, 363-70 (citing *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (analyzing lawsuits by detainees wherein allegations of torture were judicially proven false and others where courts were left with “lingering questions concerning the credibility of [a detainee] . . . claim that he was tortured”)).

which is common to all four Geneva Conventions (“CA3”), as the minimum standard for all interrogations of detainees, including unlawful enemy combatants, unless a waiver is approved at higher echelons.²⁴⁴ A 2007 Bush executive order halted techniques construable as prohibited under CA3, extending the prohibition to CIA interrogators save for specific circumstances wherein a presidential authorization is required *a priori*.²⁴⁵ In 2009, President Obama’s first official act was to transfer detainees to civilian prisons and away from interrogators entirely; his second was to order “an end to torture,” ostensibly by terminating CIA interrogation authority.²⁴⁶ This second order suggested the CIA had routinely interrogated in violation of CA3, which CLOACA defines as the threshold below which “torture” results. Yet the CIA had already been restricted to CA3 standards, and thus Obama’s second executive order left the United States dangerously bereft of any capacity to conduct coercive interrogation at all.²⁴⁷ To the extent only coercive interrogation extracts the information necessary to prevent future attacks, the United States is less safe. Further, interrogators are left with a Hobson’s choice in which aggressiveness earns them prosecution, whereas timidity is chargeable as dereliction of duty, if investigators identify their passivity as a cause in a future attack on Americans.²⁴⁸

Secondly, while claims of torture induced the United States to self-limit coercive interrogation, they also prompted tactical adaptations, including the arguable circumvention of domestic law by rendering Islamist detainees to allied nations not so self-

²⁴⁴ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat 2680 (2005) (codified as amended 10 U.S.C. § 801 (2006); 28 U.S.C. 2241; 42 U.S.C. 2000dd (2006)) (ordering DOD personnel to adhere, save for approved exceptions, to CA3 as standard for interrogating detainees however characterized).

²⁴⁵ Exec. Order 13,440, 72 Fed. Reg. 40707, 40708 (Jul. 24, 2007).

²⁴⁶ Exec. Order 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009) (closing Guantanamo Bay); Exec. Order 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (ending CIA coercive interrogation).

²⁴⁷ See John Yoo, *Obama Made a Rash Decision on Gitmo*, WALL ST. J. (Jan. 29, 2009), <http://www.wsj.com/articles/SB123318955345726797> (decrying termination of CIA’s “special authority to interrogate terrorists”).

²⁴⁸ See WITTES, *supra* note 103, at 187-88 (describing a “terrible conundrum” for U.S. interrogators and excoriating Congress for its refusal to extricate them therefrom).

constrained.²⁴⁹ “Rendition” to foreign proxies that develop desired information with more aggressive techniques began in the 1970s after Congress stripped the CIA of many legal authorities.²⁵⁰ Because information regarding rendition operations is classified under domestic law, it is difficult to assess its frequency. Although permissible under domestic and international law as a general rule,²⁵¹ many CLOACA scholars summarily conclude recent U.S. renditions amount to conspiracy to torture.²⁵²

A predictable consequence of the claim that U.S. interrogation is tantamount to torture is that the utility of capturing Islamists is destroyed. In 2010, frustrated by continued claims of detainee torture even after it terminated coercive interrogation, the Obama administration made the tactical decision to begin killing Islamists with UAVs—a policy that, while effective and lawful, also kills any possibility of collecting information through interrogation of detainees that might prevent future attacks on U.S. interests.²⁵³

²⁴⁹ See Margaret L. Satterthwaite, *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the “War on Terror”* 550-560, 557 (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 8-64, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311622 (describing U.S. argument that rendition is an “adaptation” to 4GW and the politics of detention that enables coercive interrogation “without running afoul of the rules”).

²⁵⁰ See WITTES, *supra* note 103, at 28-30.

²⁵¹ Under CIL, forcible rendition of a suspect in a war crime or crime against humanity committed beyond the territory of the rendering state is permissible under universal jurisdiction. See e.g., Covey Oliver, *Judicial Decisions: The Att’y-Gen. of the Gov’t of Israel v. Eichmann*, 56 AM. J. INT’L L. 805 (1962); *United States v. Best*, 304 F.3d 308 (3d Cir. 2002).

²⁵² See, e.g., Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007) (concluding rendition violates LOAC); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT’L L. 295 (2007) (concluding, also, that rendition violates LOAC); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007) (concluding, again, that rendition violates LOAC).

²⁵³ See Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts*, WASH. POST (Feb. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/13/>

5. Restoration of Islamist Combatants to the Battlefield

Furor over Islamist detention unsettled the hoary view that only U.S. citizens are fully vested with constitutional rights and “the Constitution [does not] promise[] people so wholly outside of the American social compact as [Islamist] operatives overseas any of its benefits.”²⁵⁴ Generations ago in *Johnson v. Eisentrager*, the Supreme Court, warning that “[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to . . . divert his efforts and attention from the military offensive abroad to the legal defensive at home,” held that permitting enemy detainees—emphatically outside the U.S. polity and its territorial jurisdiction—access to civilian courts would “bring aid and comfort to the enemy.”²⁵⁵ Relying upon *Eisentrager* for the proposition that enemy combatants detained abroad could not avail themselves of the writ of habeas corpus, and upon battlefield capture data reported by the military, the United States transferred Islamists captured by military and CIA personnel in Afghanistan and Iraq to GTMO.²⁵⁶ Because it detained Islamists as unlawful combatants, the United States maintained they could be held for the duration of the war, tried for precapture crimes, and coercively interrogated to develop intelligence to prevent future attacks.²⁵⁷

The notion that citizenship and enemy status determine whether, and how much of, the panoply of constitutional rights is available to a given detainee, however, was bitterly contested. A

AR2010021303748.html (reporting that a counterterrorism policy shift from capture and detain to target and kill that commenced in 2009 was likely a calculated response to mounting claims of detainee torture).

²⁵⁴ See WITTES, *supra* note 103, at 115.

²⁵⁵ *Johnson v. Eisentrager*, 339 U.S. 763, 769 (“[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance . . . who . . . have remained with, and adhered to, enemy government.”).

²⁵⁶ See, e.g., *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated as moot*, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (citing *Eisentrager* for the theory that Congressional authorization of armed conflict and inherent executive power combined to create authority to detain “enemy combatants” wherever captured).

²⁵⁷ See Bush Memorandum, *supra* note 113.

CLOACA cohort rejected U.S. authority to detain Islamists—even those who had engaged in combat against the United States—under any circumstances save for briefly prior to deportation or trial in civilian courts.²⁵⁸ Another demanded the United States provide detainees individualized status determinations on the pretense many were “innocent laborers, students, and relief workers” captured far from battlefields, and that even if some were Islamist fighters, the third Geneva Convention guaranteed individual hearings to determine status and rights on capture.²⁵⁹ Another argued determining detainees’ status was impossible.²⁶⁰

In response, detention proponents asserted that there was no legitimate doubt as to detainees’ status and no individualized determination was necessary beyond a finding by the president, or his delegate in the military chain-of-command, that a detainee was affiliated with an Islamist VNSA at war with the United States.²⁶¹ America maintained that preventive detention was authorized by LOAC for captured enemy combatants on the basis of their organizational ties without regard to locus, or personal conduct, at time of capture. The United States insisted further that to provide detainees with undue process—specifically, individualized status determinations in civilian forums—would harm national security, either by obligating the government to reveal intelligence sources and methods in open court and remove combat troops from the

²⁵⁸ See Gabor Rona, *A Bull in a China Shop: The War On Terror and International Law in the United States*, 39 CAL. W. INT’L L.J. 135, 148 (2008) (denying civil detention authority except pretrial, pre-deportation, or post-conviction in civil courts); McCormack, *supra* note 120, at 108; Zayas, *supra* note 121, at 15.

²⁵⁹ WITTES, *supra* note 103, at 16. To CLOACA, locus and conduct at capture, not Islamist affiliation, is dispositive of individual detention status. MARK DENBEAUX, THE MEANING OF “BATTLEFIELD”: AN ANALYSIS OF THE GOVERNMENT’S REPRESENTATIONS OF “BATTLEFIELD” CAPTURE AND “RECIDIVISM” OF THE GUANTANAMO DETAINEES 4 (2007).

²⁶⁰ See Luban, *supra* note 202, at 1985 (stating that “no one . . . is in a position to know” the status and culpability of GTMO detainees).

²⁶¹ See Jeff Miller, *Investigating the John Adams Project*, DAILY SIGNAL (May 21, 2010), <http://dailysignal.com/2010/05/21/guest-blogger-congressman-jeff-miller-r-fl-on-investigating-the-john-adams-project/> (“You are not sent to [GTMO] unless you have directly harmed . . . American troops . . . or . . . civilians.”); WITTES, *supra* note 103, at 49 (“[LOAC] presume[s] that a captured enemy fighter is indeed a captured enemy fighter.”).

battlefield to testify as to the facts supporting detention, or by forcing it to choose protection of classified information and preservation of combat power over restraint of dangerous people sworn to attack the United States.²⁶²

CLOACA applauded, supported, and participated in a subsequent rash of lawsuits.²⁶³ In *Hamdi v. Rumsfeld*, the Supreme Court reaffirmed executive power to detain enemy combatants for the duration of the war, holding “[i]f . . . our only alternative . . . is to try enemy combatants in the civilian justice system while the war is underway, we will then have to choose between either providing our enemies with discovery that will be extremely useful to them or releasing them to return to their jihad.”²⁶⁴ However, the *Hamdi* Court provided part of the requested relief, holding detainees were entitled to individualized status determinations (without specifying a forum).²⁶⁵ In *Rasul v. Bush*, the Court further eroded *Eisentrager*, holding GTMO detainees were entitled to file habeas petitions challenging their detention.²⁶⁶ Detainee advocates launched media campaigns and litigation to disrupt military interrogations and prosecutions with spurious claims of detainee innocence: one dishonest narrative alleged that “more than 55% [of GTMO detainees] are not accused of ever having committed a single hostile

²⁶² See WITTES, *supra* note 103, at 167 (“[P]ut a substantial burden of proof on the government to justify each detention, and . . . some very dangerous people will go free[.]”).

²⁶³ Burlingame & Joscelyn, *supra* note 242, at A23. The rush by members of CLOACA to represent detainees was not motivated by “professional nobility” but by self interest: “in many . . . quarters of the legal profession it is *chic* to volunteer to represent . . . detainees[.]” Charles C. Dunlap, Jr., *Does Lawfare Need An Apologia*, 43 CASE W. RES. J. INT’L. L. 121, 139 (2010).

²⁶⁴ Andrew C. McCarthy, *Lawfare Strikes Again*, NAT’L REV. ONLINE (June 12, 2007), <http://www.nationalreview.com/article/221258/lawfare-strikes-again-andrew-c-mccarthy>.

²⁶⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 533 (2004). In compliance with *Hamdi*, the U.S. developed Combatant Status Review Tribunals [“CSRTs”]—military hearings wherein individual status determinations were made to determine whether detainees were in fact affiliated with Al Qaeda and could thus be detained as unlawful combatants.

²⁶⁶ See *Rasul v. Bush*, 542 U.S. 466, 480-84 (2004) (holding GTMO detainees were under “effective control” of the United States and thus entitled to petition for habeas corpus).

act[,] [o]nly 8% [a]re characterized by the DOD as “al Qaeda fighters” and “[o]f the remaining detainees, [58]% have no definitive connection with [Islamists] at all.”²⁶⁷

It mattered not to CLOACA that 40% of detainees admitted Islamist status, 75% were a “demonstrated threat,”²⁶⁸ and most vowed to return to jihad if they gained release.²⁶⁹ *Ipsa dixit*, the detainees—“students, farmers, and goatherds” in the wrong place at the wrong time and subjected to preventive detention, an “extreme” measure “inconsistent with . . . human autonomy and free will”²⁷⁰—were victims of Islamophobia. If the United States disagreed, it could try to prove otherwise in civilian criminal trials. NGO lawyers and a CLOACA cluster—self-styled patriots nobly representing despised pariahs²⁷¹—demanded their clients’ release and closure of GTMO, a site they analogized to World War II-era death camps. Those who gainsaid the detainee innocence and attorney heroism narrative were

²⁶⁷ *The 14 Myths of Guantanamo: Hearing Before S. Armed Services Comm.*, 110th Cong. 5-6 (2007) (Statement of Mark P. Denbeaux, Professor).

²⁶⁸ An investigative team from West Point determined that seventy-three percent of detainees constituted a “demonstrated threat” and ninety-five percent a “potential threat” to the United States. JOSEPH FELTER & JARRET BRACHMAN, CTC REPORT: AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED SUMMARIES 30 fig. 21 (2007), available at http://www.pegc.us/archive/Organizations/CTC_csrt_rpt_20070725.pdf; see also William Glaberson & Margot Williams, *Next President Will Face Test on Detainees*, N.Y. TIMES (Nov. 3, 2008), <http://www.nytimes.com/learning/students/pop/articles/03gitmo.html> (validating these findings). Forty-two percent admitted to “significant association” with Islamist VNSAs, and many who denied association were “undoubtedly lying.” WITTES, *supra* note 103, at 85-86, 94; see also *Odah v. U.S.*, 611 F.3d 8 (D.C. Cir. 2010) (denying habeas petition by citing evidence the detainee trained at a Taliban camp and deployed in combat); *Al-Adahi v. Obama*, 698 F. Supp. 2d 48 (D.D.C. 2010).

²⁶⁹ See Major General Charles J. Dunlap, Jr. & Major Linell A. Letendre, Response: *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417, 426-27 (2008) (“Some detainees [before CSRT hearings] make no issue of their guilt or their disposition to continue to commit hostile acts.”).

²⁷⁰ David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 696 (2009).

²⁷¹ See Marc A. Thiessen, *The ‘al-Qaeda Seven’ and Selective McCarthyism*, WASH. POST (Mar. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/08/AR2010030801742.html> (insisting detainee lawyers were not performing their “constitutional duty”).

heretics against the U.S. rule-of-law religion. When Deputy Assistant Secretary of Defense for Detainee Affairs Charles Stimson expressed “shock” that elite law firms were “representing terrorists,”²⁷² CLOACA joined a successful campaign to have him fired for a statement the American Bar Association branded “deeply offensive to . . . the legal profession, and we hope to all Americans.”²⁷³

When the Detainee Treatment Act purported to eliminate federal jurisdiction over waves of habeas petitions by detainees,²⁷⁴ still more litigation ensued over this and related issues, including the power of Congress to define and punish pre-capture offenses in military commissions and whether detainees could be subjected to coercive interrogation. In *Hamdan v. Rumsfeld*, a detainee who had served as driver and bodyguard to Osama bin Laden and was scheduled for military prosecution on charges involving material support of terrorism failed in his challenge of Congressional power to define and punish that offense in the Military Commissions Act of 2006 (“MCA”).²⁷⁵ Worse, in 2008, the Court struck down MCA’s jurisdiction-stripping provisions and further gutted *Eisentrager* in *Boumediene v. Bush*, which read *Eisentrager* as grounded almost exclusively in the weighty burden habeas jurisdiction would have imposed on the military if federal courts were invested with jurisdiction to review military convictions of enemy combatants.²⁷⁶ The *Boumediene* Court, finding no practical burdens given military control of GTMO, held that the Combatant Status Review Tribunal (“CSRT”) system and D.C. Circuit review of CSRT determinations were unconstitutional because detainees lacked lawyers, knowledge of the charges, and power to confront witnesses.²⁷⁷ Absent

²⁷² *Top Pentagon Official Calls for Boycott of Law Firms Representing Guantanamo Prisoners*, DEMOCRACY NOW (Jan. 17, 2007), http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott (quoting Federal News Radio).

²⁷³ Neil A. Lewis, *Officials Attack Top Law Firms Over Detainees*, N.Y. TIMES (Jan. 13, 2007), http://www.nytimes.com/2007/01/13/washington/13gitmo.html?_r=0.

²⁷⁴ DTA, *supra* note 244.

²⁷⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 567. Congress authorized military commissions to try detainees, codified triable LOAC violations and procedures, and applied DTA jurisdiction-stripping amendments to pending cases. Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600.

²⁷⁶ *Boumediene v. Bush*, 553 U.S. 723, 763, 795 (2008).

²⁷⁷ *Id.* at 783, 795.

Congressional suspension of the writ, detainees were entitled to judicial habeas review despite their foreign citizenship, the locus of capture, and detention beyond U.S. territory, and their presumptive status as unlawful enemy combatants.²⁷⁸ Federal judges stood ready to determine if detainees were Islamist VNSA affiliates, substituting theirs for military judgments.²⁷⁹

Not content to purloin powers constitutionally committed to the executive, the Court implied that detainees were entitled to lawyers in habeas proceedings²⁸⁰ and to review classified information containing sources, methods, and identities of U.S. personnel at the heart of the effort to defeat the cause for which detainees were captured while fighting.²⁸¹ *Eisentrager* established that a lawful Axis combatant was entitled to release only at the end of World War II, yet *Boumediene* subverted that rule to create a regime whereby a detainee whom the United States could prove by clear and convincing evidence was an unlawful combatant is entitled, during the pendency of the conflict, to immediate release should the government not reveal the classified evidence necessary to prove beyond a reasonable doubt his affiliation with Islamism—an enemy with whom, unlike the Nazis and Japanese, a negotiated surrender is impossible.

²⁷⁸ *Id.* at 767 (concluding CSRTs fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review”).

²⁷⁹ *Id.* at 828 (Scalia, J., dissenting) (describing the decision as “devastating” to the President’s ability to fight Islamists). The majority opinion is symptomatic of an ill-advised drift by courts [from] war, and military discretion based on intelligence, to peace and law enforcement discretion based on evidence. Matthew C. Waxman, *Dismantling Guantanamo: Facing the Challenges of Continued Detention and Repatriation: Guantanamo, Habeas Corpus, Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT’L L. 245, 266 (2009).

²⁸⁰ *Boumediene*, 553 U.S. at 767 (finding that a Personal Representative, and not a lawyer, assigned to a detainee during CSRT proceedings is constitutionally inadequate).

²⁸¹ See, e.g., S. REP. NO. 110-90, at 14 (2007) (stating that in habeas proceedings the government faces the choice of giving highly sensitive intelligence to Islamists or “foregoing the use of . . . the most important evidence against a detainee, and thus running the risk [he] will be released”); Colonel Frederic L. Borch, III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have “Full and Fair” Trials: A Rebuttal to Military Commissions: Trying American Justice*, ARMY LAW. 10 (Nov. 2003) (examining this “choice” in depth).

Despite a result in *Boumediene* overwhelmingly favorable to detainees, because it did not clearly specify the procedures, standards of proof, or rules of evidence to govern CSRTs and military commissions,²⁸² nor resolve the question of whether detainees in Afghanistan were entitled to invoke habeas in U.S. courts, CLOACA expanded its “law-free zone” allegations²⁸³ as lawyers filed suits challenging detentions and prosecutions under subsequently revised rules.²⁸⁴ Seven years later, judges have ordered GTMO detainees released in cases where the United States could not or would not disprove torture allegations, and others were released after short prison terms.²⁸⁵ A decade-plus of judicial intervention, goaded by CLOACA, has disturbed the answers to a series of questions—*i.e.*, who can the military detain, on what basis, for how long, and under what conditions, as well as who can be prosecuted, on what charges, and in what forums—that *Eisenstrager* had resolved and upon which the Bush administration relied. Islamists, and potential recruits, can

²⁸² See BENJAMIN WITTES, ET AL., THE EMERGING LAW OF DETENTION: THE GUANTANAMO CASES AS LAWMAKING 1-2 (2010) (analyzing habeas litigation post-*Boumediene* and finding a lack of jurisprudential clarity as to who may be detained, on what basis, whether a detainee can abandon affiliation post-capture, what evidentiary presumptions are permissible, how classified information should be protected, and admissibility of allegedly coerced statements).

²⁸³ See, e.g., David Cole, *Law-Free Zoning*, NATION (May 27, 2010), <http://www.thenation.com/article/law-free-zoning>.

²⁸⁴ See Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801-07, 123 Stat. 2190 (revising rules and procedures for military prosecution of detainees); *Obaydullah v. Obama*, 609 F.3d 444 (D.C. Cir. 2010) (challenging detention and stay of habeas petition); *Khadr v. Obama*, 724 F. Supp. 2d 61 (D.D.C. July 2011) (challenging detention under the MCA and use of military commission for trial). Detainees have challenged the administrative process to determine point-of-capture status and current dangerousness. See, e.g., *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011) (upholding detention of detainee attached to Taliban combat unit); *Al Maqaleh v. Gates*, 605 F.3d 84, 87-88 (D.C. Cir. 2010) (denying habeas jurisdiction over detainees in Afghanistan).

²⁸⁵ See, e.g., *Abdah v. Obama*, 708 F. Supp. 2d 9 (D.D.C. 2010) (holding, after suppressing evidence allegedly derived from torture, that insufficient evidence existed to justify continued detention); *United States v. Hamdan*, 800 F.Supp. 2d 1247 (CMCR 2011) (upholding military commission conviction and sentence for an act of terrorism, providing material support to a terrorist organization, and knowingly facilitating terrorism as bodyguard to Osama bin Laden).

now contemplate a swifter and surer return to the battlefield than U.S. enemies in World War II.²⁸⁶

Worse yet, after *Boumediene*, the Obama administration introduced a protocol providing periodic detention reviews and release on a determination that a detainee will not be prosecuted and no longer poses a threat to the United States.²⁸⁷ Although detainees designated too dangerous to release will remain in indefinite detention, the Obama administration, like its predecessor,²⁸⁸ freed many. This “charge or release” policy “allows . . . [Islamist] fighter[s] to game the system and return to the fight.”²⁸⁹ Dozens of liberated detainees have killed and been killed in battle, scores have been recaptured, and some are in the top command structure of ISIS.²⁹⁰ In 2011, the Director of National Intelligence testified that recidivism was 27%, with 161 detainees having resumed jihad—up from 74 in 2009 and 37 in 2008. More recent estimates suggest up to thirty percent of Islamists imprudently released due to “domestic political pressures” were back at war with the United States and its allies.²⁹¹

²⁸⁶ High-profile law firms represented Islamist detainees who, upon release, were confirmed as recidivist *jihadis* by the Department of Defense. Debra Burlingame & Thomas Joscelyn, *Gitmo’s Indefensible Lawyers*, WALL ST. J., <http://www.wsj.com/articles/SB10001424052748704131404575117611125872740> (last updated Mar. 15, 2010).

²⁸⁷ DEP’T OF JUSTICE, ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE ii, 7, 25 (2010).

²⁸⁸ Before January 2009, the U.S. determined that 500 GTMO detainees were not sufficiently dangerous to justify continued detention and, because they were not amenable to prosecution, would be extradited or repatriated. Cole, *supra* note 270, at 705-06. Of these, sixty-one soon returned to acts of unlawful combatancy. *Id.*

²⁸⁹ Peter Margulies, *The Ivory Tower at Ground Zero: Conflict and Convergence in Legal Education’s Responses to Terrorism*, 60 J. LEGAL EDUC. 373, 377 (2011).

²⁹⁰ Thomas Joscelyn, *Gitmo “Poet” Now Recruiting for Islamic State*, WKLY. STANDARD (Nov. 19, 2014, 7:25 AM), http://www.weeklystandard.com/blogs/gitmo-poet-now-recruiting-islamic-state_819587.html; S. REP. NO. 110-90, at 13 (2007).

²⁹¹ Chad Pergram, *New Congressional Report Slams Bush and Obama Administrations over Gitmo Detainee Releases*, FOX NEWS POLITICS (Feb. 9, 2012), <http://www.foxnews.com/politics/2012/02/09/report-almost-30-percent-terrorists-released-from-gitmo-continued-terrorist/>; Raffaella Wakeman, *September 2013 Guantanamo Recidivism Report from DNI*, LAWFARE (Sept. 6, 2013, 9:42 AM), <http://www.lawfareblog.com/2013/09/september-2013-guantanamo-recidivism-report-from-dni/>. Even ardent detainee advocates concede many are Islamist

In sum, legal arguments developed by CLOACA in the context of status determinations and habeas litigation have undermined precedent upon which the executive was entitled to rely in discharging its constitutional duty to defend Americans, denatured the moral opprobrium that attaches to unlawful combatancy, and elevated unlawful combatants into a position superior to soldiers who obey LOAC, distinguish themselves from civilians, and earn combatant immunity. CLOACA has helped strip the executive branch of constitutional command prerogatives, transfer them to the judiciary, and deprive U.S. commanders of the full utility of the tools of detention and interrogation vital to force protection and mission achievement. Moreover, they have reduced the liberty risks to potential Islamist recruits, diminished the incentive for detainees to cooperate in preventing future attacks as a condition of release, and improved the correlation of forces against the United States by returning jihadis to the battlefield.

6. Evacuation of American Military Personnel from the Battlefield

Because much of LOAC consists not of absolute rules but of standards given practical form through a subjective balancing of principles, no military commander can be sure in advance of a planned military operation how a court called to perform a *post hoc* review of his operational decisions might judge him, and “no judge . . . could reasonably condone any course of action in advance.”²⁹² Nevertheless, LOAC has traditionally functioned as a permissive regime granting a responsible military commander a “margin of

fighters not mistakenly captured while innocently in the vicinity of combat operations. See, e.g., Margulies, *supra* note 289, at 392 (admitting the facts “make the misadventure thesis inappropriate”). Nonetheless, CLOACA support for and state practice consistent with the “catch and release” policy based on individualized dangerousness legitimates this ill-considered policy. See Barak Medina, *Regulating Anti-Terror Warfare Through the Individual Dangerousness Doctrine* (Aug. 1, 2013), <http://ssrn.com/abstract=2259158> (suggesting the practice is *lex ferenda*). The Obama administration plans to quietly release more of the 143 Islamists who remain detained at GTMO in 2015. Julian E. Barnes, *Pentagon Prepares More Guantanamo Releases*, WALL ST. J. (Nov. 27, 2014, 3:23 PM), <http://www.wsj.com/articles/pentagon-prepares-more-guantanamo-releases-1417119817>.

²⁹² Benvenisti, *supra* note 20, at 354.

appreciation”²⁹³ and evaluating his alleged breaches not based on the perfect information available *post hoc* but on what he knew or should have known *a priori* his decision to attack a target in the manner and with the means chosen.²⁹⁴ LOAC stands in his boots amid the fog of war and smoke of battle and refrains from second-guessing presumptively good-faith judgments save for where actions are demonstrably the result of, *e.g.*, a deliberate intent to kill civilians or a willful recklessness in using force excessive in relation to military advantage.²⁹⁵ Moreover, LOAC considers that command investigations are the most appropriate mechanism to investigate alleged violations of LOAC, and military justice systems routinely prosecute violations.²⁹⁶

However, NGO and CLOACA militancy, prompting advent of the International Criminal Court and aggressive assertion of universal war crimes jurisdiction, has elevated the personal risks faced by military commanders. Hailed by CLOACA as “bringing to justice” authors of “horrendous violations of LOAC”²⁹⁷ and within the tradition of prosecuting the architects of Nazi genocide,²⁹⁸ the hyperlegalization of military operations leverages motivated (mis)interpretation and redefinition of LOAC principles by

²⁹³ See, *e.g.*, H.C. 769/02, Pub. Comm. Against Torture in Israel v. Gov’t of Israel [2005], available at http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf (“A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch’s . . . margin of appreciation.”).

²⁹⁴ See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257, 1271-74 (2000) (elaborating standard for lawfulness of tactical command decisions under LOAC in re: proportionality and distinction).

²⁹⁵ See Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT’L L. 255, 274 (2010) (arguing for a “reasonableness standard based on [a] command[er]” making decisions “at . . . crucial moments of the operation”).

²⁹⁶ *Mor Haim v. Israeli Defence Forces*, HCJ 6208/96 (16 Sept. 1996).

²⁹⁷ See COHN, *supra* note 235, at 6 (describing litigation alleging LOAC violations as “bringing to justice” the military commanders responsible); Benjamin G. Davis, *Refluat Stercus: A Citizen’s View of Criminal Prosecution in U.S. Domestic Courts of High-Level Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN’S J. LEGAL COMMENT. 503 (2008) (advocating prosecution of authors of “horrendous violations of . . . [LOAC]”).

²⁹⁸ See COHN, *supra* note 235, at 13 (analogizing legal action against Western soldiers to the work “to prosecute, convict, and execute Adolph Eichmann”).

forwarding alleged violations to hostile international courts. Advocates would require a commander, on report of an alleged violation, to impose a ceasefire and avail criminal investigators of his personnel, weapons, and equipment while his enemies escape or reinforce.²⁹⁹ The trend away from the presumption of commanders' good faith gives Western military personnel cause to fear that, should military operations, no matter how LOAC-compliant they were viewed *a priori*, result in dead civilians, no matter how unintended, they will be removed from battlefields and prosecuted by their countries' political opponents.³⁰⁰ Civilian judicial forums and CLOACA revisionism intersect to shrink the margin of appreciation to the vanishing point, legally decapitate the military establishment, and debilitate Western combat power.³⁰¹

If CLOACA bristles at characterizations of the "bringing to justice" paradigm as a poorly-camouflaged device to achieve military results by non-military means,³⁰² the drive to fetter Western commanders and shift operational advantage to Islamists continues undaunted. During the 2003 Iraq intervention, activists lodged indictments in several states alleging war crimes by U.S. leaders, including Defense Secretary Rumsfeld and General Franks.³⁰³

²⁹⁹ Newton, *supra* note 95, at 280.

³⁰⁰ Compliance with LOAC is a commander's responsibility that burdens execution of military missions. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1831-45 (2007). Fear of prosecution for acts or omissions judged "war crimes" *post facto* by NGOs and CLOACA can prevent commanders from acting robustly and leave them feeling "worried about being second-guessed by investigators" and "surrounded by . . . law wielded by enemies[.]" Christopher Waters, *Beyond Lawfare: Juridical Oversight of Western Militaries*, 46 ALBERTA L. REV. 885, 895-96 (2009).

³⁰¹ See Phillip Carter, *Legal Combat: Are Enemies Waging War in our Courts?*, SLATE (Apr. 4, 2004), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/legal_combat.html (describing legal "decapitation strike[s]" against commanders).

³⁰² See, e.g., Leila N. Sadat & Jing Geng, *On Legal Subterfuge and the So-Called "Lawfare" Debate*, 43 CASE W. RES. J. INT'L L. 153, 154 (2010) (posing the question, "Since when is filing a lawsuit the same as mounting violent and bloody attacks on civilians and civilian objects?").

³⁰³ See Jeffrey T. Kuhner, *Iraqis Target Gen. Franks for War Crimes Trial*, WASH. TIMES, Apr. 28, 2003, at A1.

Although attempts to impede U.S. military operations through litigation failed, the precedent invigorated CLOACA academics who invoked the specter of Nuremburg, claiming senior U.S. commanders authored “violations of [LOAC as] . . . an admitted part of a ‘common plan’ or ‘program’ . . . in response to [9/11],”³⁰⁴ ensuring that a regime of “oppression [was] loosed on the world.”³⁰⁵ For CLOACA, the U.S. response to the Islamist threat mirrors the Nazi conspiracy in adopting a program of “manifestly unlawful transfer, detention, and interrogation” that “violate[s] our common dignity, degrade[s] our military, thwart[s] our mission, . . . deflate[s] our . . . influence abroad[,] emboldens [the] enemy, serve[s] as a terrorist recruitment tool, . . . and fulfill[s] terrorist ambitions.”³⁰⁶ Further, U.S. troops bear personal responsibility for these policies and must face “prosecution here and in foreign courts.”³⁰⁷ One forum wherein CLOACA proposes their prosecution is Germany—birthplace of the Nazi conspiracy that allegedly inspired the U.S. scheme to violate LOAC.³⁰⁸

Islamist abuse of criminal process to evacuate military commanders from the battlefield and disrupt military operations, anticipated in *Eisentrager*, has drawn Congressional ire.³⁰⁹ Concern about the potential for politically-motivated prosecutions of U.S. military personnel abroad is a major reason for the United States’ refusal to join the International Criminal Court, as well as for legislation and status-of-forces agreements ensuring U.S. troops are not brought before foreign tribunals. However, relentless political and academic pressure has been brought to bear to convince the United States that it is expedient to subject its troops to courts-martial to prove that it takes allegations of LOAC violations seriously

³⁰⁴ Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCH. L. REV. 5201, 5202 (2008).

³⁰⁵ DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* 96-97 (2006).

³⁰⁶ Paust, *supra* note 304, at 5203-04.

³⁰⁷ *Id.* at 5204.

³⁰⁸ See COHN, *supra* note 235, at 9 (describing efforts to convince Germany to prosecute U.S. leaders for crimes that “shock the conscience” of the world).

³⁰⁹ See, e.g., Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES (Nov. 11, 2005), <http://www.nytimes.com/2005/11/11/politics/11detain.html>.

and that it is unnecessary to make referrals to international courts. The United States has court-martialed hundreds of personnel based on allegations of war crimes against Islamists, and several recent investigations, including on charges of murder, suggest that, even absent adequate evidence of crimes, senior U.S. military commanders will cave to political pressure and convene courts-martial as *de facto* proxies for foreign civilian judicial forums,³¹⁰ with the result that U.S. troops are removed from the battlefield, the correlation of forces tilts in favor of Islamists, and the tactic is validated as an important aspect of Islamist combat support operations.

7. Execution of Direct Action Missions

Under 18 U.S.C. § 2339A-D, also known as the “material support statute,” material support of terrorists, broadly defined as the provision of money, training, equipment, personnel, transportation, services, physical assets, and “expert advice or assistance,”³¹¹ is a criminal act. Courts have upheld the material support statute as an incidental restriction on speech and association that clearly advances an important governmental interest in divesting terrorist organizations from financial, physical, and human capital without targeting protected political speech.³¹² The prohibition against providing terrorist groups “training,” “services,” and “expert advice and assistance” includes provision of training and advice to Islamists in the use of LOAC, even where experts providing these services lack any intent to further Islamist activities, so long as the support benefits the Islamist group in fact. Training in LOAC confers upon recipients a body of “specialized knowledge” and it is “wholly foreseeable that directly training the [Islamist group] on how to use [LOAC] would provide that group with information and techniques that it could use as part of a broader strategy to promote

³¹⁰ See Alan F. Williams, *Overcoming the Unfortunate Legacy of Haditha, the Stryker Brigade “Kill Team,” and Pantano: Establishing More Effective War Crimes Accountability by the United States*, 101 KY. L.J. 337 (2012) (analyzing political influence in courts-martial and prosecution decisions in the 4GW against Islamism).

³¹¹ 18 U.S.C. 2339A(b)(1) (2012).

³¹² *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (stating the material support statute is an incidental restriction on speech and association addressing an important government interest).

terrorism.”³¹³ While “independently advocating for a cause is different from providing a service to a group that is advocating for that cause,” the Supreme Court upheld Congressional authority to prohibit advocacy “in coordination with, or at the direction of, a terrorist organization.”³¹⁴

Yet CLOACA alleges “the greatest threat to our freedoms is . . . not [Islamists] but . . . our own government’s response,”³¹⁵ that the material support statute is an unconstitutional “form of preventive detention,”³¹⁶ and that high-profile convictions of professors and lawyers for providing “training” or “expert advice or assistance” to Islamist violent non-state actors exemplify “how out of hand things have gotten in the ‘war on terrorism.’”³¹⁷ CLOACA antipathy to the material support statute was exacerbated by the conviction of Lynne Stewart, a radical lawyer who advocates “violence directed at the institutions which perpetuate capitalism, racism and sexism”³¹⁸ and represented Omar Abdel Rahman, the “blind sheikh” who masterminded the 1993 World Trade Center bombing. Stewart provided material support to Rahman by assisting his interpreter in sending encrypted messages indicating Rahman’s approval of further Islamist attacks. Stewart also misrepresented that Rahman had been denied medical care, which the United States characterized as dissemination of a false claim to spread propaganda and thus an additional count of material support.³¹⁹ She was convicted and imprisoned for providing expert advice and assistance

³¹³ Holder v. Humanitarian Law Project, 561 U.S. 1, 5-6 (2010).

³¹⁴ *Id.* at 24.

³¹⁵ David Cole, *Enemy Aliens and American Freedoms*, NATION (Sept. 5, 2002), <http://www.thenation.com/article/enemy-aliens-and-american-freedoms>.

³¹⁶ David Cole, *Panel: Restrictions on Freedom of Association Through Material Support Prohibitions and Visa Denials*, 57 AM. U. L. REV. 1203, 1214 (2008).

³¹⁷ David Cole, *The Lynne Stewart Trial*, NATION (Feb. 17, 2005), <http://www.thenation.com/article/lynne-stewart-trial>.

³¹⁸ Joseph P. Fried, *In Muslim Cleric’s Trial, a Radical Defender*, N.Y. TIMES (June 28, 1995), <http://www.nytimes.com/1995/06/28/nyregion/muslim-cleric-s-trial-radical-defender-left-leaning-lawyer-revolutionary.html>.

³¹⁹ Press Release, Dep’t of Justice, Superseding Indictment Adds New Charges Against Ahmed Abdel Sattar, Lynne Stewart, and Mohammed Yousry (Nov. 19, 2003), available at http://www.justice.gov/archive/opa/pr/2003/November/03_crm_631.htm.

in conspiracy with Rahman and Al Qaeda.³²⁰ CLOACA, reading into Stewart's prosecution a "new willingness . . . to see . . . lawyers as enemy combatants," claimed she was guilty of mere violations of prison administrative regulations meriting only bar discipline.³²¹ It branded her conviction a prohibition on "all First Amendment activity in support of [terrorist] organizations"³²² and a devious twisting of the material support statute into a tool to criminalize lawyers' statements of general support on behalf of "unpopular clients."³²³

Despite this rhetoric, under professional canons governing the practice of law, practitioners may represent a client without "endors[ing] the client's political, economic, social or moral views or activities."³²⁴ Even if the client advocates or engages in terrorism in support of an ideology with which the practitioner approves, he or she may represent the client so long as he or she does not cross over into "operational solidarity" by, e.g., participating in a terrorist act as principal, aider and abettor, or accessory.³²⁵ For CLOACA scholars not bound by constraints inhering in the representation of clients, the zone of discretion is even broader, and the tenets of academic freedom insulate against attribution of criminal responsibility for statements that connote affective solidarity with Islamists. CLOACA might seem free to express opinions sympathetic to Islamist aims without violating the material support statute.

³²⁰ Julia Preston, *Lawyer, Facing 30 Years, Gets 28 Months, to Dismay of U.S.*, N.Y. TIMES (Oct. 17, 2006), <http://www.nytimes.com/2006/10/17/nyregion/17stewart.html>.

³²¹ Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL'Y 299, 367 (2007).

³²² Cole, *supra* note 316, at 1217. CLOACA considers the material support statute as interpreted to bar verbal support for "so-called terrorist organizations[.]" Kende, *supra* note 119, at 1560.

³²³ Margulies, *supra* note 321, at 176. "[E]ven the volunteering of one's time . . . constitutes material support [under the material support statute][.]" Cole, *supra* note 315, at 1214.

³²⁴ MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (2011).

³²⁵ See Margulies, *supra* note 321, at 173-75, 177-82, 187-89 (2003) (differentiating lawyers in "affective" solidarity with clients from those in "operational solidarity").

However, the anxiety that the statute excites in CLOACA may be rooted less in concerns that the representation of Islamists will incriminate practitioners of Stewart's ilk than the prospect that their own disquisitions on LOAC may be received not as protected academic "speech" but as "services," "training," and "expertise or assistance" to Islamist organizations in violation of the statute. In *United States v. Tarek Mehanna*, an American Muslim was convicted of providing material support through "services" and "expert advice or assistance" to Al Qaeda in translating, interpreting, and distributing materials advocating, justifying, and inspiring jihad.³²⁶ Mehanna, a self-styled Islamic scholar "who provided information to others . . . less knowledgeable" in the "blessed field" of "stand[ing] up for the *Mujahidin* and . . . their ideas," claimed his work as the "media wing" of Al Qaeda was protected speech under the First Amendment.³²⁷ Disagreeing, the jury found that Mehanna, who expressed hatred of the United States and hope for its defeat, was not engaged in independent and constitutionally-protected advocacy of Islamist aims, but had in fact worked "in coordination with or at the direction of" Al Qaeda to provide services, training, expertise, and assistance in support of its terrorist mission.³²⁸

It is hard to craft a more apt description of CLOACA than "scholars" who "provide information to others . . . less knowledgeable" in the "blessed field" of "standing up for [Islamists] and their ideas." If Stewart and Mehanna are criminals for materially supporting terrorists, CLOACA scholars who contribute expert scholarship and advocacy that systematically (mis)interprets LOAC

³²⁶ See generally Superseding Indictment, U.S. v. Mehanna, 2010 WL 2516469 (D. Mass. 2010) (No. 09-CR-10017-GAO).

³²⁷ Government's Proffer and Memorandum in Support of Detention at 14, *United States v. Mehanna*, 2010 WL 2516469 (D. Mass. 2010) (No. 09-CR-10017-GAO) (citing Mehanna's role in "teaching others" and Steps 17 and 34 from 39 *Ways to Serve and Participate in Jihad*, a manual to incite jihad that Mehanna interpreted, translated, and compared to *Mein Kampf*).

³²⁸ Superseding Indictment, *supra* note 326, at 1-2 (alleging overt acts in furtherance of a 2339(b) conspiracy, including providing expert interpretation of Islamic texts regarding jihad, authoring and distributing recruiting materials, justifying attacks on noncombatants, serving as "media wing" of Al Qaeda, and inspiring participation in unlawful combatancy).

so as to advantage Islamist combat operations against the United States are propagandists in violation of the material support statute.

B. Combat Arms: Delegation of America as a Rule-of-Law Nation Worth Defending

CLOACA realizes the most direct application of its combat power through attacks on U.S. legitimacy that undermine the willingness of Americans to continue to support what they are told is an unlawful and unwinnable war. Rather than make good-faith legal arguments as to what LOAC does, does not, should, and should not require and prohibit—mindful that the continued existence of the rule-of-law civilization undergirding the capacity to make and apply LOAC depends upon U.S. victory over Islamism—these academics offer up politicized arguments that the Islamist jihad is a reaction to legitimate Muslim grievances against a Judaeophilic foreign policy, that U.S.-led interventions in Iraq and Afghanistan are aggressive and unnecessary wars, that “torture” and military commissions prove Western injustice, that the United States is engaged in a government-sanctioned pattern of war crimes *à la* Nazi Germany, that U.S. civilian leaders must be prosecuted for these crimes, that U.S. criminality breeds more terrorists while threatening our values, and that intrepid dissidents who dare challenge their enterprise are jurispaths deserving to be drummed out of LOACA into prison.

1. Attribution of Islamist Casus Belli to American Foreign Policy

CLOACA blames Islamist attacks on a U.S. failure to eliminate the “root causes” of Islamism—“poverty, lack of education, and foreign occupation.”³²⁹ Islamism is thus a reaction to four aspects of U.S. foreign policy: (1) promoting socioeconomic

³²⁹ COHN, *supra* note 235, at 16. One CLOACA scholar suggests “we need to understand the reasons behind the terrifying hatred . . . and . . . not foment more[.]” Roberto J. Gonzalez, *Lynne Cheney-Joe Lieberman Group Puts Out a Blacklist*, S.J. MERC.-NEWS (Dec. 13, 2001), available at <http://globalresearch.ca/articles/GON112A.html>. For another, “[t]he only . . . way to make Americans . . . safer is to reduce the supply of terrorists.” Brian J. Tamanaha, *Are We Safer From Terrorism? (No, But We Can Be)*, 28 YALE L. & POL’Y REV. 419, 431 (2010).

“injustices” in the Islamic world via the distributional effects of U.S. capitalism,³³⁰ (2) sanctioning rogue Muslim regimes,³³¹ (3) dispatching infidel troops into “Muslim lands,” and (4) allying with Israel.³³² Those who claim “we participated in [Islamism’s] creation” insist the United States must cease “choosing militarism and global inequality over peace and global justice.”³³³ As, by this perverse view, the United States is the aggressor, any U.S. military response is counterproductive, unjust, generative of more Islamists, and illegal.³³⁴ CLOACA would thus have the U.S. terminate alliances, withdraw forces, and redistribute resources to disincite future attacks.

2. Declaration that the Armed Conflict Response is an Overreaction to a Law Enforcement Problem

Prior to 9/11, Islamist attacks, like narcotrafficking or counterfeiting, were framed as a law enforcement problem.³³⁵ This reflected the formalist notion that Islamist VNSAs, although they had global reach and engaged in levels of violence common to war, were not states and could not participate in war, which by definition

³³⁰ See, e.g., PAUL BERMAN, *TERROR AND LIBERALISM* (2002) (presenting arguments that U.S. capitalism fueled 9/11); Gonzalez, *supra* note 329 (“[I]njustices . . . lead to hatred” and “it is from the desperate . . . and bereaved that these suicide pilots came.”).

³³¹ Islamist apologists attribute the effects of economic sanctions on populations of the rogue regimes against which they are levied not to rogue regimes but to Western nations enforcing them. See John Quigley, *International Law Violations by the U.S. in the Middle East as a Factor Behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815, 816 (2002) (claiming sanctions against Husseinist Iraq “violate[d] the rights of states and peoples[.]”); Tamanaha, *supra* note 329, at 436-37 (“Imagine the anger in the Muslim world at knowing . . . that U.S.-led sanctions on Iraq . . . resulted in the deaths of a half million Iraqi children.”).

³³² See Quigley, *supra* note 331, at 835 (attributing Islamist attacks on U.S. interests to U.S. policies in support of Israel); Tamanaha, *supra* note 329, at 428 (“[W]e must eliminate the ultimate provocation that inflames Islami[sts] . . . [and] remove our troops from Muslim lands.”).

³³³ Mari Matsuda, *A Dangerous Place: A Response to David Cole’s “Their Liberties, Our Security,”* BOSTON REV., Dec. 2002/Jan. 2003, at 20-22.

³³⁴ See, e.g., Tamanaha, *supra* note 331, at 436 (“Muslims targeting the [U.S.] believe Muslims were attacked *first* by America, and remain under [illegal] attack.”).

³³⁵ See generally Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323 (2002) (taking this position and citing others in accord).

meant interstate armed conflict.³³⁶ Conceiving of terrorism thusly betrayed a failure to appreciate the strategic evolution of war and the centrality of violent non-state actors to Fourth Generation War. The attacks unleashed that infamous morning transformed, from the U.S. vantage point, the nature, magnitude, and definition of the Islamist danger, as well as the proper instrumentalities to employ in response. Congress delegated authority to “use all necessary . . . force” against their perpetrators³³⁷ to the president and the country, ending a decade of denial, and conceding that 9/11 had effected a general declaration of war by Islamism.³³⁸ In jettisoning law enforcement as a “very serious intellectual failure,”³³⁹ the United States resolved that future attacks were preventable only by a credible threat of punishment only the military could pose.³⁴⁰ It now avers, albeit grudgingly, that it is at “war against [Islamism].”³⁴¹

International relations, defining “war” as violence between contending polities with a minimum annual average of 1,000 combat deaths, and international law, providing that armed conflict is a “resort to armed force between States or . . . between [States] and [violent non-state actors],”³⁴² support this position. Admittedly, it is difficult to specify the geographic and temporal boundaries of Fourth Generation War with an Islamist foe that is ununiformed,

³³⁶ See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 715-720 (2004) (“The paradigms of crime and conflict are challenged by acts defined as crimes under law but having the scope of violence common to war.”).

³³⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

³³⁸ See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 15 (2002) (“It has taken almost a decade for us to comprehend the true nature of this new threat.”).

³³⁹ Ruth Wedgwood, *The Law at War: How Osama Slipped Away*, 66 NAT’L INT. 69, 71-72 (2002).

³⁴⁰ See Jeffrey A. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa’eda, the Taliban, and Associated Forces—The First Year*, 30 PACE L. REV. 340, 343-44 (2010) (“[T]he criminal justice system was unable to deal with an ideology of religious-based hate able to recruit tens of thousands . . . and field terrorist cells [globally[.]]”).

³⁴¹ President George W. Bush, Remarks on Strengthening Intelligence and Aviation Security (Jan. 7, 2010).

³⁴² Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

geographically dispersed, and lacking leadership authorized to surrender. Although LOAC presumes spatial bounds on war, in that zones of combat and peace are differentiable, as well as temporal bounds, in that initiation is marked by declaration and termination by surrender,³⁴³ facts-on-the-ground create an “implied geography [and chronology].”³⁴⁴ Fourth Generation War makes it harder to ascertain, yet the inherited rubric guides the enterprise, and wherever and whenever sufficiently intense armed violence between Islamists and states occurs there is war. In social science, this is an objective inquiry; in legal frames, it is more subjective.³⁴⁵ Yet to conclude that war has been initiated and LOAC has been triggered should be uncontroversial, and post-9/11 “[o]nly a most technical and arid legalism could deny that the U.S. is in a state of war.”³⁴⁶ Because “there would have been no question” about whether a state of war existed had a rogue state executed 9/11, the fact that the perpetrators were Islamist violent non-state actors is irrelevant.³⁴⁷ Finally, even if 9/11 did not formally traverse the war threshold, LOAC entitled the United States to self-defend against the perpetrators.³⁴⁸

The determination that the United States was at war with Islamism displaced the civilian “Law of Everyday Life” in favor of LOAC³⁴⁹ and vested the United States with authority to detain and interrogate individuals indefinitely without charges and to try Islamist detainees for pre-capture crimes in military commissions.³⁵⁰ Moreover, the existence of war granted the executive the authority to use military force without warning against Islamist military forces

³⁴³ Brooks, *supra* note 336, at 725.

³⁴⁴ Anderson, *supra* note 67, at 2.

³⁴⁵ See Mary Ellen O’Connell, *Choice of Law in the War on Terrorism*, 4 J. NAT’L SEC. L. & POL’Y 343, 346 (2010) (arguing the subjectivity of legal judgments).

³⁴⁶ W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 81, 88 n.14 (2003).

³⁴⁷ See Anderson, *supra* note 67, at 32 (supporting state legal authority to use force in self-defense in “new places with a [VNSA], if that’s where they . . . go[.]”).

³⁴⁸ See Paust, *supra* note 129, at 3 (concluding the United States retains customary international law and Article 51 rights of armed self-defense in war and in peacetime); see also Koh, *supra* note 132.

³⁴⁹ Anderson, *supra* note 67, at 2.

³⁵⁰ See generally Addicott, *supra* note 340 (emphasizing that all of these tactics could only be employed in a time of war).

whenever and wherever they can be found. Because Islamists are globally dispersed, the power to target them under LOAC, and the geography of the battlefield, extends globally. Thus, the United States declared that the “war will be fought wherever [Islamists] hide, or run, or plan,”³⁵¹ substantiating the concept of a “Global War on Terror” in which America would kill or capture Islamists anywhere and everywhere for as long as it took to defeat them.

For CLOACA, recognition of violent non-state actors as legal subjects decriminalized their conduct and equalized their status to lawful combatants³⁵² while “superimpos[ing] the rhetoric of war” on a threat soluble with police and courts.³⁵³ The 9/11 attacks provided an insufficient predicate to trigger the applicability of LOAC, as the unfolding battle was not defined with the geographic and temporal precision of previous wars,³⁵⁴ and failure to demarcate specific place and time boundaries precluded war as a matter of law—at least beyond active theaters of traditional military operations in Afghanistan and Iraq. Thus, peacetime civilian law remained the applicable regime,³⁵⁵ and for CLOACA the United States’ declaration that the entire world is a potential battlefield, coupled with Islamists’ refusal to surrender, proves that selection of the war paradigm post-9/11 is a rhetorical ploy to “displace law and rights” globally with targeted killing, “[b]lack sites, extraordinary rendition, . . . and enhanced interrogation.”³⁵⁶ One CLOACA scholar attributes resort

³⁵¹ Laurie S. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism*, 39 GA. J. INT’L & COMP. L. 1, 19-20 (2010-2011).

³⁵² See, e.g. Drumbl, *supra* note 335 (making this argument); CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 431-32 (2006).

³⁵³ Laurie Blank, *The Consequences of a “War” Paradigm for Counterterrorism: What Impact on Basic Rights and Values?*, 46 GA. L. REV. 719, 734 (2012).

³⁵⁴ See Anderson, *supra* note 67, at 2 (describing how 4GW redefined the zone of combat, the applicable legal regime, and the determination of the “battlefield”).

³⁵⁵ See Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009) (“[War] ha[s] a[n] identifiable territorial . . . dimension[.]”); Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 326 (2003) (denying “war” with Islamists in a strict positivist sense).

³⁵⁶ Blank, *supra* note 353, at 726. CLOACA rapidly recycled claims that applying a “war” rather than a transnational law enforcement paradigm impinged detainee rights. See, e.g., Sadat, *supra* note 252 (making this claim); see also David W. Glazier, *Full and Fair by What Measure? Identifying the International Law Regulating*

to the war paradigm to a counter-productive desire for vengeance and a “belief in the utility of military force to suppress terrorism . . . not warranted by the record;”³⁵⁷ in a candid moment, another rejects war precisely for the *opposite* reason—it is too effective at defeating Islamists: “[t]he real aim of the war is, quite simply, to kill or capture all of . . . the [Islamists], to keep on killing and killing, capturing and capturing, until they are all gone.”³⁵⁸ By implication, CLOACA would prefer that some Islamists remain alive and free to continue attacking America.

In sum, CLOACA grafts time and place analyses onto the traditional definition of armed conflict to level dispiriting allegations that the United States is prosecuting an illegal war. Inferentially, only if the United States discovers “alternatives to self-defense”³⁵⁹—in particular, the law enforcement model³⁶⁰—that proved ineffective in preventing serial attacks between 1993 and 2001—will the United States cease the systematic violation of LOAC and human rights that employing the war paradigm against Islamism entails. That it is possible to fight and win a war while upholding LOAC is dismissed out-of-hand; rather, CLOACA impales the United States on the horns of a dilemma: win a war while doing violence to the law, or suffer Islamist attacks while “enforcing” it.

Military Commission Procedure, 24 B.U. INT’L L. J. 55 (2006); Jonathan Hafetz, *The Supreme Court’s ‘Enemy Combatant’ Decisions*, 14 TEMPLE POL. & CIV. RTS. L. REV. 409 (2006); Satterthwaite, *supra* note 249.

³⁵⁷ See O’Connell, *supra* note 212, at 3, 20 (suggesting U.S. drone strikes against terrorists “may be intended for retribution or intimidation; not suppression.”).

³⁵⁸ David Luban, *The War on Terrorism and the End of Human Rights*, 22 PHIL. & PUB. POL’Y Q. 9, 13 (2002).

³⁵⁹ Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism?*, 63 U. PITT. L. REV. 889, 908 (2002).

³⁶⁰ See Margulies, *supra* note 99, at 16 (“[C]riminal prosecution is . . . the only game in town[.]”).

3. Allegation that U.S. Military Action against Islamists is Aggressive War

Self-defense is so intrinsic to state sovereignty it “would be asserted . . . absent recognition in [LOAC].”³⁶¹ Thus, Article 2(4) of the United Nations Charter, while prohibiting aggression,³⁶² proscribes only the threat or use of force (1) prejudicial to the territorial integrity of states, (2) contrary to the political independence of states, and (3) “in any other manner inconsistent with the Purposes of the United Nations.”³⁶³ Article 51 codifies the inherent right of individual and collective self-defense³⁶⁴ in the event of an armed attack,³⁶⁵ and as such states remain free to use force to defend their territory, their political independence, and their nationals.³⁶⁶ As customary *jus ad bellum* stands codified in LOAC, provided a particular use of force in self-defense cannot legitimately be construed as challenging the territorial integrity or political independence of a state or inconsistent with international peace and security, it is *prima facie* permissible whether another state or an Islamist VNSA launches the precipitating attack.³⁶⁷

³⁶¹ Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAV. L. REV. 217, 218 (1998).

³⁶² U.N. Charter art. 2, para. 4.

³⁶³ *Id.*

³⁶⁴ “Self-defense” is “a lawful use of force . . . in response to a previous unlawful use (or, at least, a threat) of force.” DINSTEN, *supra* note 100, at 175.

³⁶⁵ See U.N. Charter, art. 51 (“Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs[.]”).

³⁶⁶ Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93 (1989).

³⁶⁷ Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 536 (2002). The International Court of Justice (“ICJ”) intimated that to invoke self-defense a state must suffer “armed attack,” which only states can deliver as a matter of law. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 43 I.L.M. 1009, paras. 139, 194-95 (2004). However, because Resolutions 1368 and 1373 impliedly recognized an armed attack by a VNSA on 9/11, and the ICJ subsequently implied that LOAC “provides for a right of self-defense against . . . armed attacks by [VNSAs][,]” the proposition that a VNSA can execute an armed attack sufficient to permit a state to use armed force in self-defense is defensible and logical. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 ICJ 116, para. 147). For a blistering critique, see Sean D. Murphy,

Security Council Resolution 1368 recognized the inherent right of the United States to self-defend against those responsible for 9/11; Resolution 1373 reaffirmed the right of self-defense and called on member-states to “take action against the perpetrators.”³⁶⁸ Both implicitly recognized 9/11 as an “armed attack” on America within the meaning of the Charter,³⁶⁹ and, although the perpetrators were Islamist VNSAs and not states, the Security Council authorized, along with NATO,³⁷⁰ U.N. member-states to use armed force in individual and collective self-defense against them. With the imprimatur of the Security Council, and in light of the plain language of the Charter, the legality of allied armed force in self-defense against Islamists in Afghanistan, and later in Iraq, Yemen, Somalia, Syria, Libya, and elsewhere, might reasonably have been thought a settled question.

On the contrary: CLOACA alleged that the U.S.-led war against Islamists was illegal on four grounds. First, one or more fronts constituted a “war of choice” and even an act of “aggression” inasmuch as there was no linkage to 9/11. Second, 9/11 was not an armed attack and the United States was therefore not legally justified in using force in response. Third, 9/11 was an armed attack but LOAC does not permit armed force in self-defense against a violent non-state actor. Fourth, 9/11 was an armed attack, entitling the U.S. to use force in self-defense, but because U.S. conduct in the resulting

Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?, 99 AM. J. INT’L L. 62 (2005).

³⁶⁸ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (“Recognizing the inherent right of individual or collective self-defence” in response to 9/11); S.C. Res. 1373, para. 3(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

³⁶⁹ U.N. recognition of the right of self-defense in response to an attack that killed three thousand, severely damaged a U.S. military installation, and destroyed two major buildings would have been meaningless without an acknowledgement that Al Qaeda—a VNSA—had committed an “armed attack.” Moreover, the U.N. previously endorsed the view that an attack by a VNSA of sufficient magnitude could constitute an aggressive “armed attack” against which self-defense rights appertain. UNGA Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (1975), Annex, Definition of Aggression, art. 3(g).

³⁷⁰ “[T]hese attacks were [committed by] the world-wide terrorist network of Al-Qaida . . . and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty[.]” Statement of Lord Robertson, Secretary General, NATO (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

war was unlawful, the resort to force in self-defense became unlawful as well.

a. “War of Choice”

Despite Al Qaeda’s responsibility for 9/11, Article 51 of the U.N. Charter, Resolutions 1368 and 1373, and Congressional authorization, CLOACA deemed as aggression the October 2001 U.S.-led intervention in Afghanistan—the state harboring Al Qaeda³⁷¹—claiming military action, rooted in vengeance and Islamophobia, derogated from Afghanistan’s territorial integrity and political independence.³⁷² Even those who conceded the lawfulness of initial intervention claimed military operations became unlawful after the collapse of the Taliban government, as the United States no longer remained under attack or under a threat emanating from Afghanistan.³⁷³

Operation Iraqi Freedom excited still greater hostility. Whether the Hussein regime provided Al Qaeda material support is uncertain,³⁷⁴ yet U.S. justification did not rely upon an Iraqi connection or self-defense broadly, but on Iraqi material breaches of

³⁷¹ See, e.g., FRANCIS A. BOYLE, THE CRIMINALITY OF NUCLEAR DETERRENCE, 29 (2002) (equating U.S. intervention in Afghanistan with spurious Nazi claims of “self-defense” masking aggression); Benjamin G. Davis, *What War Does to Law* (University of Toledo Legal Studies Research Paper No. 2012-09), available at <http://ssrn.com/abstract=1931682> (2012) (“[U]nleashing an armed conflict [in Afghanistan] without the authorization of the Security Council nor a basis in Article 51 was aggressive war[.]”); Ryan T. Williams, *Dangerous Precedent: America’s Illegal War in Afghanistan*, 33 U. PA. J. INT’L L. 563, 579, 592 (2011) (concluding neither UNSCR 1368 nor 1373 authorized military force in Afghanistan and thus absent a credible self-defense claim, or consent from the Afghan government, U.S. intervention is “a giant—and illegal—military reprisal[.]”).

³⁷² See Luban, *supra* note 357, at 3-4 (describing Afghan intervention as “blaming all Muslims for *jihadi* terrorism” out of “anger and vengeance.”); MARTIN, *supra* note 134, at 248 (claiming U.S. Afghan intervention was a “punitive measure[.]” that abandoned even the appearance of self-defense).

³⁷³ See, e.g., Williams, *supra* note 371, at 565 (“[E]ven if America’s *initial* involvement in Afghanistan arguably comported with international law, its continued military activity [after the fall of the Taliban] does not comport with [LOAC]” as it is unnecessary as a self-defense measure.) (emphasis added).

³⁷⁴ STEPHEN F. HAYES, THE CONNECTION: HOW AL QAEDA’S COLLABORATION WITH SADDAM HUSSEIN HAS ENDANGERED AMERICA xxi (2004).

Resolutions 678, 687, and 1441 conditioning the 1991 Gulf War ceasefire on divestment of weapons of mass destruction.³⁷⁵ Nonetheless, CLOACA baldly denied an Iraqi connection to 9/11 and ignored ceasefire breaches to proclaim that, because “Saddam Hussein had no [WMD]” U.S.-led intervention was an immoral and illegal “war of choice.”³⁷⁶

b. 9/11 Was Not an Armed Attack

Relying upon an anachronistic notion of the concept of “armed conflict,” CLOACA argued that 9/11 did not constitute an armed attack within the meaning of the UN Charter and the United States was therefore not entitled to use armed force in self-defense.³⁷⁷ To these scholars, militaristic U.S. leaders succumbed to “temptations to conceal, distort, or mischaracterize events” in building the case for military operations against Islamists in Afghanistan, Iraq, and elsewhere, and then launched a “search for loopholes in the Charter” to enlarge the meaning of “armed attack” and “self-defense” to “multiply[] exceptions to the prohibition on the use of force and the occasions that would permit military intervention,” undermining LOAC and global order in the process.³⁷⁸

³⁷⁵ See Letter from U.N. Ambassador John Negroponte to President Mamady Traore of the Security Council (Mar. 20, 2003), *available at* <http://iipdigital.usembassy.gov/st/english/texttrans/2003/03/20030321155110rennefl0.3604242.html> (justifying intervention in Iraq as an enforcement of Security Council Resolutions 678 and 1441 threatening “revived force” and “serious consequences” for material breach).

³⁷⁶ More measured critics deemed intervention unlawful because the Security Council *circa* 2003, unlike the Council *circa* 1991, had not reauthorized enforcement of the 1991 ceasefire Resolutions. See, e.g., Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1521, 1523 (2003).

³⁷⁷ See, e.g., Martin, *supra* note 143, at 2 (“[T]he US is not clearly a belligerent in an armed conflict[.]”) (discussing targeted killings); Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT’L L. 149, 165 (2006) (noting the U.N. Security Council did not explicitly authorize the use of force by the United States under Article 51 in its adoption of UNSCR 1368).

³⁷⁸ O’Connell, *supra* note 212, at 17-18.

*c. 9/11 Was an Armed Attack But Self-Defense Cannot
Be Employed Against a Non-State Actor*

Some CLOACA scholars argue that, even if 9/11 constituted an Article 51 attack, the use of armed force against Islamist VNSAs “undermine[s] the concept of self-defense” and “exclusive . . . Security Council [jurisdiction] to authorize the use of force”³⁷⁹ Consistent with *The Wall Case* but contrary to the Charter and a long history of state practice, for this coterie it is an article of faith that “where a state is not responsible for terrorist attacks, Article 51 may not be invoked to justify measures in self-defense” whether against the Islamist VNSA or the harboring state, so long as the latter is “making a good faith effort to stop the [Islamist VNSA.]”³⁸⁰

*d. Because Civilian Casualties Are Excessive, the Resort
to Self-Defense Was Unlawful*

Because *jus ad bellum* and *jus in bello* are functionally separate subregimes, even if an attack on a particular target were inarguably disproportionate, it would have no bearing on whether the resort to force was unlawful in the first instance. The right to resort to force is determined by reference to the former regime, and conduct in war by the latter. LOAC accepts civilian casualties during armed conflicts, with numerical limits a function of the intent of the attacker, the expected military advantage associated with destruction of the target, the conduct of the defending party, and the manner in which customary LOAC principles were applied.

To CLOACA, however, even if a VNSA attack can trigger the right of armed self-defense in theory, should resulting civilian casualties exceed some arbitrary number they decide represents the maximum allowed under proportionality analysis, then *the very resort to armed self-defense was unlawful*. This flawed calculus “conflate[s] [proportionality] under *jus ad bellum* with the principle of . . . proportionality under *jus in bello*”—a deliberate erasure of an impermeable boundary between LOAC subregimes of strategic value

³⁷⁹ Martin, *supra* note 143, at 29-30.

³⁸⁰ MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE, CASES AND MATERIALS 319-320 (2004).

to Islamists who spin unintended civilian casualties of U.S. air strikes into proof of U.S. “war crimes.”³⁸¹ In short, the value of civilian casualties depends not only upon gruesome reportage but upon CLOACA to substantiate the facile arguments that LOAC is a strict liability regime and any civilian deaths whatsoever are presumptively intended and therefore criminal, along with the war itself. In so doing, CLOACA encourages Islamists to mingle with civilian populations and Americans to doubt the legality of the war.³⁸²

4. Contention that “Torture” and the Use of Military Commissions Prove the Injustice of the American Cause

By any fair standard, no interrogation technique employed pursuant to U.S. policy constituted torture, and conditions at GTMO, where the average detainee eats specially prepared halal meals, recreates on a \$750,000 soccer field, and receives his Qur’an from gloved guards “as if it were a fragile piece of delicate art,”³⁸³ are better than most federal prisons.³⁸⁴ The Obama administration deems GTMO a Geneva-compliant facility and thus, contrary to a 2009 executive order, has kept it open.³⁸⁵ However, CLOACA claims U.S. interpretations of LOAC informing detention policies were legal “travesties”³⁸⁶ that turned GTMO into a “gulag,”³⁸⁷ a “horror,” and an

³⁸¹ Blank, *supra* note 165, at 2-3, 25. Islamists purposefully increase civilian casualties to “prove” the “unlawfulness” of U.S. attacks. Dunlap, *supra* note 28, at 37.

³⁸² Civilian casualty incidents are “highly mediagenic events” that “can lead the public to weigh the morality of wars against the importance of their aims.” RAND, *Misfortunes of War: Press and Public Reactions to Civilian Deaths in Wartime* (2006), at 71. Thus, “the [Islamist VNSA] has significant incentives to create . . . civilian casualties . . . to undermine support for the military campaign.” Blank, *supra* note 165, at 30.

³⁸³ DOD Memorandum, Camp Delta Interim SOP Modification: Inspecting/Handling Detainee Korans Standard Operating Procedure (SOP) (Jan. 19, 2003), available at <http://www.defenselink.mil/news/Jun2005/d20050601KoranSOP.pdf>; Jane Sutton, *Guantanamo commander defends \$744,000 soccer field*, REUTERS (Mar. 1, 2012, 5:14 PM), <http://www.reuters.com/article/2012/03/01/usa-guantanamo-soccer-idUSL2E8E1CC520120301>.

³⁸⁴ See Lebowitz, *supra* note 240, at 385, 388.

³⁸⁵ Exec. Order No. 13,492. 3 C.F.R. 203 (2010).

³⁸⁶ McCormack, *supra* note 120, at 102.

³⁸⁷ See Kende, *supra* note 119, at 1557 (“Nothing seems less American, and more like a Gulag, than holding people in perpetuity [. . . in GTMO].”).

“alien planet”³⁸⁸ rife with poor medical care, “sensory deprivation,” “beat[ings],” “rape,” and mock executions.³⁸⁹ Several argue that only shuttering Guantanamo and freeing detainees can “cleanse the nation of [GTMO]’s moral stain” and any resulting harm to national security is the moral price tag for having used torture.³⁹⁰ These specious claims are spun by CLOACA into a brush to tar America’s reputation, a stop to sharpen anti-U.S. sentiments, and a pick to undermine U.S. political will.³⁹¹

CLOACA also lambasts the use of Combatant Status Review Tribunals and military commissions to determine status and prosecute Islamists for pre-capture crimes. Critics label the former “kangaroo courts”³⁹² on the ground they provide allegedly insufficient guarantees against erroneous classification of ununiformed Islamists as unlawful combatants, rather than as lawful members of state armed forces, or hapless civilians mistakenly swept into detention by overzealous U.S. troops.³⁹³ However, CSRTs

³⁸⁸ Honigsberg, *supra* note 120, at 82-83.

³⁸⁹ See generally PHYSICIANS FOR HUMAN RIGHTS, *BROKEN LAWS, BROKEN LIVES* (2008), available at <http://physiciansforhumanrights.org/library/reports/broken-laws-torture-report-2008.html>.

³⁹⁰ See Burlingame & Joscelyn, *supra* note 242, at 5 (quoting a Justice Department lawyer who called for release of detainees untriable in civilian courts on the ground this is an “assumption of risk” we must endure to “cleanse the nation of Guantanamo’s moral stain.”).

³⁹¹ See, e.g., Gerard P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, 35 *PARAMETERS* 54, 62 (Autumn 2005) (alleging U.S. detention created “angry foreign allies, a tarnishing of America’s image, and declining cooperation . . . on terrorism.”); Katherine Kerstin, Op-Ed., ‘Pro Bono,’ in *This Case, is Proterrorist*, *STAR TRIBUNE* (Minneapolis) (Mar. 20, 2010), <http://www.startribune.com/opinion/88683832.html>.

³⁹² See COHN, *supra* note 235, at 13; David J.R. Frakt, *Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 *CASE W. RES. J. INT’L L.* 335, 354 (2010) (using this epithet to describe military commissions).

³⁹³ Fiona de Londras, *Prevention, Detention, and Extraordinariness*, in *GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE* 127-28 (Fionnuala Ni Aolain & Oren Gross eds., 2013) (CSRTs provide insufficient guarantees against erroneous classification as an unlawful combatant); Gabor Rona & Raha Wala, *In Defense of Federal Criminal Courts for Terrorism Cases in the United States*, in *GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE* 142-44 (Fionnuala Ni Aolain

provide far more process than required under LOAC, which presumes the good faith of the detaining party and anticipates that status is a readily ascertainable matter-of-fact, and have validated U.S. claims that the vast majority of detainees are unlawful enemy combatants subject to indefinite detention.³⁹⁴

Law and experience urge military prosecution of Islamist detainees who, tried in civilian courts, “gouge sensitive information from the government and force it to choose between the vitality of the prosecution and other crucial interests.”³⁹⁵ Although U.S. troops accused of serious crimes are tried in courts-martial, and Article 102 of the third Geneva Convention calls for combatant trials by “the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power,” unlawful combatants are entitled only to trial by a “regularly constituted court, affording all the judicial guarantees . . . recognized as indispensable by civilized peoples.”³⁹⁶ While not wholly isomorphic to courts-martial,³⁹⁷ military commissions were used in previous wars to prosecute unlawful combatants,³⁹⁸ and this forum choice signifies a

& Oren Gross eds., 2013) (military commissions being applied retrospectively for domestic infractions).

³⁹⁴ See WITTES, *supra* note 103, at 62, 71 (describing that the CSRTs concluded over ninety-three percent of GTMO detainees present when CRSTs were established were, in fact, enemy combatants). Although detainees before CSRTs were entitled not to an attorney but to a “personal representative,” and although the right to present evidence and confront witnesses was more limited than at court-martial, Congress and the President provided accused unlawful enemy combatants substantive and procedural protections very similar to those provided U.S. military personnel subject to nonjudicial punishment under the Uniform Code of Military Justice. *Compare* CSRT regulations *with* Article 15, UCMJ.

³⁹⁵ WITTES, *supra* note 103, at 171. Congressional testimony explains the need for different procedures in military commissions to protect intelligence sources and methods. While prosecuting Omar Abdel Rahman in civilian court, 200 unindicted coconspirators’ names were given to the defense in discovery, and within 10 days “this information found its way to . . . bin Laden[,] . . . inform[ing] al Qaida . . . which of its agents we had uncovered.” S. REP. NO. 110-90, pt. 7, at 14-15 (2007).

³⁹⁶ GCIII, *supra* note 90, arts. 3, 102.

³⁹⁷ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

³⁹⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 592-97 (UCMJ art. 21 authority for military commissions is almost identical to art. 15 of Articles of War used as jurisdictional basis to prosecute World War II Nazi saboteurs as unlawful enemy combatants in violation of LOAC in *Ex Parte Quirin v. Cox*, 317 U.S. 1 (1942)).

political decision to comply with the third Geneva Convention by providing unlawful enemy combatants many of the substantive and procedural guarantees that inhere in courts-martial while incorporating stronger protections for evidence implicating intelligence sources and methods.³⁹⁹ That U.S. military commissions exceed obligations under Common Article 3 by providing a quantum of process greater than that available to POWs tried for pre-capture crimes under the domestic laws of many states-parties to the third Geneva Convention should dispel the “charade of justice” meme.⁴⁰⁰

The U.S. decision to convene military commissions to prosecute Islamist detainees for pre-capture crimes related to 9/11 underscores the well-grounded position that this forum is lawful.⁴⁰¹ Still, notwithstanding that all military trial-level courts, including courts-martial, are *ad hoc* forums created only when charges are referred by convening authorities, CLOACA claims that commissions, of which none were in session on 9/11, were not “‘regularly constituted’ or ‘previously established in accordance with pre-existing laws’ and thus lack jurisdiction,” meaning their use to try detainees for pre-capture crimes violated Common Article 3.⁴⁰² CLOACA further tars military commissions as rife with substantive and procedural insufficiencies⁴⁰³ engineered to enhance conviction rates⁴⁰⁴ by inducing Islamists to seek martyrdom through “plead[ing] guilty to horrendous things [they did not do] once they realize there

³⁹⁹ Compare 10 U.S.C. §§ 949d, 949a(a)(2) (2012) with MANUAL FOR COURTS-MARTIAL, MIL. R. EVID. 505 (2012).

⁴⁰⁰ See Michael A. Newton, *Some Observations on the Future of U.S. Military Commissions*, 42 CASE W. RES. J. INT’L L. 151 (2009) (concluding commissions “provide the full range of rights” required under LOAC after surveying state practice).

⁴⁰¹ *Hamdan*, 548 U.S. at 592-94.

⁴⁰² Brief for Jordan J. Paust, Human Rights Committee of the American Branch of the International Law Association, as Amicus Curiae Supporting Respondent, at 1, *United States v. Al Bahlul*, No. 09-001 (Ct. Mil. Comm’n Rev. Sept. 9, 2011).

⁴⁰³ See, e.g., Janet Alexander, *Military Commissions: A Place Outside the Law’s Reach*, 56 ST. LOUIS U. L.J. 1115, 1118 (2012); Glazier, *supra* note 142, at 10-11 (claiming military commissions suborn coerced confessions, tolerate resource inequalities, deny confrontation of witnesses, and charge undefined offenses).

⁴⁰⁴ See Alexander, *supra* note 403, at 1121; Glazier, *supra* note 142, at 7 (claiming commissions facilitated shortcuts that secured a higher conviction rate than would have appertained in courts-martial).

is no hope.”⁴⁰⁵ To CLOACA, the United States created a perfidious and illegal forum to hasten the post-capture demise of Islamist detainees who would have been acquitted in federal civilian courts where they were entitled to be heard.⁴⁰⁶ By this view, an adverse effect on American political will arising from the use of military commissions is a just desert for sullyng LOAC and the rule of law.

5. Accusation of Serial War Crimes

The U.S. counterattack in Afghanistan, Iraq, and elsewhere was and is lawful under good-faith interpretations of LOAC. However, CLOACA demanded the United States investigate and punish senior civilian leaders, claiming only hearings, truth commissions, and civil and criminal prosecutions can atone for a conspiracy to commit serial war crimes⁴⁰⁷ so egregious that the only historical precedent is the Nazi regime. CLOACA charged senior Bush administration officials, including Vice President Dick Cheney, National Security Adviser Condoleeza Rice, Attorney General John Ashcroft, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, White House Counsel Albert Gonzales, and CIA Director George Tenet with a “common, unifying plan” to authorize, order, and abet the commission of war crimes, including allegedly torturous interrogations, disappearances, and forcible rendition.⁴⁰⁸

⁴⁰⁵ Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 NW. U. L. REV. COLLOQUY 88, 104 (2008).

⁴⁰⁶ See generally David Cole, *Military Commissions and the Paradigm of Prevention*, in GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE (Fionnuala Ni Aolain & Oren Gross eds., 2013).

⁴⁰⁷ A “war crime” is a term-of-art for a serious “violation of [LOAC] by any person[.]” U.S. ARMY, FIELD MANUAL 27-10, THE LAW OF ARMED CONFLICT para. 499 (July 1956).

⁴⁰⁸ See, e.g., M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389 (2006) (examining Bush, Cheney, and Rumsfeld’s pressure to obtain interrogation “results”); Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration’s Wilhelmine Attitude Towards the Conduct of War*, 30 FORDHAM INT’L L.J. 576 (2007) (detailing Gonzales argument that military necessity renders international law inapplicable); Peter Margulies, *Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006) (explaining how lawyers’ duty to advocate may interfere with recommending

Several members focused upon the culpability of administration lawyers whom they claim “purported to immunize government officials from war crimes liability” and, like Nazi lawyers before them, are “criminally liable for participating in a common plan to violate [LOAC].”⁴⁰⁹ Merely acknowledging that Fourth Generation War is distinct from “the traditional clash between nations adhering to [LOAC],” and suggesting that LOAC drafters may not have anticipated 4GW challenges, earned Alberto Gonzales allegations of war crimes.⁴¹⁰

That accusations by a CLOACA claque claiming senior U.S. officials authored a pattern of serial war crimes on a moral par with the architects of the Holocaust are meritless does not inoculate Americans against their demoralizing effects.⁴¹¹ An accusation of war crimes, like accusations of rape, sexual harassment, and racism, imposes tremendous social stigma, and without regard to its veracity taints the reputation of the accused. Should Americans come to harbor serious doubts about whether their country engages in war crimes as an official policy, their belief in the justice of their cause will wither, along with their willingness to fight for it.

6. Accusation that U.S. Military Policy Erodes Security

CLOACA blames U.S. policies for “shattered” alliances,⁴¹² diminished influence,⁴¹³ and eroded national security.⁴¹⁴ One

complying with law); JORDAN J. PAUST, *BEYOND THE LAW* 1 (2007) (accusing many of these named individuals).

⁴⁰⁹ Paust, *supra* note 304, at 5206. “Not since the Nazi era have so many lawyers been so clearly involved in international [war] crimes[.]” Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 811 (2005).

⁴¹⁰ See COHN, *supra* note 235, at 21 (comparing Bush administration lawyers to “Nazi lawyers . . . convicted of war crimes and crimes against humanity”).

⁴¹¹ See Wheaton, *supra* note 62, at 8 (“Actual violations of [LOAC] may not be necessary . . . perceived violations can have . . . deleterious effects on U.S. . . . will.”).

⁴¹² Tamanaha, *supra* note 328, at 19-20.

⁴¹³ See Joseph S. Nye, Jr., *Soft Power and American Foreign Policy*, 119 POL. SCI. Q. 255, 256 (2004) (claiming U.S. military policies post-9/11 made it harder to influence allies).

⁴¹⁴ See, e.g., DAVID COLE AND JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 2 (2007) (holding as an article of faith, along with many

scholar, without empirical support, laments the “degradation of our military” allegedly wrought by coercive interrogation in particular, including “detrimental impacts upon military professionalism, honor and integrity, morale, retention, and recruitment,” as well as the increased probability U.S. troops will lose respect for LOAC and commit other war crimes *sua sponte*.⁴¹⁵ The same scholar even contends that U.S. violations of LOAC “increased violence in Afghanistan and Iraq . . . and create[d] a generation of violence in alleged revenge.”⁴¹⁶ That no alleged U.S. war crime post-9/11 can explain Islamist attacks on 9/11—the most intense use of force against Americans by Islamists to date—is ignored in specifying this charge. Still others assert that U.S. war crimes justify reciprocal abuse of U.S. POWs by Islamists;⁴¹⁷ the long pre-9/11 history of Islamist treatment of detainees, in utter disregard of LOAC, goes unmentioned. In short, Islamist violation of detainee rights is independent of U.S. detention policy, and even the most exaggerated Islamist claims of torture at the hands of U.S. interrogators pale beside the ritual butchering of hostages and POWs by Islamist captors.⁴¹⁸

in CLOACA, that the United States is less safe as a result of its 4GW policies against Islamism).

⁴¹⁵ Paust, *supra* note 304, at 5212.

⁴¹⁶ *Id.* at 5214. Another CLOACA author implores us to “[t]hink of the . . . bitterness aroused by reports of innocent civilians accidentally killed . . . by [U.S.] troops[,] or by [UAVs] shooting rockets . . . that kill whomever is in the blast zone[,] anger at the images of snapping dogs set upon naked prisoners, and repeated accounts of American infliction of torture in interrogations[.]” Tamahana, *supra* note 329, at 437.

⁴¹⁷ See, e.g., Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 31 (2008) (“[T]errorism has won a great victory . . . because . . . leading democracies have proved willing . . . to undermine the rule of law in a manner that terrorists could never have achieved by themselves[.]”); Paust, *supra* note 304, at 5215 (“[I]f illegal means are used in response to terrorism, the impermissibility of terrorist means might blur and [thus] . . . counterterrorism is pregnant with future terrorists . . .”) (internal quotations omitted).

⁴¹⁸ See, e.g., Naina Bajekal, *ISIS Mass Beheading Video Took 6 Hours to Film and Multiple Takes*, TIME (Dec. 9, 2014), <http://time.com/3624976/isis-beheading-technology-video-trac-quilliam/>.

A more serious charge is that U.S. “war crimes” recruit more Islamists than U.S. military action has killed and captured,⁴¹⁹ and that detainee recidivism results from “torture” in U.S. detention.⁴²⁰ Apart from methodological problems in substantiating this claim, attribution of responsibility for the presence of homicidal Islamists on foreign battlefields and in U.S. cities to U.S. practices post-dating 9/11, rather than to the inspiration of an evil ideology, betrays gross ignorance of the spiritual foundations of jihad and unconscionable eagerness to blame the victim. Given the sordid record of Islamist abuse of non-Muslim detainees, to charge U.S. mistreatment of Islamist detainees with so offending the sensibilities of groups that practice torture as a divinely-sanctioned stratagem of war as to create an independent basis for recruitment is unadorned foolishness. Most distressing is the contention that “even if [U.S. detention policy] has made us safer, it is an abandonment of core principles . . . and . . . we should reject it categorically.”⁴²¹ For CLOACA, far better that Americans should die than Islamists suffer discomfiting interrogations that disrupt plans to kill Americans.

7. Accusation that American Military Policy Threatens Core Values

Enlarging its critique, CLOACA charges the United States with “attacking our most cherished values.”⁴²² One unsparing critic proclaims that in fighting Islamism “[t]he [United States] violated [LOAC] which [is] a ‘but-for’ cause of the terrorism [it] experiences.”⁴²³ Another decries U.S. policies as responsible for

⁴¹⁹ See Bassiouni, *supra* note 408, at 424 (“[E]ach person tortured [is] likely to . . . seek revenge[.]”); David J. R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179, 258 (2012) (“[U.S. policies] . . . help[ed] recruit the next generation of jihadists.”); Kende, *supra* note 119, at 1558 (“[H]olding [Islamists] in a Gulag . . . produce[s] more terrorists[.]”); Paust, *supra* note 304, at 5203 (leveling this charge).

⁴²⁰ See, e.g., Kende, *supra* note 119, at 1558 (“[Detainees] released . . . as harmless may have taken up arms against the U.S. . . . due to their Gitmo mistreatment.”).

⁴²¹ Darmer, *supra* note 235, at 644.

⁴²² Sadat & Geng, *supra* note 302, at 155.

⁴²³ Quigley, *supra* note 331, at 827.

“death and torture of innocent people.”⁴²⁴ For CLOACA, U.S. conduct post-9/11 is an episode of jurispactic auto-degradation.⁴²⁵ Not only did U.S. “war crimes” produce “effects more damaging than any imposed by our enemies,”⁴²⁶ but “[s]ome damage . . . is irreparable.”⁴²⁷ The message is clear: American veneration of the rule of law in the abstract is vastly more precious than real-world survival, and, because the United States cannot engage Islamists without further betraying LOAC, it should break off the battle whatever the consequence.

8. Demands for Prosecution of Civilian Leaders

Brandishing the principle *aut dedere aut judicare*, CLOACA would refer alleged war crimes by civilian leaders—whom they identify as the ultimate architects of LOAC violations—to international courts for prosecution.⁴²⁸ Whereas state sovereignty, various immunities, and peace and reconciliation imperatives once militated in favor of political remedies, the trend toward war crimes prosecution of senior government officials threatens not only their personal liberty but their proclivity to act with vigor and dispatch in defending national interests, even if potential charges are groundless.⁴²⁹ German indictment of Defense Secretary Rumsfeld and Italian investigations of President Bush and Prime Minister Blair for the intervention in Iraq,⁴³⁰ Spanish investigations of an Israeli

⁴²⁴ CYRA AKILA CHOUDHURY, RACE 2008: CRITICAL REFLECTIONS ON AN HISTORIC CAMPAIGN 69 (Myra Mendible ed., 2010).

⁴²⁵ Sadat & Geng *supra* note 302, at 160.

⁴²⁶ Susan W. Tiefenbrun, *Semiotic Definition of “Lawfare,”* 43 CASE W. RES. J. INT’L L. 29, 33 (2010).

⁴²⁷ SHERIFA ZUHUR, PRECISION IN THE GLOBAL WAR ON TERROR: INCITING MUSLIMS THROUGH THE WAR OF IDEAS 50 (Strategic Studies Institute 2008).

⁴²⁸ Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 5 (2011).

⁴²⁹ See Anderson, *supra* note 67, at 30 (“[T]he . . . left . . . are eager to prosecute Americans.”); Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Mobilization Strategies for Human Rights*, 57 BUFF. L. REV. 347, 347-48 (2008) (describing lawsuits against U.S. officials that bring political pressure to bear “independent of [their] judicial outcomes” and leave U.S. officials hesitant).

⁴³⁰ See Straganzeige gegen den noch amtierenden Verteidigungsminister der Vereinigten Staaten von Amerika, Donald H. Rumsfeld, et al., *available at*

defense minister and of U.S. lawyers for coercive interrogations, Italian investigation of CIA officers for renditions, and attempted Pakistani extradition of a CIA general counsel for targeted killing by way of UAV strikes⁴³¹ are but some of the campaigns waged against Western leaders.

“Counter-counter-terrorism via lawsuit”⁴³² also harries Western leaders into inaction. CLOACA forks intellectual fodder into a litigation strategy wherein “victims” file *Bivens* suits⁴³³ against U.S. officials—attorneys, CIA and FBI directors, the Attorney General, and the President—seeking damages and injunctive relief for alleged violations of constitutional rights arising from rendition, detention, torture, and targeted killing.⁴³⁴ Despite the speciousness of these cases—and courts that reach the merits find for defendants—CLOACA views *Bivens* suits less as opportunities to vindicate individual rights than as moments to foment public opposition to U.S. policies and leverage plaintiffs’ legal arguments into political attacks on those policies. If CLOACA recognizes that there is “at least a theoretical risk that *Bivens* actions will deter the

http://ccrjustice.org/files/Complaint_German_vol1.pdf (German indictment against Rumsfeld and others for war crimes); Indictment in the Central Criminal Court, <http://www.opednews.com/Diary/Tony-Blair-Indictment-For-by-Gene-Cappa-100109-469.html> (attempted Italian war crimes indictments of Bush and Blair).

⁴³¹ See *Top Israeli official blasts Spanish court’s probe*, CNN, <http://www.cnn.com/2009/WORLD/europe/01/30/spain.israel.gaza.lawsuit/> (last updated Jan. 30, 2009); Peter Beaumont, *Campaigners Seek Arrest of Former CIA Legal Chief Over Pakistan Drone Attacks*, THE GUARDIAN, Jul. 15, 2011 (modified Oct. 3, 2014), <http://www.theguardian.com/world/2011/jul/15/cia-usa> (attempted extradition of CIA General Counsel to Pakistan); Mick Krever, *CIA agents who tortured are vulnerable to prosecution in ‘any country in the world,’ says U.N. official*, CNN (Dec. 12, 2014), <http://amanpour.blogs.cnn.com/2014/12/12/cia-agents-who-tortured-are-vulnerable-to-prosecution-in-any-country-in-the-world-says-u-n-official/> (Italian prosecution of CIA officers).

⁴³² George D. Brown, “Counter-Counter-Terrorism Via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 844 (2009).

⁴³³ *Bivens v. Six Unknown Named Narcotics Agents*, 403 U.S. 388, 397 (1971) (allowing damage suits against federal officials who violate constitutional rights).

⁴³⁴ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009) (conditions of confinement); *El-Masri v. Tenet*, 479 F.3d 296, 300-01 (4th Cir. 2007) (rendition); *Al-Kidd v. Ashcroft*, 580 F.3d 949, 951-52 (9th Cir. 2009) (detention); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1013, 1019-20 (N.D. Cal. 2009) (interrogation); *Al-Aulaqi v. Bush*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

guardians [of national security] from doing their jobs,”⁴³⁵ it is undaunted because, short of an unlikely electoral shift to a regime that eschews detention, interrogation, and targeted killing policies altogether, preventing incumbent officials from zealously implementing these policies by dangling the specter of legal sanctions is the only way to disable them.⁴³⁶

Rather than grant a margin of appreciation to the officials in whom Americans have reposed their trust to interpret LOAC and choose policies best suited to defending their security, CLOACA substitutes its judgments for those of Congress and the executive while turning to foreign governments and unelected judges to threaten prison and fines should U.S. officials remain stalwart and steadfast in executing these policies. In so doing, it subordinates the methods and means chosen to serve the survival imperatives apprehended by a democratic political community to its own vision of law and morality. Moreover, it advances a narrative that relies for its rhetorical force upon an overt imputation of lawlessness and immorality to the United States and the risible arguments that Islamists pose little threat and are in fact the real victims of the war. Corrosive psychological effects follow: if U.S. misconduct in waging war against Islamists is so severe that government officials should be hauled before foreign criminal courts, then not only must the policies and practices that constitute this misconduct be discontinued, but also the assumption upon which these policies rest—that they are lawful and necessary—must be false. The prosecution strategy counseled by CLOACA undermines American political will by lending the imprimatur of expertise to the propositions that the United States is an immoral nation fighting an illegal war by unlawful means at the behest of a criminal leadership, and that it must abandon its policies, and better still quit the war, to regain its tarnished legitimacy.

⁴³⁵ Brown, *supra* note 432, at 855.

⁴³⁶ See generally Margulies, *supra* note 408, at 952.

9. Demonization of Intellectual Opposition

Many in CLOACA are intolerant of theories and opinions running counter to their own,⁴³⁷ and of the scholars who produce them. Attacks upon eminent LOACA scholars who support U.S. policies in the war against Islamism can take the form not merely of strident academic denunciations, social ostracism, and *ad hominem* assaults, but also of calls for professional sanctions and civil and criminal prosecution. In particular, University of California law professor and former Deputy Assistant Attorney General John Yoo, a prolific and senior LOACA scholar whose views on war powers and presidential authority are heavily-cited and referenced, absorbed a vicious stream of CLOACA vitriol for his legal advice on issues including unlawful combatancy, detention, and torture.

Yoo's response to novel legal questions, posed by an executive seeking to justify exercise of broad war powers in defense of a nation under existential threat, was received as if he had deliberately offered up a program for the systematic destruction of the rule of law. CLOACA claimed "practically everyone" believed Yoo's work "atrocious," a "slovenly mistake," "riddled with error," a "one-sided effort to eliminate any hurdles posed by [existing] law," and "intentional professional misconduct" for misrepresenting the law.⁴³⁸ Some charge that Yoo, "blinded by [conservative] ideology," abandoned his legal role to "play warrior" in foolish disloyalty to law and country.⁴³⁹ An infantilizing attack described Yoo's claim that the decision not to refer him for professional discipline was "a victory for [Americans] fighting the war" as "a bit like a child coming home with an F on his report card and telling his parents that they should

⁴³⁷ Two scholars brand criticism of CLOACA "an attack of the foundations of society." Leila N. Sadat & Jing Geng, *On Legal Subterfuge and the So-Called Lawfare Debate*, INT'L REL. & SEC. NETWORK (Apr. 19, 2013), <http://www.isn.ethz.ch/Digital-Library/Articles/Special-Feature/Detail/?lng=en&id=162857&tabid=1454244677&contextid774=162857&contextid775=162992>.

⁴³⁸ Cole, *supra* note 235, at 455.

⁴³⁹ Robert C. Power, *Lawyers and the War*, 34 J. LEGAL PROF. 39, 110 (2009).

congratulate him for not getting suspended.”⁴⁴⁰ The most vicious demanded he be prosecuted for “war crimes.”⁴⁴¹

As the Yoo episode reveals, dissent against CLOACA is heresy meriting the academic equivalent of purification by fire.⁴⁴² Vituperation and recrimination heaped upon Yoo was intended not merely to effect *his* professional destruction. Rather, the calumny was calculated to intimidate other members of LOACA who share Yoo’s philosophies but fear professional excommunication should they renounce the orthodoxies of CLOACA’s high priests. Self-censorship is widespread within academia, and dissidents learn to repress or mitigate their views or face reputational damage, ostracism, tenure denial, ignominy, and worse.⁴⁴³ Yoo was subjected to professional assassination to reinforce self-censorship, cow contrarians, and cement the perception that CLOACA positions represent the consensus of a monolithic and “correct” intellectual community. A demonstration that challenging CLOACA was an act of martyrdom was needed to preserve its ideological coherence as an instrument of power against American political will.

C. Summary

A Fifth Column has enlisted to fight against the political will of the American people, commending its knowledge of LOAC into the service of Islamists seeking to destroy Western civilization and re-create the Caliphate. CLOACA potentiates Islamist military operations against U.S. targets—the combat support element of Fourth Generation War by promoting differentially onerous rules for the U.S. military, misapplying and distorting customary principles of LOAC to U.S. disadvantage, propounding claims as to the law governing detention and interrogation that degrade U.S. intelligence

⁴⁴⁰ Cole, *supra* note 235, at 455.

⁴⁴¹ Paust, *supra* note 304, at 5204-05.

⁴⁴² See, e.g., David Luban, *Opting Out of the Law of War: Comments on Withdrawing from International Custom*, 120 YALE L.J. 151 (2010).

⁴⁴³ See Neal W. Hamilton, *Foreword: Symposium on Zealotry and Academic Freedom*, 22 WM. MITCHELL L. REV. 333, 343 (1996) (Failing to self-censor “to avoid . . . controversy that follows . . . dissent from fundamentalist ideology” triggers “reputational damage . . . ostracism . . . unfair treatment . . . and . . . threats to jobs.”).

collection and return Islamists to the battlefield, threatening U.S. troops with groundless prosecutions, and otherwise abusing their status and knowledge to support materially the Islamist foe. Worse still, CLOACA is engaged in direct PSYOPs against American political will—the direct application of combat power in Fourth Generation War to convince Americans that the attacks of 9/11 are their just deserts for a foreign policy that privileges Israel and subordinates Muslims, that in the course of an illegal war their country commits torture and war crimes on the order of Nazi Germany, that this illegal war is undermining national security and destroying the rule of law, and that the only way to rebuild American virtue is to end the war without victory, cede the field to Islamists, and extradite for prosecution those responsible for war policies—including their own intellectual apostates. Contrary to their claims of fidelity to law and the American people, this Fifth Column rewards Islamists for their unlawful combatancy, immunizes them against interrogation and killing, increases the physical and legal risks faced by U.S. personnel, tilts the balance of military power toward Islamists, deprives the United States of information necessary to prevent future attacks, and convinces Americans that their country is intractably an aggressive, immoral, unlawful, even evil force in the world deserving to lose a war that it is, in fact, losing. Part II offers explanations as to why CLOACA has cast its lot with the enemy.

II. ETIOLOGY OF A FIFTH COLUMN: WHY CLOACA ATTACKS AMERICAN POLITICAL WILL ON BEHALF OF ISLAMISTS

Explanations of why CLOACA serves as a Fifth Column against American political will on behalf of Islamism range across cultural, professional, ideological, psychological, political, philosophical, functional, and theological domains. Part II develops explanations along a continuum of decreasing tenability in terms of what the scholarly enterprise has traditionally been understood to embrace, and increasing venality in regard to what might be expected as part of the incidents and burdens of U.S. citizenship.

A. *Jurisphilia*

Commitment to the rule of law is the fundament upon which American legitimacy rests. A strong current of legalism runs through U.S. history, foreign policy, and battle conduct, and few dispute that Americans should “resist undermining the very virtues we are defending.”⁴⁴⁴ However, the rule of law is a means rather than an end. The survival of their Constitution, republican government, and sovereignty are objectives for which Americans have proven willing time and again to shed blood and expend treasure. The rule of law chalks the boundaries within which this struggle may be conducted, but it is not the goal for which Americans fight. In crises, extra-legal considerations enter the calculus decisionmakers perform to safeguard Americans.⁴⁴⁵ As Lincoln underscored, the rule of law, and even the Constitution itself, must, in extremis, yield to preservation of the nation.⁴⁴⁶ In grave circumstances, doctrinaire adherence to the letter of the law in neglect of its spirit spells disaster.⁴⁴⁷ The concession that “extra-legal measures” may “strengthen rather than weaken . . . long-term [C]onstitutional fidelity and commitment to the rule of law”⁴⁴⁸ admits that law is but a means. When war spawns emergencies, even a rule-of-law nation must adopt practical limits on legalism. The notion that the only way

⁴⁴⁴ S. SELECT COMM. TO STUDY GOV. OPERATIONS, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 258 (1975), *available at* <http://www.intelligence.senate.gov/pdfs94th/94465.pdf>.

⁴⁴⁵ See Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y. U. L. REV. 239, 254-59 (2003).

⁴⁴⁶ See Abraham Lincoln, President, Address to a Special Joint Session of Congress (July 4, 1861), transcript *available at* <http://www.presidency.ucsb.edu/ws/?pid=69802> (“[A]re all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?”). A century later, Solzhenitsyn observed that “a society with no other scale but the legal one is not quite worthy of man[.]” Alexander Solzhenitsyn, *A World Split Apart*, Address at the Harvard Class Day Afternoon Exercises (June 8, 1978), *available at* <http://thefloatinglibrary.com/2008/10/12/solzhenitsyns-harvard-address-a-world-split-apart/#more-705>.

⁴⁴⁷ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (cautioning against “a doctrinaire textualism” in analyzing legal obligations that restrict the conduct of national security and military policy during war).

⁴⁴⁸ Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003).

to remain above moral approach is to cleave to the most expansive reading of LOAC possible is extravagant indulgence.

Yet a rip current of “jurisphilia” holding law in fetishistic adoration and venerating it not as means but as goodness incarnate runs through the legal profession.⁴⁴⁹ Jurisphiles are disinterested in the consequences of law but “enchant[ed]” by a vision of it as an expression of “morality,” “virtue,” and “love . . . reflect[ing] God’s glory, will, and cosmic order.”⁴⁵⁰ The jurisphile sacralizes law and believes being legal is being right—period.⁴⁵¹ Jurisphilia so pervades the legal academy that many scholars define morality as “a matter of following rules”⁴⁵² and immorality as rule-deviation—however minor or necessary.

CLOACA, “stand[ing] tall for the rule of law,”⁴⁵³ spies the sin of de-legalization in every method or means implicating LOAC.⁴⁵⁴ It scoffs when branded “pro-terrorist” yet issues gales of protest over U.S. detention, interrogation, targeting, and prosecution policies, convinced it is a faithful servant of LOAC, battling apostates for its restoration.⁴⁵⁵ If “the most powerful weapon against terrorists is our

⁴⁴⁹ See generally Iain Scobbie, *Jurisphilia/Jurisphobia: U.S. Approaches to International Law Theory*, 100 AM. SOC’Y INT’L L. PROCEEDINGS 166 (2006).

⁴⁵⁰ Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633, 664 (2011). Jurisphiles reference law’s “mystery,” and credit its indeterminacy for our obedience; a rationalized law would shed this compliance pull. See, e.g., Linda L. Berger & Jack L. Sammons, *The Law’s Mystery*, 2 BRIT. J. AM. LEGAL STUD. 1 (2013).

⁴⁵¹ See Solzhenitsyn, *supra* note 446 (describing jurisphilia as the belief that “[i]f one is right from a legal point of view, nothing more is required” and observing that “a society with no other scale but the legal one is not quite worthy of man[.]”).

⁴⁵² Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 119 (2003). The term “legalism” is a rough synonym for jurisphilia.

⁴⁵³ Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 620 (2003).

⁴⁵⁴ Amos N. Guiora & David Luban, *An Exchange on Law and Israel’s Gaza Campaign*, 31 AM. BAR. ASS’N NAT’L SEC. L. REP. 1, 10 (2009). Few in CLOACA concede that “[i]t is too difficult . . . for courts to decide whether all [U.S. post- 9/11] policies are substantively correct” because “the dangers of [4GW] [are] too uncertain at this early date.” Neil Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1365-66 (2007).

⁴⁵⁵ See Frakt, *supra* note 392, at 353 (lauding himself and CLOACA for fighting on behalf of “the restoration of the rule of law” after its “compromise”).

commitment to the rule of law,”⁴⁵⁶ and if the policies and personnel who design and implement them are antithetical to this commitment, it is clear why CLOACA fixates on these policies and personnel as the primary threats to the nation.

B. Cosmopolitanism

“American Exceptionalism” is the conviction that the United States is a divinely-chosen moral beacon to the world, objectively superior to other nations due to its canonical commitment to liberty and its global willingness to back its foreign policy with military power to defend this principle.⁴⁵⁷ American Exceptionalists—a phrase applicable to almost all American leaders throughout history—believe that when their military commits to battle it does so in pursuit of this divine mission and with purity of arms.⁴⁵⁸ American success in war has so often proven indispensable to order and liberty across the globe,⁴⁵⁹ and because theirs is a moral nation, and often the only one that will “actually go into the world and strike down evil,”⁴⁶⁰ American Exceptionalists believe the country is entitled to act unilaterally and to make, interpret, and apply LOAC in a manner that best allows it to meet God’s calling.⁴⁶¹

⁴⁵⁶ See Jessica Stern, *Execute Terrorists at Our Own Risk*, N.Y. TIMES (Feb. 28, 2001), <http://www.nytimes.com/2001/02/28/opinion/28STER.html>.

⁴⁵⁷ Koh, *supra* note 376, at 1481 n.4. American Exceptionalists believe the U.S. is a benign and redeeming force in international politics and has always used force “on the right side of history[.]” John Monten, *Primacy and Grand Strategic Beliefs in US Unilateralism*, 13 GLOBAL GOVERNANCE 119, 131 (2007).

⁴⁵⁸ See generally Nomi Maya Stolzenberg, *Facts on the Ground*, in PROPERTY AND COMMUNITY 70 (Eduardo Penalver & Gregory Alexander eds., 2010).

⁴⁵⁹ Monten, *supra* note 457, at 119-20.

⁴⁶⁰ BEVIN ALEXANDER, *HOW AMERICA GOT IT RIGHT: THE U.S. MARCH TO MILITARY AND POLITICAL SUPREMACY* 249 (2005). The belief that Old World nations are too corrupt, materialistic, amoral, and venal to use force to defend liberty and freedom, necessitating U.S. unilateral intervention, is central to American Exceptionalism. Monten, *supra* note 457, at 120-21.

⁴⁶¹ See Monten, *supra* note 457, at 132 (ascribing to American Exceptionalists the view that its divine mission and “benign nature” legitimize U.S. military power); Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT’L L. 1307, 1308, 1312-13 (explaining U.S. autointerpretation of LOAC).

“Cosmopolitanism”—the belief that humans form a universal community based on shared problem-solving responsibility and the irrelevance of cultural, racial, and national divides—negates exceptionalism and nationalism.⁴⁶² Cosmopolitans are power-averse and rely on global webs of institutions, treaties, and diplomacy to keep peace.⁴⁶³ Whereas American Exceptionalists believe fighting for liberty and human rights legitimates force, Cosmopolitans inhabit a “post-historical paradise” where war is an unmitigated evil threatening pacifism, multilateralism, and legal institutionalism.⁴⁶⁴ To Cosmopolitans, whose abstention from military campaigns post-9/11 is designed to prevent their nations from becoming targets,⁴⁶⁵ Islamism poses no threat, and American Exceptionalists’ history-bound lack of nuance and unsophisticated addiction to power threaten the progression of law and justice.⁴⁶⁶

With scholarship, advocacy, and appeals to “transnational norm entrepreneurs, like the Pope[,] . . . Jimmy Carter, [and] Nelson Mandela,”⁴⁶⁷ Cosmopolitans pressure LOAC to forge new restrictions

⁴⁶² Kwame Appiah, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS*, xiii-xv (2006). A central strand is cultural relativism—the belief that one religion or ideology is equal to and as valid as any other. *Id.* Because Islamism is as legitimate as Western civilization, Cosmopolitans deny the West any right to resist it at all. *Id.*

⁴⁶³ Cosmopolitanism is so antipathetic to the use of force, even in defense of human rights, that millions of Cosmopolitans worldwide marched to protest military intervention to depose Saddam Hussein in 2003. PODHORETZ, *supra* note 59, at 98.

⁴⁶⁴ See, e.g., Bardo Fassbender, *The Better Peoples of the United Nations? Europe’s Practice and the United Nations*, 15 EUR. J. INT’L L. 857, 857 (2004) (noting European Cosmopolitans’ belief that they are the “better peoples of the [UN]” for their pacifism, multilateralism, and formal legal institutionalism).

⁴⁶⁵ ALEXANDER, *supra* note 460, at 225. Spain cravenly withdrew troops from Iraq in response to Islamist attack in 2004. Al Goodman, *Spain Plans Quick Pullout of Iraq*, CNN.COM (Apr. 19, 2004, 5:06 AM), <http://www.cnn.com/2004/WORLD/europe/04/18/spain.withdraw/>.

⁴⁶⁶ Cosmopolitan critiques of American Exceptionalism center on the utility and morality of force, the rules governing its use, and who should make the rules. Yet it extends deeper: Cosmopolitans chastise the United States for rejecting norms regarding gun control, capital punishment, global warming, and human rights, and hope to dismantle an international order that “disempower[s] third world peoples[.]” *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* (Antony Anghie et al., eds., 2004).

⁴⁶⁷ Koh, *supra* note 376, at 1526.

to “delay, frustrate, and undermine . . . U.S. military policies.”⁴⁶⁸ Ardent Cosmopolitanism is almost a requirement for commissioning into CLOACA;⁴⁶⁹ claims that the “international community has a . . . pressing obligation to subject the [United States] to far more . . . rigorous forms of accountability,”⁴⁷⁰ that American arms should be bound to more onerous rules and standards, and that U.S. unilateralism threatens peace⁴⁷¹ are the most transparent expressions of Cosmopolitan hostility to a special American writ to use force in vindication of universal principles. Invariably, CLOACA Cosmopolitans task LOAC to the cabining of U.S. military power and bedeviling of U.S. policies in the war against Islamism.

C. End of History

The “end of history thesis” encapsulates the liberal expectancy that the collapse of bipolar enmity would end not only U.S.-Soviet geostrategic rivalry but all ideological contestation over the foundations for organizing human political communities, which peoples everywhere would now agree included democracy, rule of law, free markets, and human rights. As nationalism, religion, and ethnicity withered away to be replaced by reason, economic integration, and modernity, the end of history would yield the end of politics and the end of politics by other means—war—thereby ushering in perpetual peace.⁴⁷² With nothing left over which to fight, LOAC would become amenable to rules and interpretations constraining state power and independence.

⁴⁶⁸ Robert A. Pape, *Soft Balancing Against the United States*, 30 INT’L SEC. 1, 10 (2005).

⁴⁶⁹ In the past decade, CLOACA scholarship serially denounced American Exceptionalism. See Audio Tape: *Who Me? American Exceptionalism and International Law*, AALS Annual Meeting (Jan. 6, 2006) (on file with author); 99th Meeting, ASIL, Panel, *American Exceptionalism in Treaty Behavior*, 99 AM. SOC’Y INT’L L. PROC. 429, 441 (2005).

⁴⁷⁰ Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283, 294 (2011).

⁴⁷¹ See Margulies, *supra* note 289, at 373 (hailing CLOACA’s “vigorous campaign against [U.S.] unilateralism” which members regard as a threat to peace post-9/11).

⁴⁷² See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (elaborating his end of history thesis).

However, 9/11 signified that it is premature to write the obituary for the “stubborn traditions of culture, civilization, religion, and nationalism” that spawn ideological conflict.⁴⁷³ When Islamist recrudescence restarted history, intellectuals were caught in a quandary offering only two solutions: abandon faith in the end of history or deny the Islamist threat. Although the latter is utopic—even childish⁴⁷⁴—CLOACA doubled down on this wager. Its bet on the end of history did not pay off, yet as Islamism waxes ever more threatening, CLOACA stubbornly advances claims regarding the progressive modification of LOAC that, if incorporated into the practice of Western militaries, would disable efforts to engage Islamists while encouraging Islamist violence.

D. Flawed Analogy to the Civil Rights Movement

The Civil Rights Movement—a socio-legal struggle that won the full complement of constitutional, civil, and political rights for all regardless of race—was a towering achievement, yet it was a phenomenon *sui generis* and not a paradigm for vindicating every claim of systemic discrimination no matter how inapposite or a lens through which to view every conflict between social groups. Yet CLOACA analogizes the war with Islamism, and the policies crafted to win it, as a revivification of the discrimination that spawned the Civil Rights Movement, with Muslims standing in for African-Americans, reviled not for race but for their faith.⁴⁷⁵

By this view, “ordinary Muslims” are punished for the crimes of “Muslim barbarian[s]” for whom they are not responsible;⁴⁷⁶ fear and prejudice and not danger motivate detention, interrogation, and prosecution.⁴⁷⁷ One scholar decries the “racist premise” by which “being Muslim is a *de facto* source of shame . . . [and] tantamount to .

⁴⁷³ ROBERT KAGAN, *THE RETURN OF HISTORY AND THE END OF DREAMS*, 8 (2008).

⁴⁷⁴ See LEE HARRIS, *CIVILIZATION AND ITS ENEMIES* 142 (2004) (dismissing the belief that “the world . . . must be changed . . . to fit [my] ideals” as “childish”).

⁴⁷⁵ See Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 121-22 (drawing this analogy pre-9/11).

⁴⁷⁶ Choudhury, *supra* note 424, at 54.

⁴⁷⁷ Christina A. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WISC. L. REV. 115, 116.

. . . treason;⁴⁷⁸ another blames a “venomous narrative surrounding Islam and national security” for an “authoritarian tendency in American thought to demonize communal ‘others’ during moments of perceived threat.”⁴⁷⁹ Others analogize post-9/11 discrimination against abhorrent creedal outsiders to the “Red Scare.”⁴⁸⁰ Some discern no civilizational defense against vicious totalitarianism but rather “a permanent global war to cement [U.S.] domination” requiring “demoniz[ation]” of Muslims.⁴⁸¹ Allegations of “neo-McCarthyist” hysteria attend this critique, as do proclamations of a rising tide of Islamophobia; declarations abound that contemporary policies, including the material support statute, are re-tooled Cold War instruments criminalizing expression and association by despised ideological minorities who irk the “right-thinking” majority.⁴⁸²

What both skeins of analysis share is the conviction that Muslims are no more enemies of the United States than were other groups, whether organized around immutable characteristics such as African Americans or contrarian ideologies viz. domestic Communists. If true, this “harmlessness” presumption leads ineluctably to the conclusion that legal policies designed to counter and defeat the Islamist threat are not only unnecessary, because Islamists are Muslims and Muslims pose no threat, but are institutionalized forms of Islamophobia inimical to American principles. However, these analogies are flawed, and the harmlessness presumption is patently false. While African Americans *qua* African Americans posed no threat, and denial of their civil rights was the definition of invidious discrimination, U.S. Communists *were* part of an international organization dedicated to destroying the U.S. form of government, and limitations imposed on

⁴⁷⁸ Choudhury, *supra* note 424, at 48.

⁴⁷⁹ Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEG. ED. 433, 436, 438-39 (2010). Many in CLOACA regard the conflict with Islamism as an externalization of American antipathy to outgroups fueled by fear. *See, e.g.*, Wells, *supra* note 477, at 171-72.

⁴⁸⁰ *See, e.g.*, Meyerstein, *supra* note 119, at 378 (describing anti-Islamist policies as akin to “McCarthyist response[s] to the ‘[R]ed scare’”); Steven R. Morrison, *Conspiracy Law’s Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013).

⁴⁸¹ HOROWITZ, *supra* note 317, at 122 (quoting *Social Movements’ Manifesto*).

⁴⁸² *See* Cole, *supra* note 316, at 1213-16 (drawing this parallel).

their freedoms of expression and association were part of a concerted effort to defeat Communism that succeeded after generations of momentous struggle. Moreover, Muslims who internalize and act in furtherance of the Islamist ideology—i.e., Islamists—are an existential threat no less menacing than Communists. Only by drawing strained comparisons, succumbing to historical amnesia, and downplaying the rapacity of a fanatical enemy can CLOACA conclude that fidelity to the Civil Rights Movement requires dismantling and disavowing the policies crafted to defeat Islamists and that national security can survive this.

E. Skepticism of Executive Power

The executive is a “creature of the Constitution,”⁴⁸³ yet presidential exercise of broad wartime powers is a custom of old vintage, and in past crises, Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt underwrote policies that pressured its letter and spirit.⁴⁸⁴ The judiciary, despite claiming authority to “say what the law is” since *Marbury*,⁴⁸⁵ has been loathe to constrain the executive in national security and war because “the very nature of executive decisions as to [these matters] is political, not judicial [and] [s]uch decisions are . . . and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.”⁴⁸⁶ Thus, the argument that the executive, as a co-equal branch of government, has some liberty in the exercise of war powers to reach its own conclusions as to what the Constitution means, even if these differ from those of the Court, enjoys support in some nooks of the legal academy.⁴⁸⁷ Arguably, Lincoln’s Emancipation Proclamation and Bush’s detainee policies were exercises of inherent authority to interpret the Constitution during war in ways that, while they advanced political objectives by directly contradicting *Dred Scott* and

⁴⁸³ Reid v. Covert, 354 U.S. 1, 6 (1957).

⁴⁸⁴ See, e.g., Margulies, *supra* note 233 (contextualizing alleged extra-constitutional acts by Lincoln (Civil War), Wilson (WWI), and FDR (WWII)).

⁴⁸⁵ Marbury v. Madison, 5 U.S. 137, 138 (1803).

⁴⁸⁶ Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

⁴⁸⁷ Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 19 (2007) (“[T]he power to interpret the Constitution is . . . nowhere exclusively delegated to the courts.”).

asserting a broad theory of executive war powers, respectively, were no less entitled to legitimacy than judicial pronouncements.⁴⁸⁸ War presidents may be compelled to reject “constitutionally and/or morally erroneous”⁴⁸⁹ judicial decisions when to follow them would derogate from their duty to defend the nation. When presidents reject legally suspect or immoral interpretations of their war powers, their decisions, if in satisfaction of this duty, should “proceed untrammelled by even the threat of legal regulation and judicial review.”⁴⁹⁰ While expansive executive power in war can impinge other branches and threaten liberties, since 9/11 Americans have accepted executive authority to read the Constitution to support detaining, interrogating, trying, and killing Islamists.

Notwithstanding its democratic pedigree, executive war power is blocked by a raft of self-congratulating CLOACA scholars “standing heroically” to block its exercise.⁴⁹¹ “[F]ear of unchecked presidential power . . . [wielded by] conservative administrations”⁴⁹² may have impelled them to law school and the professoriate.⁴⁹³ CLOACA savages U.S. policies as violations of moral absolutes that fuel “[a] threat of tyrannical government . . . greater than whatever threat . . . the worst terrorists may pose.”⁴⁹⁴ Some lament that, even if an argument from necessity supports U.S. war policies, “[i]t was once an unspeakable thought that our Constitution should have lacunae-temporal discontinuities within which nation-saving steps would be taken[,] blessed . . . by the brute necessities of survival.”⁴⁹⁵ Harsher critics label the entire welter of anti-Islamist policies as an “effort to

⁴⁸⁸ See JEFFREY F. ADDICOTT, *TERRORISM LAW: THE RULE OF LAW AND THE WAR ON TERROR* 311 (2nd ed. 2004) (quoting Rehnquist, C.J., “In wartime, . . . this balance shifts to some degree . . . in favor of the government’s ability to deal with conditions that threaten the national well-being.”).

⁴⁸⁹ Schauer, *supra* note 487, at 22, 25-26.

⁴⁹⁰ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1132-33 (2009).

⁴⁹¹ David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 n.4 (2008).

⁴⁹² WITTES, *supra* note 103, at 22.

⁴⁹³ See AUERBACH, *supra* note 70, at viii (“Something about protecting against illegitimate authority drew me to law school.”).

⁴⁹⁴ WITTES, *supra* note 103, at 2-3.

⁴⁹⁵ Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1802 (2004).

[expand executive] power . . . by invoking the metaphor of war.”⁴⁹⁶ The most heated rhetoricians contend the Bush administration exploited 9/11 to erect a police state.⁴⁹⁷

Thus does CLOACA strain to bring President Bush to heel by outlawing, or rendering too politically costly, indefinite detention, coercive interrogation, and targeted killing. Although CLOACA scholars concede that thwarting U.S. policies constitutes “use of [LOAC] as a weapon against the [United States],” they unashamedly privilege what they deem “healthy democratic . . . accountability”⁴⁹⁸ over national security. Yet academics that strip away some of the most effective tools available in the battle against Islamists are deaf to the admonition of the Supreme Court regarding interference with the exercise of inherent executive powers during wartime, and gravely mistaken in concluding the imagined sins of the Bush administration exceed the real virtue of having prevented subsequent attacks. By turning to the courts in the name of civil rights to deny Americans the protections of tools devised by the executive, CLOACA has become a profoundly anti-democratic agent of an enemy that intends the destruction of the Constitution and the rights for the defense of which the executive created these very tools. The academic sport of checking the executive results in a president less well-equipped to defend Americans, Islamists less constrained by U.S. power, and Americans less safe.

F. Issue-Entrepreneurship

Issue-entrepreneurs forge professional identities by displacing orthodox theory, doctrine, and method with iconoclastic discourse.⁴⁹⁹ The more they trespass upon predecessors and contemporaries, the more they attract resources and followers.⁵⁰⁰ Issue-entrepreneurs push ideological agendas with scant

⁴⁹⁶ JONATHAN SIMON, CHOOSING OUR WARS, TRANSFORMING GOVERNANCE IN RISK AND THE WAR ON TERROR 79 (Amoore & de Goode eds., 2008).

⁴⁹⁷ Margulies & Metcalf, *supra* note 479, at 439-40.

⁴⁹⁸ Frakt, *supra* note 392, at 345.

⁴⁹⁹ Margulies, *supra* note 233, at 12, 47.

⁵⁰⁰ ERIC A. POSNER, LAW AND SOCIAL NORMS 119-33 (2000). Iconoclasm “helps issue entrepreneurs get noticed.” Margulies, *supra* note 233, at 48.

consideration of the damage to epistemologies and canons that define fields, or to third parties and the public who invest in and structure their expectations and conduct upon traditional bastions of knowledge. Legal academics have embraced this role with regard to law generally and LOAC specifically. By staking out revisionist claims at odds with the sedimented views of states and orthodox scholars, and cynically equating self-defense with aggression, interrogation with torture, targeted killing with murder, and U.S. patriots with war criminals, CLOACA issue-entrepreneurs won the badges of tenure and named chairs.⁵⁰¹

G. Professional Socialization

Professionals absorb a set of norms, a body of knowledge, and a worldview that grant them admission into exclusive societies with special status and prerogatives.⁵⁰² The enculturation of legal professionals begins in law schools,⁵⁰³ which “exert intense control by purposely influencing beliefs, values and personality characteristics of students.”⁵⁰⁴ Subsequent socialization ingrains a sense of special province, consciousness, and expectation regarding law.⁵⁰⁵ Members police this identity and province against encroachment by contrary norms and worldviews,⁵⁰⁶ and are prone to credit or dismiss evidence and argument based on identic congeniality.⁵⁰⁷ Legal professionals accord greater reliability to arguments by other legal professionals

⁵⁰¹ See Waters, *supra* note 300, at 900 (making this assertion).

⁵⁰² MILLER, *supra* note 68, at 18.

⁵⁰³ See LAWRENCE M. FRIEDMAN ET AL., LEGAL CULTURE AND THE LEGAL PROFESSION (1996) (describing the enculturation of legal professionals).

⁵⁰⁴ Stephen Shanfield & Andrew Benjamin, *Psychiatric Diseases in Law Students*, 35 J. LEGAL EDUC. 65, 65 (1985).

⁵⁰⁵ See LAWYERS’ IDEALS/LAWYER’S PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 5 (Robert L. Nelson et al., eds., 1992) (theorizing the professional socialization process of lawyers).

⁵⁰⁶ David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIR. PSYCHOL. SCI. 119, 119-20 (2002).

⁵⁰⁷ See Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 2 (2011) (“[I]ndividuals are predisposed to fit their perceptions of policy-relevant facts to their group commitments.”).

than to those by outsiders,⁵⁰⁸ and treat law as the optimal, and even the sole, path toward social change.⁵⁰⁹ Thus, even where a particular answer to a legal question is not compelled by formal rules, and where a diversity of views in the body politic might be expected to find representation within the legal profession, a core of agreement, forged by an intuitive identic sense, shepherds legal professionals into broad consensus.⁵¹⁰

Carried too far, an orthodox professional identity creates “groupthink”—the tendency of a desire for intragroup cohesion to impel members to manifest loyalty to the theories, policies, and decisions to which their group is committed, rather than subject these to scrutiny and constructive criticism.⁵¹¹ This “dangerous tendency to form a herd”⁵¹² compromises the integrity of the legal academy by substituting politically-approved conclusions for open inquiry. After systematically excluding conservative scholars for generations,⁵¹³ the legal academy now approximates an “echo-

⁵⁰⁸ Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808 (2003).

⁵⁰⁹ See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5-9, 13 (1975) (describing a “social perspective which perceives and explains human interaction largely in terms of the rights and obligations inherent in rules” as the core of legal professional identity).

⁵¹⁰ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 59-61, 121-57, 206-08 (1960).

⁵¹¹ Groupthink—forcing the fostering of consensus by reinforcement of group identity at the expense of failure to challenge mistaken premises and faulty assumptions in making and vetting collective decisions—can yield disaster. See generally IRVING JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS* 174-75 (2d ed. 1982).

⁵¹² Solzhenitsyn, *supra* note 446. Legal academics can fairly be described as forming a “herd of independent minds.” See Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 177 (1999).

⁵¹³ See David Horowitz, *The Professors’ Orwellian Case*, FRONT PAGE MAG (Dec. 5, 2003), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=15136> (“[A] series of recent studies by independent researchers has shown that . . . professors to the left of the political center outnumber professors to the right . . . by a factor of 10-1 and more. At some elite schools . . . the ratio rises to 28-1 and 30-1.”). For decades, liberal law deans and faculties self-replicated, excluding conservatives from hiring and tenure. See Jennifer Pohlman, *Law Schools Hiring Liberal Educators*, NAT’L JURIST, Nov. 2010, at 14 (“[L]aw schools . . . hir[e] more openly liberal professors than . . . conservative[s.]”).

chamber of approbation” where a tribe of like-minded liberals mutually reinforces received wisdom and earns accolades by recycling fashionable opinions.⁵¹⁴ Because contrarians face scorn, stigmatization, and even ouster,⁵¹⁵ powerful incentives exist for legal faculty, even if privately conflicted, to embrace the prevailing ideological hegemony and ape the arguments of leading scholars without regard to logic or consequence.

Dogmatists patrolling an ideological fence around a zone of “decent opinion” create a hostile environment for scholars to undertake honest and searching inquiries regarding questions to which answers are already divined. If a CLOACA consensus deems coercive interrogation torture, targeted killing murder, and U.S. leaders war criminals, how can less-senior scholars, let alone the untenured, resist these *diktats*? If endowed chairs are the rewards for preaching CLOACA dogma regarding permissible methods and means of killing, capturing, detaining, interrogating, and prosecuting Islamists, and if academic purgatory awaits apostates who support U.S. policies, the inference that debate is closed and views contrary to the CLOACA consensus are errant and illegal is easy for outsiders to draw.

H. Subject Matter Ignorance

The debasement of knowledge driven by Wikipedia, Google, and other purveyors to the *hoi polloi* beguiles many to credit the myth that it is impossible for some individuals to know vastly more about certain subjects than others,⁵¹⁶ yet expertise—the synthesis of

⁵¹⁴ Solzhenitsyn, *supra* note 446 (“In the West . . . nothing is forbidden, but what is not fashionable will hardly ever find its way into periodicals or books or be heard in colleges.”).

⁵¹⁵ See Devins, *supra* note 512, at 186 n.93 (“[T]here is a real risk of opprobrium for those who do not toe the company line[;]” scholars who adopt divergent viewpoints “find [themselves] in a hornets’ nest.”); Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J.L. & PUB. POL’Y 429, 438 (2002) (“[L]eft-leaning intellectuals push one another to extremes, and tow [sic] a . . . party line . . . through imposing reputational sanctions on those who disagree, or even ostracizing them.”).

⁵¹⁶ See Suzanna Sherry, *Democracy’s Distrust: Contested Values*, 125 HARV. L. REV. 7, 10 (2012) (“Everyone is now an expert—from the user-created content of

“talent or intelligence and a long tenure of experience in a given subject”⁵¹⁷—is real. Experts exceed non-experts in possessing substantive information but also in methodological competence: non-expert theorizing relies on induction and intuition, but experts specify a research question, employ appropriate methods, and derive logical and neutral conclusions from available evidence.⁵¹⁸ A concomitant of expertise is specialization: the more the knowledge universe expands the harder it is to assimilate developments. As law complexifies, “[l]awyers know more and more about less and less.”⁵¹⁹ Each subfield and regime is greater than the sum of its rules, norms, institutions, and procedures—it is a holistic amalgam of “craft, of acculturation, and of . . . shared . . . purpose.”⁵²⁰ A given legal subfield is foreign cultural terrain⁵²¹ to a scholar lacking expertise in it no matter how perspicacious, and the judgments he or she renders on issues arising therein will be objectively inferior to those of experts.⁵²²

The legal academic labors under the perception that he or she “possess[es] a brilliant . . . mind” but lacks “knowledge of the practical affairs of life” and conjures up “half-baked and conceited theori[es] thinking [he or she] know[s] better what law ought to be . . . than the people . . . of America.”⁵²³ But, by the bare fact of training in elite law schools and native intellect, legal academics are not experts in any subfield and earn this exalted status only through

Wikipedia to self-diagnosis of medical conditions to a website that provides do-it-yourself legal documents, we . . . find experts unnecessary and . . . faintly suspect[.]”).

⁵¹⁷ Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 879 (2012).

⁵¹⁸ See Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012) (expressing the value of legal expertise).

⁵¹⁹ Deborah L. Rohde, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1337 (2000).

⁵²⁰ Oldfather, *supra* note 517, at 872.

⁵²¹ Cultural theories maintain that each legal subfield is a distinct cultural realm replete with its own language, customs, rules, and procedures, and cultural competence therein is a requisite to expert performance. See, e.g., Leigh Greenslaw, “*To Say What the Law Is*”: *Learning the Practice of Legal Rhetoric*, 29 VAL. L. REV. 861, 892 (1995).

⁵²² See Oldfather, *supra* note 517, at 885-88 (describing legal experts as likely to make “superior decisions” as compared to nonexperts).

⁵²³ AUERBACH, *supra* note 70, at 91, 93-94 (quoting William Vance and Elihu Root).

sedulous research and time-intensive theory development and testing. Claims to expertise must be peer-validated. Legal academics who have not earned expert status have the duty of candor to disavow it lest they denature its meaning and discredit their profession.⁵²⁴ Those who arrogate foundationless expertise to themselves engage in fraud; “pretending to have an expert opinion on something [academics] know next to nothing about is a deception.”⁵²⁵ Legal academics who tread in subfields beyond their ken may sincerely believe they are qualified to offer informed opinions by virtue of their generalist training, erudition in other subfields, and conversations with better-versed colleagues, but they do not know what they do not know. Expertise is real. Those who write and teach on a subject should, but often do not, possess it.⁵²⁶

This is painfully true in LOAC, the subject-matter of which—war—is remote from the experience of civilians the vast majority of whom are “woefully ill-informed on . . . national security and the . . . means of maintaining it.”⁵²⁷ Only about 7% of Americans have performed military service,⁵²⁸ and the military remains “a

⁵²⁴ See Amy Gajda, *The Law Professor as Legal Commentator*, 10 J. LEGAL WRITING INST. 209, 210 (2004) (positing a standard to protect the credibility of legal academia).

⁵²⁵ Devins, *supra* note 512, at 184.

⁵²⁶ See Devins, *supra* note 511, at 166-172 (explaining academic opining on subjects beyond their expertise as a “desire to be part of the fray . . . to see their names in print, . . . to tell their families that they did something that mattered, [and] . . . for political reasons.”); Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191, 195-96 (1999) (conceding that legal academics often mistakenly “believe that they kn[o]w enough . . . to have a reasonably informed opinion”).

⁵²⁷ Richard H. Kohn, *Building Trust: Civil-Military Behaviors for Effective National Security*, in AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 283 (Suzanne C. Neilsen & Don M. Snider eds., 2009). Remediation of this deficiency requires “reading, travel, informal social interaction, and above all listening” to military experts. *Id.* at 284.

⁵²⁸ See U.S. Census Bureau News, U.S. DEP’T OF COMMERCE (Oct. 31, 2013), http://www.census.gov/newsroom/releases/pdf/cb13ff-27_veterans.pdf; see also *Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2014*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Mar. 16, 2015) (collectively indicating that, as of 2012, there were 21.2 million veterans out of a national population of approximately 315 million at the time).

specialized society apart from civilian society.”⁵²⁹ LOAC scholarship is augmented by knowledge of military history and by experience: those with neither are more prone to advocate untenable prescriptions.⁵³⁰ Because CLOACA counts almost no one in its ranks who ever joined the brotherhood of arms, it lacks the “thorough understanding of the . . . very special ‘business’ of war” without which its “legal erudition goes for naught.”⁵³¹ Ignorant of the domain *sui generis* of war, and unable to access the decisional universe of soldiers, CLOACA disregards the salience and difficulty of developing expertise in LOAC, and, in effect, implies that war is no more alien to everyday experience than the subject-matter of family law (e.g., marriage), property (leases), or torts (car accidents). Thus does one LOACA scholar “view with extreme suspicion all theories and representations of war that equate it with any other activity in human affairs.”⁵³² This is not to deny to all non-warriors the epistemic privilege of producing and consuming LOAC scholarship: it is merely an admonition that entry costs must be paid and an attitude of “respectful humility” assumed should they endeavor to write persuasively about LOAC.⁵³³

Regrettably, many in CLOACA have rushed the disciplinary gates. A self-confessed LOAC tyro, admitting no prior study of LOAC in a thirty-five-year career and conceding its great breadth and complexity, nevertheless excoriates U.S. policies, alleging illegalities, with no foundation, resulting from “efforts to avoid th[e] application [of LOAC] . . . doctrines [regarding] the status and

⁵²⁹ Parker v. Levy, 417 U.S. 733, 743 (1974). Those lacking military service should heed that “[w]ar must be fought by men whose values and skills . . . are those of . . . a very ancient world, which exists in parallel with the everyday world but does not belong to it.” JOHN KEEGAN, HISTORY OF WARFARE xvi (1993).

⁵³⁰ See H. Wayne Elliot, *History, War, and Law*, 30 TEX. INT’L L.J. 631, 637 (1995) (“Only [with] a firm foundation in military history can one truly begin to understand the utility and limits of [LOAC].”).

⁵³¹ Dunlap, *supra* note 174, at 127-28.

⁵³² KEEGAN, *supra* note 529, at xvi.

⁵³³ Refreshingly, a CLOACA militant strident in criticizing U.S. Islamist policies openly renounces martial expertise and interest apart from those of the “ordinary citizen,” making plain his assumption that military experience and the merit value of one’s LOAC scholarship need not correlate. See generally Benjamin G. Davis, *The 9/11 Military Commission Motion Hearings: An Ordinary Citizen Looks At Comparative Legitimacy*, 37 S. ILL. U. L.J. 599 (2013).

detention of combatants[,] the limits on the use of torture or other cruel, inhuman or degrading treatment during interrogation, the . . . rendition of prisoners to countries where torture is practiced, and the use of pre-emptive . . . force.”⁵³⁴ Others with a longer portfolio of published works and tenure in the subfield, but with a similar dearth of military experience, propound prosaicisms utterly at odds with military custom, military necessity, and the imperatives of combating Islamists that betray their incognizance of war and those who wage it. At the extreme fringe, a handful bereft of experience regard the martial caste with such disdain, and the military mind with such contempt, that attempts to familiarize them might well be resented and rebuffed.⁵³⁵

There is a powerful and destructive inverse correlation between martial expertise and LOAC radicalism. One critic condemns CLOACA as a “self-aggrandizing” lot that, by “trading on their name chairs to talk about issues far outside their professional competence” and “mak[e] perfectly indefensible statements” in “high-profile forums,” has disgraced LOACA.⁵³⁶ Deriding a proposal to require arrest and preclude killing of Islamists, this critic links martial inexperience to CLOACA foolishness, discerning that its author is “not a . . . warrior of any fashion judging from her impracticality of theory.”⁵³⁷ Another, lambasting a proposal to compel public release of operational details of planned targeted killings to ensure LOAC compliance, warns “if any nation were so unwise as to provide publicly the . . . operational detail [the author] wants, . . . potential targets would ‘go to school’ on such immensely

⁵³⁴ Richard J. Wilson, *A Long, Strange Trip: Guantanamo and the Scarcity of International Law* 6-7 (American Univ., WCL Working Paper No. 2009-12), available at <http://ssrn.com/abstract=1368420>. Professor Wilson, disclaiming prior LOAC exposure, states that because he so strongly “felt that the situation of the detainees . . . cried out for application of [LOAC]” he could undertake intensive self-study sufficient to support sweeping denunciations of U.S. policies. *Id.* at 6-9. He is not alone: CLOACA numbers many lettantes who were, “[u]ntil . . . recently, [un]aware of the . . . requirements . . . for [POW status]” and ignorant of seminal LOAC cases, treaties, and customary international law. Gross, *supra* note 448, at 1016.

⁵³⁵ See, e.g., Wells, *supra* note 477, at 178.

⁵³⁶ Gajda, *supra* note 524, at 211-12.

⁵³⁷ Nordan, *supra* note 129, at 5.

valuable information so as to evade a strike[,] mandat[ing], in effect, an intelligence-gathering process [to] help . . . militants live on to carry out their reign of terror.”⁵³⁸ While venturing that naïfs may not intend harm to the United States, a LOACA bloc—most of whom are veterans—bemoans “insufficient attention to unintended consequences of well-meant positions”⁵³⁹ and warns against the dangers of uncritical acceptance of the scholarship of novitiates with no stock of martial wisdom or experience to temper or test, even heuristically, their claims.

I. *Law as Politics*

The line between law and politics is blurry. Both involve competition over “different visions of the good society.”⁵⁴⁰ In making, interpreting, and adjudicating law, legislators, judges, and scholars impose values on others, and in a predominantly positivist system, where law has few limits, legal support can be ginned up for almost any end. In pure theory, ascertaining the law that resolves a legal question is a value-neutral process requiring only discovery of relevant constitutions, statutes, judicial decisions, and other sources. In practice, legal texts neither end disputes nor differentiate law from politics. Disagreement persists over whether meanings are supplied by texts or “created by a reader according to his . . . experiences, beliefs, and purposes”⁵⁴¹ and bounded contextually.⁵⁴² If legal sources are infinitely malleable, and legal analysis is an interpretive act, then ideological preferences are injected into analysis—unconsciously by those who think themselves “doing law”⁵⁴³ or deliberately by those

⁵³⁸ Dunlap, *supra* note 174, at 133.

⁵³⁹ *Id.* at 133-34.

⁵⁴⁰ Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 8 (2011).

⁵⁴¹ Daryl J. Levinson, *The Consequences of Fish on the Consequences of Theory*, 80 VA. L. REV. 1653, 1654 (1994).

⁵⁴² See Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625, 637 (1978) (“A sentence is never not in a context.”).

⁵⁴³ See WARD FARNSWORTH ET AL., IMPLICIT BIAS IN LEGAL INTERPRETATION 3 (John M. Olin Program in Law and Economics Working Paper No. 577, 2011), available at <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1253&context=law>

who cherry-pick language and craft motivated meanings to sway others into espousing their claims.⁵⁴⁴ Compounding this ideological intrusion, “subjectively-imposed legalities”⁵⁴⁵ invariably seep into legal analysis, collapsing the boundary separating analysis from political advocacy⁵⁴⁶ with the result, for example, that legal judgments regarding whether President Clinton committed an impeachable offense correlate almost perfectly with, and are tinged by, the partisan affiliations of those who rendered them.⁵⁴⁷

Moreover, not only is the interpretation of rules politicized, but so are the facts at issue in legal disputes. Self-interested individuals argue not only questions of law but of fact because “it is impossible . . . to make ‘factual findings’ without inserting . . . policy judgments, when the factual findings *are* policy judgments.”⁵⁴⁸ Just as with questions of law, questions of fact are indefinitely debatable, and no objective standard and no authoritative fact-finder are available, as in the hard sciences, to provide resolution.⁵⁴⁹

In practice, LOAC rule indeterminacy and disagreements as to the facts at the core of contentious issues in the Islamist Fourth Generation War intersect to form a zone of acute disputation. LOAC, like other legal regimes, has gray areas that invite good-faith

_and_economics (“[M]ost people deciding contentious legal questions . . . feel that they are doing law and that their adversaries are doing politics.”).

⁵⁴⁴ Greenhaw, *supra* note 521, at 867-68. Carried to an extreme, “creative misreading” of a legal text can devolve into revisionism and even misprision. See generally HAROLD BLOOM, *A MAP OF MISREADING* ch. 5 (1975) (discussing motivated misreading of texts).

⁵⁴⁵ Matthew Zagor, *‘I am the Law!’ – Perspectives of Legality and Illegality in the Israeli Army*, 43 *ISR. L. REV.* 551, 585 (2011) (Isr.), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914778.

⁵⁴⁶ See Sherry, *supra* note 516, at 12 (“[L]egal academics [regularly] . . . substitute crass political [objectives] for real legal analysis.”); Fallon, *supra* note 518, at 229-30 (“assum[ing] that norms involving personal integrity and legal craft limit what [an academic] could say in support of a [legal conclusion]”).

⁵⁴⁷ See Sunstein, *supra* note 526, at 197 (conceding this point).

⁵⁴⁸ *Brown v. Plata*, 131 S. Ct. 1910, 1954 (2011) (Scalia, J., dissenting).

⁵⁴⁹ Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 *ETHICS* 1, 2-3 (1973) (contrasting hard sciences and social sciences on this basis).

jousting.⁵⁵⁰ It is folly to think that controversial questions in LOAC are amenable to resolution by scholarly acumen alone. However, CLOACA, in its writings on the resort to force, aggression, detention, interrogation, targeted killing, and other subjects, undertakes a different task: it exploits the open texture of LOAC treaties and domestic statutes, makes dubious claims regarding the applicability of controversial soft-law sources, misapprehends the import of provisions and language divorced from historical context or read in isolation, and subjugates military necessity—while denying engagement in a political project.⁵⁵¹ CLOACA cannot claim involvement in a principled academic enterprise when it ignores inconvenient facts and asserts as “truths” its politically-motivated judgments regarding U.S. policies that would prejudice American self-defense if implemented. CLOACA polemicists insist that 9/11 was a domestic crime rather than an act of war; self-defense authorized by Congress and the U.N. is aggression; detention and interrogation of avowed enemies are torture rather than legitimate intelligence measures; targeted killings by UAVs is murder rather than self-defense; and U.S. personnel who authorize precision attacks against Islamists hiding among civilians are war criminals rather than LOAC-compliant patriots.

For CLOACA, scholarship and partisanship, if not identical, inform each other, non-motivated knowledge does not exist, and LOAC is a realm in which the ability to win others over, rather than revelation of ultimate truth, is the favored currency. Heretofore, CLOACA has blithely ignored the risk of revealing itself and its enterprise as inherently political, but if in time “the press and the public come to see the[m] as essentially no different from—except, perhaps, a little bit less honest than—Karl Rove and Jim Carville,

⁵⁵⁰ Like other subfields, LOAC presents “more gray areas than black and white.” Wm. Hays Parks, *The Law of War Adviser*, 18 MIL. L. & L. WAR REV. 357, 385 (1979).

⁵⁵¹ See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y. B. INT’L HUMAN. L. 3, 56 (2011) (referencing the “obvious risk of abuse or self-serving mistakes” in interpreting law and fact in LOAC analysis), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754223.

[they] will come to regard [CLOACA] not as educators but . . . as . . . political operatives.”⁵⁵²

J. *Academic Narcissism*

Narcissistic Personality Disorder (“Narcissism”) is a personality disorder in which the afflicted labors to mask a pervasive sense of inferiority and emptiness and be perceived as important, powerful, physically and intellectually gifted, desirable, and admirable.⁵⁵³ Maladaptive or malignant narcissists lack core values, save for a perceived entitlement to objectify and use others in support of pathologically grandiose fantasies of success, status, wealth, and fame; they are dishonest, self-absorbed, conscienceless, arrogant, envious, spiteful, vindictive, and willing to do anything to anyone to shield their true selves, which are vastly inapposite to their external personas, from exposure.⁵⁵⁴ Yet narcissism is not an “on-off” condition but a spectrum disorder: “adaptive” narcissists are less pathologically antisocial yet still project idealized selves who oversell their knowledge, capacity, and experience while hiding inadequacies or contradictory realities in order to reap adulation, prestige, and power.⁵⁵⁵ Narcissism affects individuals and groups; relative to the general population, high-status professionals who garner attention and admiration—e.g., politicians, athletes, actors, and lawyers—manifest elevated narcissism.⁵⁵⁶

⁵⁵² Amy Gajda, *The Law Professor as Legal Commentator*, 10 LEGAL WRITING J. 209, 211-12 (2004).

⁵⁵³ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 714-17 (Michael B. First et al. eds., 4th ed., 2000).

⁵⁵⁴ *Id.*

⁵⁵⁵ See generally Robert W. Hill & Gregory P. Yousey, *Adaptive and Maladaptive Narcissism Among University Faculty, Clergy, Politicians, and Librarians*, 17 CURRENT PSYCH. 163, 163-64 (1998) (differentiating “maladaptive” narcissism from “adaptive” narcissism).

⁵⁵⁶ See generally Pat MacDonald, *Narcissism in the Modern World*, 20 PSYCHODYNAMIC PRAC. 144, 144 (2014). These professions draw “adaptive narcissists” who crave attention and prestige and can make a “confident social presentation” because they are not so consumed by the maladaptive constituents of narcissism—exploitativeness of others in particular—that they are disabled occupationally. See Hill & Yousey, *supra* note 555, at 164-65.

It is no accident that lawyers are far more likely than non-lawyers to suffer mental disorders, disconnect from true or “genuine” selves, engage in dishonesty, control others and situations, and depend on external validation to relieve internal self-esteem deficiencies: many lawyers chose law as a career path because it gratifies otherwise unmet needs for social attention, wealth, prestige, and status.⁵⁵⁷ As with lawyers more generally, narcissism also guides the career paths and behaviors of judges⁵⁵⁸ and law professors.

In particular, legal academics, who “like to be the center of attention,”⁵⁵⁹ find in the legal academy golden opportunities to gratify the narcissistic persona through exercise of pedagogical and scholarly functions.⁵⁶⁰ Those for whom the “law professor image is easily as important as substance”⁵⁶¹ have structured and situated themselves within the legal academy as the “exclusive means by which students can come to understand the law,” and law students by design “look to their professor as the one and only source of light in a forbidding sea of darkness.”⁵⁶² Further, scholarship permits “professional purveyors of pretentious poppycock”⁵⁶³ to propound

⁵⁵⁷ See Lawrence S. Krieger, *What We’re Not Telling Law Students—And Lawyers—That They Really Need to Know: Some Thoughts-In-Action on Revitalizing the Profession From Its Roots*, 13 J.L. & HEALTH 1, 3-4, 8, 18, 23-24, 27 (1999).

⁵⁵⁸ See, e.g., David Lat, *Judge of the Day: William Sosnay*, ABOVE THE LAW (Jan. 9, 2008), <http://abovethelaw.com/2008/01/judge-of-the-day-william-sosnay/> (providing a particularly notorious example of judicial narcissism, Judge William Sosnay halted court for hours, angered that a veteran prosecutor appeared before him wearing an ascot rather than the preferred tie upon which the fastidious, pompadoured judge insisted).

⁵⁵⁹ Desmond Manderson & Sarah Turner, *Coffee House: Habitus and Performance Among Law Students*, 31 LAW & SOC. INQUIRY 649, 669 (2006).

⁵⁶⁰ See generally Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 9-10 (1986) (unlike other graduate schools in the United States, law professors often have an equal focus on instruction and publishing).

⁵⁶¹ Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 948 (1990).

⁵⁶² Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41, 49 (2010).

⁵⁶³ Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 286 (1962), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3793&context=fss_papers.

“magical insights [to] transform . . . society,”⁵⁶⁴ even if most of their publications are “slops [that] fill the law reviews”⁵⁶⁵ with contrarian and unorthodox positions designed to generate controversy, notoriety, and subsequent citations,⁵⁶⁶ and to use this scholarship as “feather[s] in [their] professional cap[s]” placed there to “impress . . . colleagues.”⁵⁶⁷

Whether CLOACA or any of its members suffer from narcissism is difficult to ascertain directly. Yet CLOACA scholarship and advocacy grants its members entrance into and status within the prestigious legal academy, public forums within which to contravene and condemn orthodox LOAC and U.S. policies as part of a transformative project, and peer and public attention and admiration. It also grants CLOACA some significant control over, even “ownership” of, LOAC.

K. Appropriation of LOAC Ownership

The Western political tradition whereby the will of the *demos* translates more or less directly into the laws that govern it is under assault. Long before the U.S. Supreme Court declared itself the final arbiter of questions of law, lawyers, by filling a seat at every table, assumed the power to make and interpret the rules that govern virtually every aspect of public and private life. The antidemocratic arrogance of the legal profession manifests not only in seizing exclusive power to “say what the law is” but also in a gambit to parlay procedural knowledge and technical superiority in making and interpreting rules into dominance over all U.S. institutions, organizations, and professions.⁵⁶⁸ Lawyers are “jack[s]-of-all-trades”

⁵⁶⁴ See Richard A. Epstein, *Let “The Fundamental Things Apply”: Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1311 (2002).

⁵⁶⁵ Lasson, *supra* note 561, at 928.

⁵⁶⁶ See Daniel A. Farber, *Gresham’s Law of Legal Scholarship*, 3 CONST. COMMENT. 307, 309 (1986), available at https://conservancy.umn.edu/bitstream/handle/11299/164693/03_02_DAF.pdf (explaining why reviews seek, and faculty submit, iconoclastic articles).

⁵⁶⁷ Lasson, *supra* note 561, at 948-49.

⁵⁶⁸ See, e.g., Miller, *supra* note 68, at 26-27 (describing lawyers’ tendency to control other social groups).

without non-legal experience or knowledge,⁵⁶⁹ yet because “[n]obody . . . knows where ‘law’ begins and ends,” every field of human endeavor and social development presents them an opportunity for aggrandizement.⁵⁷⁰ Having arrogated to themselves legal exclusivity, lawyers are indispensable agents within every discipline by virtue of their unique skill in protecting and promoting the legal interests of non-legal institutions, and this translates into power, prestige, and recompense in every field. Social dominance of lawyers, although a reinforcement to the rule of law, comes at a cost.

Whereas experts in non-legal subjects define and solve problems within the social, political, economic, and moral dimensions of their fields, everything is a legal issue for lawyers, who self-conceive as social engineers tasked to enforce compliance with the rules that best accord with and express the norms and principles *they* believe should govern human conduct.⁵⁷¹ Preoccupation with procedure over substance and with “ought” rather than “is”—disciplinary fruits of a field more analogous to religion than science—seduces lawyers into underestimating the wisdom of non-lawyers and ignoring the social externalities of imported rules.⁵⁷² CLOACA, ensconced in ivory towers, is at a great social distance from the subject matter yet exerts heavy influence on LOAC.⁵⁷³ Egos stroked by Supreme Court dictum frocking them as the “priests of

⁵⁶⁹ See Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401, 429 (2007) (“Law however, is regarded not as a discipline in its own right with something of its own to contribute to the interdisciplinary enterprise.”).

⁵⁷⁰ See Lawrence M. Friedman, *Lawyers in Cross-Cultural Perspectives*, in *LAWYERS AND SOCIETY: COMPARATIVE THEORIES* 8-9-03 (Richard L. Abel & Phillip S. Lewis eds., 1989).

⁵⁷¹ See West, *supra* note 452, at 127 (“lawyers . . . hold out hopes for law, lawyers, procedures, and legal forms, even in circumstances where a bald commitment to [law] for the sake of [law] would be seemingly inappropriate, and even wildly so.”).

⁵⁷² See generally Fred Grünfeld, *International Law and International Relations: Norm and Reality or Vice Versa*, 3 AMSTERDAM L. F. 3, 3, 13 (2011), available at <http://amsterdamlawforum.org/article/view/233/411> (discussing epistemological limits of legal scholarship including a disconnect with reality occasioned by the normative nature of law as a field more derivative of religion than positivist science).

⁵⁷³ See Jörg Kammerhofer, *Law-Making by Scholars* 11 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182547 (identifying conditions under and reasons why international legal scholars “make” law).

our democracy” responsible for “mak[ing] responsible citizens,”⁵⁷⁴ CLOACA claims the power and duty to check the normative transgressions it reads into U.S. LOAC observance post-9/11.⁵⁷⁵

“Ownership” of LOAC, defined as primacy in determining, interpreting, and adjudicating the law governing war,⁵⁷⁶ is crucial, because LOAC, to secure compliance, must resonate within the normative universe of its owners. LOAC scholarship produced by those with a knowledge of military history and military experience best accords with the norms of soldiers and respects the utility and limits of law in war.⁵⁷⁷ However, the overwhelming majority in CLOACA are civilians bereft of an empathetic understanding of the variables that drive war and create the universe in which those who fight it live and die; their social distance from the subject compounds this lack of expertise. Unable to comprehend the decisional milieu of soldiers when judging actions in war, these CLOACA professors arguably lack the most essential data. Nonetheless, many are shamelessly undeterred: as the similarly disposed lawyer the Right Honorable Sir Joseph Porter explained through song in Gilbert and Sullivan’s *HMS Pinafore*, the normative passion and ambition that accompanied his legal training were enough to make him First Lord of the Admiralty despite a complete lack of nautical experience: “Stick close to your desk and never go to sea, And you all may be rulers of the Queen’s Navy.”⁵⁷⁸

For ages, state militaries made and interpreted LOAC, guided by the commensurable imperatives of martial honor and national security. Recently, legal absolutists in CLOACA have fed skepticism about whether professional self-regulation can secure compliance by those whose mission is to win wars rather than observe law, arguing for a paradigm in which activists and

⁵⁷⁴ *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

⁵⁷⁵ See Davis, *supra* note 371, at 8 (many legal academics “arrogantly criticize or discredit everybody, but . . . they are *untouchables*”).

⁵⁷⁶ See Anderson, *supra* note 181, at 1 (“Ownership” connotes “authority to declare, interpret, and enforce [LOAC], as well as [to] shape [LOAC] now and in the future.”).

⁵⁷⁷ Elliot, *supra* note 530, at 637.

⁵⁷⁸ GILBERT & SULLIVAN, *HMS PINAFORE* (Decca Music Group 2003) (1892).

international courts exogenously determine and enforce LOAC.⁵⁷⁹ In so doing, they claim primacy over LOAC,⁵⁸⁰ relegating military establishments to a consultancy role, and discounting their time-tested interpretations and practices.⁵⁸¹ CLOACA claims the rise of the war with Islamists triggered an obligation to “hold back the state’s lethality to assure the space of dissent . . . and . . . liberty,”⁵⁸² particularly as it concerns detention, interrogation, and targeted killing. In reality, it has commandeered LOAC and condemned orthodox prescriptions and proscriptions that state military establishments long recognized as binding. That its expropriation of LOAC results in incredible and dangerous rules unworthy of respect by state militaries, fragmentation of the regime, embitterment of academy-military relations, and delegitimation of the idea of law in war matters little to this cloister cosseted from the realities of war.

L. Lack of Political Accountability

Lawyers are accountable solely to the judicial system and their clients, and can thus engage in advocacy on behalf of despised people and causes even if this marks them as “agents of chaos” that rend the social fabric.⁵⁸³ Unaccountability is costly: since the 1970s, engagement on unpopular sides of social issues has eroded their

⁵⁷⁹ Legal absolutists typically lack military service and are disinterested in militaria generally and soldiers specifically. Cf. PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* 503 (2002).

⁵⁸⁰ Legal communities “consist of people . . . bound by a shared interest in learning and sustained by a repertoire of communal resources, such as routines, words, tools, ways of doing things, stories, symbols[,]” and claims regarding what the rules of a regime are and should be. EMANUEL ADLER, *COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS* 15 (2005); Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 *NYU J. INT’L L. & POL.* 1049, 1051 (2012) (“What counts as law is a function of what a particular community accepts as legitimate.”).

⁵⁸¹ Cf. Anderson, *supra* note 181, at 3 (“[CLOACA scholars] believe [LOAC] belongs to them” and “feel little obligation to acknowledge . . . the [military’s views.]”).

⁵⁸² Davis, *supra* note 370, at 12. By this view, members of CLOACA are not interlopers but “intermediaries who temper the excesses of . . . government and promote greater stability in the polity, by deterring the myopia that could otherwise afflict . . . decisionmakers” and “undermine democracy.” Margulies, *supra* note 288, at 390.

⁵⁸³ See Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 *GA. L. REV.* 633, 634 (1994).

prestige. Whereas the legal profession was once a respected institution, Americans now repose the greatest quantum of confidence in the military; only Congress is less trusted than lawyers.⁵⁸⁴

That the anti-democratic tendencies of lawyers are on parade in CLOACA is scant surprise. Whereas U.S. leaders waging war are politically accountable to a people for their safety, unelected Islamists and CLOACA are not.⁵⁸⁵ Without “skin in the game,”⁵⁸⁶ CLOACA has the luxury to render motivated judgments regarding the form and function of LOAC, lodge intemperate criticisms of U.S. policies and personnel,⁵⁸⁷ and “inflate [their] sense of self-importance [as to] that upon which they should . . . be heard.”⁵⁸⁸ CLOACA is just a domestic interest group attempting to leverage expertise and social capital to influence the policies that govern the war against Islamism. Yet because it can offer its condemnations with absolute immunity—legal, political, and reputational—CLOACA is free to exercise influence in a manner that too often imposes costs in American blood and treasure.

⁵⁸⁴ See Lzdia Saad, *Congress Ranks Last in Confidence in Institutions*, GALLUP (Jul. 22, 2010), <http://www.gallup.com/poll/141512/congress-ranks-last-confidence-institutions.aspx> (reporting that the American public ranks the military as the institution in which they hold the greatest confidence, maintains little confidence in lawyers, and has the least trust in Congress).

⁵⁸⁵ Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005).

⁵⁸⁶ Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT’L L. 841, 844 (2011).

⁵⁸⁷ Although the following is an example from a work of fiction, the sentiment is accurate. The view that it is preposterous for U.S. troops to be prosecuted by those for whom they have sacrificed much to protect, and judged by standards disconnected from battlefield realities, was expressed by the fictional characters Marine Colonel Nathan Jessup to Navy Lieutenant Daniel Kaffee in the film *A Few Good Men*, when Jessup, angered by Kaffee’s dogged investigation of an enlisted Marine’s death during a disciplinary action, informs Kaffee, “I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom I provide, then questions the manner in which I provide it.” *A FEW GOOD MEN* (Columbia Pictures 1992).

⁵⁸⁸ Anderson, *supra* note 586, at 859-60.

M. Human Rights Absolutism

LOAC is a permissive regime that evolved to humanize war without disabling belligerents from attempting to break adversarial political will. Wars are fought to be won, and LOAC accepts that military necessity can and does require the use of force to kill people so long as those targeted are combatants and the methods and means are consistent with proportionality, distinction, and humanity. By contrast, human rights law is a newer and more restrictive regime conceived to preserve human dignity that purports to prohibit all casualties not strictly required to safeguard human life.⁵⁸⁹ While human rights law does not prohibit all killing in war, it saddles the state with the burden of showing that lethal force was “absolutely necessary” to protect life or public order.⁵⁹⁰ To satisfy this strictest of legal tests, human rights law proclaims that states must minimize not only civilian but military casualties—including both lawful *and unlawful* combatants—and may resort to force *only* if non-lethal measures such as arrest or incapacitation would subject their armed forces to overwhelming risks and/or costs.⁵⁹¹ In short, LOAC facilitates victory through deadly force, with secondary consideration to limiting suffering, while human rights law defends life by narrowing who can be killed, and when and how, with scant concern for military missions. As such, human rights law imposes a far more protective standard than LOAC, and considers protection of human rights much more important than winning wars. It is thus unsurprising that a military commander and a human rights activist weigh military necessity and humanitarian considerations differently,

⁵⁸⁹ See, e.g., Alston Report, *supra* note 128, at 11 (“Lethal force under human rights law is legal if it is strictly and directly necessary to save life.”).

⁵⁹⁰ McKerr v. U.K., Reports of Judgments and Decisions, Eur. Ct. H.R., at 30 (2001); Human Rights Comm., General Comment No. 6, ¶ 3 HRI/GEN/1/Rev. 6 (1982).

⁵⁹¹ David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT’L L.J. 231, 260-61 (2005). Human rights law requires states to minimize all potential casualties—civilians but also lawful and unlawful combatants—when executing military operations. Isayeva v. Russia, 41 Eur. Ct. H.R. 847, ¶ 171 (2005).

or that their opposed norms and goals reflect in these divergent regimes.⁵⁹²

Further, anything can be offered up as a human right,⁵⁹³ and because discovery of human rights is a growth industry⁵⁹⁴ the boundaries of human rights law are in flux.⁵⁹⁵ Further, no clear choice-of-law rules mediate friction between subfields, which developed along different trajectories and can be deeply incompatible.⁵⁹⁶ Conflicts jurisprudence provides that, as *lex specialis*, LOAC takes precedence during war with human rights law “governing . . . lacunae in coverage.”⁵⁹⁷ However, while a “chasm still separates” LOAC and human rights law,⁵⁹⁸ a “growing Western-liberal humanitarian consciousness, which loathes war,”⁵⁹⁹ has encouraged convergence of the subfields⁶⁰⁰ by smuggling human rights norms into LOAC, privileging human rights law at the expense of LOAC, and even denying the applicability of the latter.⁶⁰¹ For human rights absolutists whose “interpretive responsibility” is the elaboration of the broadest possible human rights regime and to end

⁵⁹² See Rudolf Dolzer, *Clouds on the Horizon of Humanitarian Law?*, 28 YALE J. INT’L L. 337, 388 (2001) (differentiating value-systems).

⁵⁹³ See generally Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003) (exploring breadth and contestability of entitlements posited as “human rights”).

⁵⁹⁴ See Margulies, *supra* note 288, at 380 (referencing critics’ use of this term to label a troika of academics, NGOs, and tribunals propounding new human “rights”).

⁵⁹⁵ See Anicee Van Engeland, *Human Rights Strategies to Avoid Fragmentation of International Law as a Threat to Peace*, 5 INTERDISC. J. HUM. RTS. L. 25 (2011) (describing human rights law as suffering under “severe strain” due to “interpretations, approaches, or distortions” of entrepreneurs urging admission of new “rights”).

⁵⁹⁶ See generally RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002).

⁵⁹⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

⁵⁹⁸ Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the International War on Terror?*, 7 THEOLOGICAL INQUIRIES L. 97, 103 (2005).

⁵⁹⁹ Blum, *supra* note 86, at 174.

⁶⁰⁰ See Meron, *supra* note 224, at 243-44 (contending that transformations in war and philosophy have “drawn [LOAC] in the direction of [human rights law].”).

⁶⁰¹ See Satterthwaite, *supra* note 249, at 559 (“[M]any scholars . . . assert[] that [LOAC] is not applicable to the ‘War on Terror’” while insisting human rights law applies instead.).

rather than regulate war, the best of all possible worlds is the utopia where no human lives are lost.⁶⁰²

Thus, because only states will accept constraints that attenuate the intensity of war and the loss of human life, human rights absolutists champion five “rules”: (1) states must comply with differentially onerous legal regimes, (2) self-defense by states attacked by Islamists is unlawful aggression, (3) states are liable *per se* for all unintended civilian casualties, (4) weapon systems advantaging states are illegal, and (5) non-injurious interrogation methods are torturous.⁶⁰³ That their folly affords Islamists strategic advantage is epiphenomenal to the project of limiting state lethality. That their “humanitarian politics” is not law but aggressive normative entrepreneurship directed against the integrity of the LOAC regime, state ownership of LOAC, and the prospects for Western victory over Islamism does not dissuade them from claiming theirs as the most authoritative interpretation of LOAC.⁶⁰⁴

N. Legal Nullification and Civil Disobedience

The dominant view is that law “resolve[s] and supersede[s]” moral conflicts and provide[s] a framework for coordinated social action in the face of persistent moral disagreement; those whom the law governs are obliged to obey provided it does in fact create a final and peaceful settlement, or at least an accommodation, of conflicts over controversial moral issues and values within this framework.⁶⁰⁵ Further, a person who sincerely believes that a law is morally wrong nevertheless has an obligation to obey it, because the law is better at

⁶⁰² See David A.J. Richards, *Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School*, 45 STAN. L. REV. 1955, 1972 (1992-1993) (charging legal scholarship with an “interpretive responsibility . . . to give the best statement . . . of the meaning of human rights”); Meron, *supra* note 224, at 240 (“[H]umanization of [LOAC] [i]s a process of it put[ting] an end to all kinds of armed conflict.”).

⁶⁰³ See generally DINSTEIN, *supra* note 103; O’Connell, *supra* note 35.

⁶⁰⁴ Arguments over which regime governs war are long-settled in favor of LOAC, yet CLOACA continues to assert claims based on human rights law. Anderson, *supra* note 67, at 8.

⁶⁰⁵ See, e.g., W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 366-70 (2004).

securing an accommodation, balancing, or prioritizing among various competing values than a process of individual deliberation; it has authority for this reason.⁶⁰⁶ This duty of obedience to law even in the face of profound disagreement is particularly incumbent upon lawyers because by virtue “of his position in society, even minor violations of law by a lawyer . . . lessen public confidence in the legal profession.”⁶⁰⁷ Zealous advocacy extends no further than the boundaries of law for to permit legal professionals to transgress these would destroy social order and democratic principles.

The dominant view does not preclude legal academics and the lawyers they train, in their advocacy, from incorporating non-legal considerations, such as values, economic interests, social goals, or political preferences, nor deny to them open and notorious challenges to law through scholarship, litigation, or lobbying that make good-faith arguments for legal reform. However, it forbids covert nullification of the law, defined as the “re-introduc[tion] of contested moral values into the domain of law, either in the guise of principles of interpretation or as the basis for an ethically motivated decision to act or not to act on behalf of a client [or a cause].”⁶⁰⁸ For objections to laws they consider unjust or immoral to be consistent with professional duties, legal professionals may not deny the difference between law as it is and law as they wish it to be, and may not offer “interpretations” that do not fairly represent the substance of existing law or acknowledge the transformative nature of their projects. By this dominant view, indulgence in self-serving legal interpretation, even if motivated by noble ends, is impermissible civil disobedience.

Functionalism, by contrast, views law as a structure that embodies, promotes, and protects values.⁶⁰⁹ Law is not intrinsically entitled to respect or obedience but earns both if and only if it

⁶⁰⁶ *Id.* at 368.

⁶⁰⁷ See, e.g., MODEL RULES OF PROF'L CONDUCT r. 8:4 (2013).

⁶⁰⁸ Wendel, *supra* note 605, at 366.

⁶⁰⁹ See William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 223 (1996) (describing this alternative view of law).

protects these values;⁶¹⁰ legal professionals must disobey unjust laws and “take reasonable action to restore respect for law.”⁶¹¹ For functionalists, distinctions between law and morality dissolve, and legal professionals may (and perhaps even must) disregard the law to save a life, prevent state abuses, and advance social goals.⁶¹²

One functionalist challenge is simply to violate law through civil disobedience—indirectly as advisor or directly as “comrade.”⁶¹³ A more subtle method offers a motivated “interpretation” interposing the moral judgments of the interpreter as to what the law should be between those of the lawmakers and the interpreter’s actions subtly contravening the law—in effect “nullifying” the law while maintaining the fiction that the nullifier remains a faithful legal subject despite taking actions foreclosed by any fair reading of the law. Nullification is thus a “successful effort to alter or erase enacted law; civil disobedience [is] an [unsuccessful] effort.”⁶¹⁴ Accordingly, functionalism directs obstruction of laws legal professionals believe unjust, preferably through interpretive subterfuge, but if necessary through overt disobedience: “[i]f persuasion, argument, and conflict within the law fail to prompt the dominant society to . . . reorder

⁶¹⁰ See Heidi M. Hurd, *Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn't)*, 42 SAN DIEGO L. REV. 75, 76 (2012) (“[I]f there are weightier reasons to break the [law] than to abide by it[,], the fact that what one is breaking is a [law] is no more significant than . . . breaking . . . a stick.”); Martin Luther King, Jr., *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 84-85 (1963) (“[O]ne has a moral responsibility to disobey unjust laws [because] an unjust law is no law at all[.]”).

⁶¹¹ Yaroshefsky, *supra* note 229, at 580-81.

⁶¹² See Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 746-47 (1991) (accepting that a legal professional may violate law to advance social goals); Yaroshefsky, *supra* note 229, at 599 (advocating lawbreaking “when failure to do so results in . . . violations of . . . [LOAC].”); Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191, 195 (2001) (justifying legal disobedience to save life).

⁶¹³ See David J. Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 800 (1991) (“[A] lawyer can join the client as a comrade[.]”).

⁶¹⁴ Simon, *supra* note 609, at 231 (Functionalism theorizes “strong support in the culture . . . for . . . purposive . . . interpretation that shades into nullification.”).

principles, then . . . activity outside the law, against the law, and around the law may be required.”⁶¹⁵

CLOACA is a functionalist camp that views existing LOAC as insufficiently protective of human life and dignity, on its face or as applied by the United States. Some acknowledge existing LOAC yet disfavor it on one ground or several and make arguments calling quite openly and transparently for its modification. However, a larger corpus of CLOACA scholarship cannot fairly be characterized as anything but calls for academic nullification and even civil disobedience. CLOACA reflexively resolves differences of opinion on LOAC against the United States and its policies, and uniformly claims, contrary to facts, the plain language of legal sources, the well-settled interpretations of civil and military courts, and the practice of national militaries, that the United States was not attacked on 9/11 and cannot engage in self-defense, that there is no such thing as unlawful combatants, that stress without injury constitutes torture, and that use of a UAV in Pakistan to kill an Islamist is murder whereas the same act with a sniper rifle across the border in Afghanistan is lawful. By mulishly denying that their legal aspirations are faithful only to their political program, CLOACA commits acts of nullification.

Occasionally, in agitating for imposition of criminal liability upon the senior U.S. leaders who design and implement war policies, and by leveling malicious accusations to hector and harry these leaders into paralysis or prison, CLOACA crosses over into civil disobedience with scholarship that indicates they do not view LOAC as a universally applicable regime but rather as a set of infinitely malleable tools employed to benefit particularized interests, in particular the Islamist cause. This latter body of work owes a debt to Critical Race Theory, a paradigm in which race plays the same role as class in Marxist theory. In Critical Race Theory, existing legal structures reflect the racist society that constructed them, and racially oppressed groups are entitled to self-determine which laws are valid and worth observing and which can be disobeyed to relieve their

⁶¹⁵ Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1815-16 (1992).

subordination.⁶¹⁶ For CLOACA, religion plays the same role as race in Critical Race Theory and as class in Marxism, and Muslims, oppressed by Western political, economic, and military hegemony, are entitled to disregard any and all rules of LOAC that reinforce their military disadvantage and thus their political and economic subordination to the West.

In sum, CLOACA ignores existing LOAC, offers bad-faith interpretations where it has gaps or ambiguities, and misrepresents normative preferences for what LOAC should be as positive assessments of what LOAC is. Its failure to uphold its responsibilities under the dominant view of law, and its resort to nullification and civil disobedience rather than debate, persuasion, and dialectic synthesis, suggests that the canons, customs, and norms that instantiate CLOACA are fundamentally anomic and unprofessional.

O. Anti-Militarism

Liberalism—a philosophy that promotes individual rights, champions human perfectibility, and regards peace as man’s natural state—dominates U.S. civil government.⁶¹⁷ Conservatism—a communitarian philosophy convinced of human imperfectability and war as man’s default condition—instantiates the military.⁶¹⁸ U.S. civil-military relations thus necessitates cooperation between groups that see man, the state, and war differently, and a civil-military bargain provides that, in exchange for military nonintervention in

⁶¹⁶ See generally RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY (2001) (postulating the core tenets of Critical Race Theory).

⁶¹⁷ See SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 89, 144 (1957). Liberalism is a “set of political, economic, religious, educational, and other social beliefs that emphasize freedom of the individual, . . . participatory government[,] tolerance[,] social progress[,] egalitarianism and [minority] rights, secular rationality[,] and positive [state] action to remedy social deficiencies.” FRED KERLINGER, LIBERALISM AND CONSERVATISM: NATURE AND STRUCTURE OF SOCIAL ATTITUDES 15 (1984).

⁶¹⁸ Conservatism is a “set of political, economic, religious, educational, and other social beliefs . . . emphasi[zing] stability, religion and morality, liberty and freedom, the natural inequality of men, the uncertainty of progress, . . . distrust of human reason [and] majority rule, . . . individualism, [and] private property[.]” KERLINGER, *supra* note 617, at 63-65, 93-94.

politics, civilian government accepts military guidance in war decisions. Until the 1960s, the bargain held, and the military—the sole institution with the expertise and valor required to defend the republic—was the revered national guardian.⁶¹⁹

However, the Vietnam War convinced liberals of a martial threat to democracy, peace, and the entire liberal project.⁶²⁰ “Visceral repugnance of anything . . . military . . . began [in] the academ[y]”⁶²¹ and caused a cultural divorce between civilians and the military and Left and Right. Academics are joined in the vanguard of military vilification by leading Democratic politicians who see the troops as a “constant reproach to their own strategic amateurism and privileged absence from service.”⁶²² A popular majority, while pro-military, ratifies an arrangement whereby a tiny fraction of serving Americans “make[s] all the sacrifices to defend the nation.”⁶²³

Ignorance of and revulsion for the military is rampant in CLOACA scholarship, evincing that its authors despise the martial caste and military self-regulation. CLOACA scholarship that would subordinate military necessity to the lives of unlawful Islamist combatants, nullify and disobey LOAC to advance political preferences, dismiss military wisdom, and criminalize troops who carry into effect policies firmly grounded in existing LOAC dispenses with any pretense that its authors regard the military as national guardians. *Sub silentio* substitution of uninformed value judgments regarding what should be lawful in war imposes dangerous constraints upon the military, creating the strong inference that hatred of the military and its values drives CLOACA.

⁶¹⁹ MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER* 231 (1960).

⁶²⁰ See HUNTINGTON, *supra* note 617, at 156 (noting American liberal belief that the military is “an obstacle to . . . [liberal] aims.”).

⁶²¹ CHARLES C. MOSKOS, *THE AMERICAN ENLISTED MAN* 34, 157, 178-79 (1970).

⁶²² NIELSEN & SNIDER, *supra* note 527, at 25.

⁶²³ *Vet Views on Society and Service*, 99 *VETERANS OF FOREIGN WARS*, no. 4, 2012, at 16.

P. Pernicious Pacifism

For most Americans, “violence used to defend and protect the social order is rational and legitimate.”⁶²⁴ Even if they are not themselves physically or temperamentally suited to take up arms in their own defense,⁶²⁵ Americans approve of the use of force to defeat Islamism. A small but influential segment of the population, however, utterly disapproves of the U.S. use of force on ideological grounds.

Pacifism⁶²⁶ is a worldview that discounts the idea of enemies,⁶²⁷ condemns war,⁶²⁸ scorns soldiers as “warmonger[s],”⁶²⁹ countenances appeasement,⁶³⁰ and urges disarmament.⁶³¹ Academic

⁶²⁴ HARRIS, *supra* note 474, at 173. Negotiation backed by the threat of, and will to use, force are credited by most Americans with keeping them safe. *Id.* at xv, 66.

⁶²⁵ The metaphor of sheep, sheepdogs, and wolves to describe the masses, warriors, and evil malefactors, respectively, where the sheep are defenseless by design, the sheepdogs are capable of great violence but trained to protect the sheep, and the wolves are atavistic killers, is illustrative. See DAVID GROSSMAN, SHEEP, SHEEPDOGS, AND WOLVES (1998) (describing that most people are “kind, gentle, productive” sheep, and soldiers and other warriors are “needed to protect them” from the wolves).

⁶²⁶ See MARIAN MOLLIN, RADICAL PACIFISM IN AMERICA 3-47 (2006) (identifying “resistance to war and opposition to racism,” “social justice,” “civil rights[,]” “anti-imperialism,” and anticapitalism as subconstructs of pacifism).

⁶²⁷ See, e.g., GROSSMAN, *supra* note 625, at 1-3 (“Sheep . . . live in denial” and “do not want to believe that there is evil in the world[.]”); HARRIS, *supra* note 474, at 66 (“[Pacifists] genuinely can’t fathom ruthlessness . . . because their idealism refuses to countenance such an illiberal truth.”).

⁶²⁸ See Colin S. Gray, *How Has War Changed Since the End of the Cold War?* 35 PARAMETERS 14, 24 (2005) (pacifists believe “humankind . . . is ceasing to regard warfare as acceptable.”).

⁶²⁹ HUNTINGTON, *supra* note 617, at 115. In effect, pacifists are sheep that “do not like the sheepdog . . . [because] his fangs and . . . capacity for violence . . . [provide] a constant reminder that there are wolves in the land.” GROSSMAN, *supra* note 625. Pacifists are also free-riders who “do not feel they are in any real danger from their countries’ enemies” but know that “if push comes to shove, the 101st Airborne will ultimately ensure their safety.” Victor Davis Hanson, *The Future of Western War*, 38 IMPRIMIS, no. 11, 2009, at 5.

⁶³⁰ Pacifists appease enemies, as exemplified by the diplomatic efforts of British Prime Minister Neville Chamberlain in offering Czechoslovakia to Germany in the foolish hope the concession would sate Adolf Hitler. *On This Day, 30 September*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/september/30/newsid_3115000/3115476.stm (last visited Apr. 13, 2015).

pacifists regard war as a malignancy spawned by nationalism and a dearth of international dispute settlement institutions.⁶³² Despite spectacular failure in the 1930s, when confronted by Nazism and Fascism, pacifism is a state religion in Europe, and it came as scant surprise, post-9/11, that some Western states maintained low military profiles, “hop[ing] the [United States] w[ould] take care of the terrorists, or that the terrorists [would] just go away.”⁶³³ That the United States used force in a coalition-of-the-willing to self-defend, and that allied military powers relied on orthodox LOAC interpretations to defeat their enemies efficiently, was intellectually discomfiting to pacifists.

Although no membership roll exists, pacifism counts CLOACA professors in its *avant garde*, and its philosophical commitments are woven assiduously into their scholarship. On every salient issue ranging from the lawfulness of the U.S. response to 9/11 to whether a warfighting or law enforcement paradigm is appropriate, whether U.S. interpretations of LOAC sufficiently protect various status categories, whether U.S. methods of detention and interrogation comply with LOAC, and whether, where, how, when, and with what the United States and its allies may attack enemies, CLOACA takes the position that would frustrate and criminalize U.S. conduct. By illustration, in just two paragraphs of an article, a prominent CLOACA member claims the United States engaged in a conspiracy to “conceal, distort, or mischaracterize events” and “undermine international order” in responding to Islamist attacks, that it had no legitimate claim to self-defense, that its troops are murderers as it was unnecessary and immoral to engage in war at all, and that it was obliged to capture Islamists rather than kill them.⁶³⁴ Such a screed would be impossible without application of every premise of pacifism: that Islamists pose no threat, that senior

⁶³¹ “War abolitionists” pray that “reason will prevail and all international disputes will be resolved by nonviolent means.” Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY L. 3, 4 (1997).

⁶³² See HUNTINGTON, *supra* note 617, at 151 (“[Pacifists believe] all that is needed [to end war] is . . . the elimination of nationalistic . . . and bellicose propaganda” or “international . . . machinery for the pacific settlement of disputes.”).

⁶³³ ALEXANDER, *supra* note 460, at 228.

⁶³⁴ O’Connell, *supra* note 212, at 18-20.

U.S. leaders are warmongers who catalyze the conflict, and that but for U.S. policies peace with Islamists could be negotiated. That it is to those persons who join together cosmopolitanism, institutionalism, and international rule of law—namely, CLOACA—whom we must turn if we are to extricate ourselves from an illegal war follows ineluctably.

Q. Useful Idiocy

“Useful idiot,” a pejorative coined by Vladimir Lenin to label a member of the Western opinion elite who promoted the Soviet Union, providing free propaganda⁶³⁵ service even as the evil dictatorship held the Westerner in contempt for his pathological naivete in believing himself to be doing noble work,⁶³⁶ describes many in CLOACA. Useful idiocy assumes three forms.

In the first, useful idiots fabricate a history of Islamic achievement to stage Islam as the intellectual and moral equal of the West. Second, they describe the war with Islamists as a fleeting anomaly attributable to a trifling group of troublemakers breaching the tenets of their own religion rather than a divinely mandated conflict.⁶³⁷ Useful idiots separate Islam from Islamists by attributing to the former principles in common with the West, including “justice and progress” and “the dignity of all human beings,” that will facilitate return to an allegedly long relationship of “co-existence and cooperation.”⁶³⁸ That the relationship is bloody, and that by conducting *jihad* Islamists discharge their religious obligations as

⁶³⁵ “Propaganda” is the deliberate manipulation of facts, ideas, and information to convince a selected audience of the truth of a proposition and to motivate desired political action favorable to the cause of the party employing it. JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN’S ATTITUDES* (Konrad Kellen trans., Vintage Books ed., 1973) (1965).

⁶³⁶ See Solzhenitsyn, *supra* note 449 (“[The] Communist regime could stand and grow due to the enthusiastic support from an enormous number of Western intellectuals who felt a kinship and refused to see Communism’s crimes.”).

⁶³⁷ For a discussion of politically motivated attempts to equate Islamic intellectual history with that of the West, see MCCARTHY, *supra* note 239, at 244.

⁶³⁸ President Barack Obama, Address in Cairo, A New Beginning (June 4, 2009), available at <http://www.whitehouse.gov/blog/NewBeginning/transcripts>.

they understand them, are inconvenient but stubborn facts.⁶³⁹ Third, useful idiots dismiss the “Green Peril” as a wildly exaggerated “*trope du jour*”⁶⁴⁰ because Islamic VNSAs are mere spiritual bands led by benign philosophers whose disunity precludes any threat to the West.⁶⁴¹ This view converts wariness of Islamism into “Islamophobia,”⁶⁴² rendering others reluctant to speak truth lest they be smeared as bigots or hounded from jobs.⁶⁴³

Self-censorship is now endemic: Western elites label Islamists “militants” or “insurgents” rather than “terrorists” or “murderers”⁶⁴⁴ and even cease noting that perpetrators of attacks are Islamists.⁶⁴⁵ If useful idiots concede any Islamist threat, they hedge, claiming it is engaged in a purely defensive struggle against “militant anti-Muslim fundamentalists”⁶⁴⁶ responsible for the poverty of Islamic lands—the result of Western economic imperialism—and the abuse of expatriate Muslims’ civil rights.⁶⁴⁷ That it is *Islam* on the

⁶³⁹ The phenomenon whereby opinion elites present a sanitized version of Islam that ignores its long *jihad* against the West predates 9/11; since the 1980s, “prominent professors of Middle Eastern studies [have] tried to wish away the growing threat of radical Islamism . . . [and have] simply refused to study extremist Muslims[.]” de Russey, *supra* note 66, at 6.

⁶⁴⁰ See Margulies & Metcalf, *supra* note 479, at 440 (using the phrase to suggest the perception of Islamism as a threat is false and manufactured for political purposes).

⁶⁴¹ See generally JOHN ESPOSITO, *THE ISLAMIC THREAT: MYTH OR REALITY* 411 (1992) (contending that Islamism presents no threat).

⁶⁴² Wells, *supra* note 477, at 159-68.

⁶⁴³ See Michael Mukasey, *Executive Power in Wartime*, 40 IMPRIMIS, no 10, 2011, at 1, 3-4 (“[W]e are handicapped . . . by the refusal . . . to acknowledge [Islamist] goals[.]”).

⁶⁴⁴ See Samuel Estreicher, *Privileging Asymmetric Warfare (Part III): The Intentional Killing of Civilians Under International Humanitarian Law*, 12 CHI. J. INT’L L. 589, 590-91 (2011-2012) (criticizing reluctance to make evaluative judgments about [Islamists] as self-censorship); *Id.* at 593 (“[Islamists] are killers, murderers.”).

⁶⁴⁵ See Bruce Hoffman, *Defining Terrorism*, 24 SOC. SCI. REV. 6, 20-34 (1986) (criticizing Western elites’ refusal to use the word “terrorism” in referencing attacks).

⁶⁴⁶ See Leon T. Hadar, *What Green Peril?* 72 FOR. AFFAIRS 27, 32 (1993).

⁶⁴⁷ See Rhaj Bhala, *Poverty, Islamic Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy—Agricultural Tariffs and Subsidies*, 2 U. ST. THOMAS L.J. 1, 10, 19 (blaming Islamism on Western economic manipulations alleged to deprive Muslims of jobs, education, and welfare); Peter Margulies, *Foreward: Risk, Deliberation, and Professional Responsibility*, 1 NAT’L SECURITY L. &

offensive, more tolerant of vast wealth disparities, and more abusive of its citizens' rights than the West, is irrelevant.⁶⁴⁸ To today's useful idiots, just as to previous generations shilling for the Soviets, the West is always to blame. The most inane CLOACA proposal advises Western withdrawal from Islamic lands and abandonment of non-Islamic regimes so a recreated Caliphate, applying *Shari'a*, can create 'legal stability' and enable coexistence.⁶⁴⁹ That this is a surrender proposal either escapes or accords with its author who, with all useful idiots, has crossed into a state of affective solidarity excusing Islamist barbarism and suffusing empathy for their goals in his work.⁶⁵⁰

In sum, useful idiots insist that envisioning Islamism as a threat is a hateful act against an entire civilization while demanding that the West terminate economic, political, and military aggression against Islam to end the war. It is difficult to conceive of these and other views developed in CLOACA scholarship as anything other than monuments to useful idiocy.

R. *Liberal Bias*

For the second time in 150 years, Americans are fighting a civil war.⁶⁵¹ Divided along ideological rather than geographical lines, and battling in universities and media rather than fields and forests, Americans lack a common core of beliefs and preferences about rights, duties, and the state. While conservatives tend to foreign policy and defense and use force to protect U.S. interests, liberals view war as evil, are consumed with eliminating domestic

POL'Y 357 (2005) ("[I]nequality . . . breed[s] violence . . . by giving [Islamist] political entrepreneurs . . . capital for their ventures[.]").

⁶⁴⁸ See Robert J. Delahunty, *Trade, War, and Terror: A Reply to Professor Bhala*, 9 U. ST. THOMAS L.J. 1,161 (2011) (debunking Bhala and Sunstein theses). Almost forty years ago, Solzhenitsyn chided the Left, observing that "[w]hen a [Western] government starts an earnest fight against terrorism, public opinion immediately accuses it of violating the terrorists' civil rights . . . out of a benevolent concept according to which there is no evil inherent to human nature[.]" Solzhenitsyn, *supra* note 449.

⁶⁴⁹ See NOAH FELDMAN, *THE RISE AND FALL OF THE ISLAMIC STATE* 3 (2008).

⁶⁵⁰ See Margulies, *supra* note 321, at 174 (labeling as "affective solidarity" the "bonds of empathy" and trust that link those joined in this state of being).

⁶⁵¹ See PODHORETZ, *supra* note 59, at 14-15 (describing the Left-Right battle over LOAC and post-9/11 law and policy as "nothing less than a kind of civil war").

inequalities, and pay short shrift to external threats.⁶⁵² Whereas conservatives embrace a capitalistic order and the military that defends it,⁶⁵³ the Left views the United States as an unjust nation wherein only if elites radically remake belief systems and institutions—including the military—can poverty, sexism, racism, and war be ended.⁶⁵⁴

Liberals have staked out the academy as the prime site of cognitive transformation. Over the last half-century, universities, once “protectors of reasoned discourse” where “scholars [worked] in sylvan tranquility” to generate knowledge and develop critical thinking, have morphed into “hotbeds of radical[ism]” marked by “an aberrational form of political correctness [and] the abandonment of reliance on facts, common sense, and logic.”⁶⁵⁵ Social change, not rigorous search for truth, is the lodestar for academics dedicated to inculcating “correct” views.⁶⁵⁶ Leftist scholars do not cavil from “censor[ship] in the name of higher moralities” or excommunicating heretical students and faculty; those failing to address “appropriate” issues, ask proper questions, and reach approved conclusions have difficulty entering and remaining in the academy.⁶⁵⁷ In no field is this more deliberately orchestrated than law.

⁶⁵² NIELSEN & SNIDER, *supra* note 527, at 96, 101.

⁶⁵³ See generally J.T. Jost et al., *Ideology: The Resurgence in Social, Personality, and Political Psychology*, 3 PERSP. PSYCHOL. SCI. 126 (2008).

⁶⁵⁴ *Id.* (elaborating the liberal catechism). Liberals believe there is a “need [for elites] to lea[d] human behavior” and change beliefs. Sunstein, *supra* note 647, at 197.

⁶⁵⁵ Fallon, *supra* note 518, at 232. Liberal academics eschew traditional scholarship because they “believe it is their mission to crusade against wrongs and cure every ill the world has ever known[.]” STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME*, 10-12 (2008).

⁶⁵⁶ This practice breaches a fiduciary responsibility inasmuch as “the trust that society has placed in academics . . . [is] grounded in certain assumptions about academic conduct[.]” including a “detached cast of mind” and a willingness “to read and to think about arguments on both sides of an issue.” FISH, *supra* note 655, at 168. Many academic liberals, however, would rather “crusade against wrongs and cure every ill the world has ever known[.]” *Id.* at 10-12, 168.

⁶⁵⁷ Hamilton, *supra* note 443, at 335. An example is Middle East studies, a field where conservatives typically adopt a pro-Israel stance and liberals a pro-Palestinian, pro-Islamic outlook. Many departments “repress legitimate debate concerning Israel” and systematically exclude pro-Israeli viewpoints, students, and faculty from

A century ago, liberal elites began engineering the legal profession to rectify perceived injustices. By hiring and tenuring faculty on the basis of their commitment to the liberal project, the Left politicized and reconfigured legal education.⁶⁵⁸ By the 1970s, much of the U.S. legal academy was adamant that the purpose of law schools was to “develo[p] the theory and practice of . . . progressive interpretation of the [U.S.] constitutional tradition” and that scholars must pledge themselves “not [to] the study of dominant doctrinal results, but [to] development of creative arguments that do justice to [marginalized] persons and groups.”⁶⁵⁹ Naturally, only arguments reinforcing liberal public culture were understood to “do justice,” and liberal legal academia came to tolerate but one methodological approach to discovering knowledge (application of progressive tenets), one interpretive objective (justice for the “marginalized”), and one epistemological standard (truth is the progressive march toward social justice). As liberal legal academia waxed more potent and dedicated to doing whatever necessary to achieve its transformative project, including stripping legitimate authority from government, the military, police, courts, and law itself,⁶⁶⁰ scholarship and scholars that challenged the liberal project were anathematized to prevent the dwindling stock of conservatives in the legal academy from interfering.⁶⁶¹

Thus are many elite law schools uniformly Leftist,⁶⁶² and thus do liberals outnumber conservatives by 20:1 or more at most law schools. Although they may sincerely believe their ideology does not

participating. U.S. COMM’N ON CIVIL RIGHTS, FINDINGS AND RECOMMENDATIONS OF THE U.S. COMMISSION ON CIVIL RIGHTS REGARDING CAMPUS ANTI-SEMITISM (2006).

⁶⁵⁸ See AUERBACH, *supra* note 70, at ix, 4-76, 77-92 (describing liberal Progressive assertion of control of the legal academy to use law to make society more “just”).

⁶⁵⁹ Richards, *supra* note 602, at 1956, 1974.

⁶⁶⁰ See AUERBACH, *supra* note 70, at xii (describing the liberal legal academy’s antiauthoritarian activism against institutions of social control).

⁶⁶¹ McGinnis et al., *supra* note 71, at 1168. Ostracism and threats to employment are visited upon efforts by conservatives to counter liberal legal academic hegemony. See John O. McGinnis & Matthew Schwartz, *Conservatives Need Not Apply*, WALL ST. J., Apr. 1, 2003, at A14 (discussing these risks).

⁶⁶² See Devins, *supra* note 515, at 173 (“[M]ost law professors are left-liberal Democrats.”); McGinnis et al., *supra* note 71, at 1168; Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI. KENT L. REV. 765, 780 n.54 (1998) (less than ten percent of law faculty are conservative).

affect their work,⁶⁶³ liberal legal academics are disposed to interpret information in a manner consistent with their ideological biases, which are important determinants of their scholarship.⁶⁶⁴ A few liberal leaders of the legal academy concede their vulnerability to the charge that their scholarship is marred by “a larger trend toward highly partisan . . . left-wing activity, in which law professors do not care about truth but instead push . . . [a] political agenda.”⁶⁶⁵

Within CLOACA, the “hammer and sickle lens”⁶⁶⁶ warps the projection of issues, as well as who may project them. The few remaining conservatives are elbowed away from LOAC, and scholarship, teaching, and advocacy are politicized.⁶⁶⁷ Too often, CLOACA not only foregoes a dispassionate search for knowledge but makes no pretense of a search at all: as with other matters of faith, it is only necessary that the correct conclusions be reached and that prescribed heroes and villains be lauded or excoriated. Consider that, although CLOACA made no attempt to disguise its virulent hostility to George W. Bush or its desire that his policies of coercive interrogation, military commissions, and targeted killings fail in Iraq and other battlefields, CLOACA criticism of these policies—most of which were expanded by the Obama administration—became nuanced, sparse, and muted after Inauguration Day in January 2009.

The most cogent example that CLOACA has abandoned all neutrality is its suggestion that Islamists whom U.S. troops meet on

⁶⁶³ See Jost et al., *supra* note 653, at 126 (“[It] is difficult to see our own moral and political convictions as springing from anything other than . . . reason and . . . evidence.”).

⁶⁶⁴ See McGinnis et al., *supra* note 71, at 1169 (referencing this research); see also Michael Vitiello, *Liberal Bias in the Legal Academy*, 77 MISS. L.J. 507 (2007).

⁶⁶⁵ Sunstein, *supra* note 526, at 199. Were this not so, could Bernadine Dohrn, founder of the Leninist terror group Weather Underground, which advocated violent overthrow of the Constitution, bombed government buildings, robbed banks, and earned her a spot on the FBI Ten Most Wanted List and a series of felony convictions, become a law professor at Northwestern, or Kathy Boudin, another Underground founder and convicted murderer, be named Sheinberg Scholar-in-Residence at NYU Law School?

⁶⁶⁶ ROBERT PATTINSON, WAR CRIMES 9 (2007).

⁶⁶⁷ See McGinnis & Schwartz, *supra* note 661 (reporting that very few conservatives are permitted to teach “subjects that set the agenda for debate on the hot button issues of our time,” including LOAC).

foreign battlefields are not unlawful combatants bent on killing Americans, but merely “marginalized people,” not unlike impoverished or homosexual Americans, who deserve that CLOACA spend “the next decade [in] reflections on the policies undertaken in the name of national security [to] prob[e] . . . not just what [LOAC] should be, but how it functions and whom it serves.”⁶⁶⁸ In essence, after 9/11, the United States, facing no threat, chose to perpetuate an evil national history stained by the original sins of slavery and Indian genocide and other acts of discrimination against minorities and women by waging a racist, imperialist war against Islam. With this and other works riddled with liberal bias, CLOACA is indefensible against the charge that its ideological agenda overwhelms its duty to seek and disseminate truth regarding what LOAC is and what it permits to a nation engaged in an existential conflict.

S. Intellectual Dishonesty

It is one thing to lack the tools to discover truth; it is another to deny or obfuscate it in service to a confounding ideology. Intellectual honesty demands that, in conducting and disseminating research, scholars diligently consider all available evidence, evaluate competing hypotheses, rule out alternative explanations, and reach complete, defensible, and fair judgments.⁶⁶⁹ In the Fourth Generation War with Islamism, intellectual dishonesty assumes two forms.

First, contrary to history and Islamist interpretations of the *Qur'an*, CLOACA asserts that either the Islamist Way of War is compatible with LOAC or Islamists categorically breach their professed faith. Second, either to influence public policy by making “correct” arguments⁶⁷⁰ or further the Islamist cause,⁶⁷¹ they contend that the policies of the United States—a nation born in 1776—caused

⁶⁶⁸ Margulies & Metcalf, *supra* note 479, at 471.

⁶⁶⁹ See Eric Cheyfitz, *The Corporate University, Academic Freedom, and American Exceptionalism*, 108 S. ATL. Q. 701, 720 (2009).

⁶⁷⁰ See Fallon, *supra* note 518, at 37 (attributing academic temptations to “tailor . . . arguments to our audiences” to “achieve an . . . influence on public events[.]”).

⁶⁷¹ See Estreicher, *supra* note 644, at 602 (intimating that some CLOACA academics do “favor[] the merits of the underlying [Islamist] cause[.]”).

an ancient Occidental-Islamic conflict, and only U.S. disengagement will bring peace. “[I]ntellectual distortions”⁶⁷² are legion and are the work of “militant[s] disguised as [scholars] no different than [Islamists] in Afghanistan”⁶⁷³ insofar as both shred their vocational rules.

Fighters in academic garb support Islamism because their pronouncements masquerade as apolitical, detached, and expert analyses dispositive of the issues they address. If they acknowledged ideological solidarity with Islamists, disciplined and integral CLOACA scholars might produce scholarship that, although gravid with militant bias, bore some redeeming virtue. Dishonest concealment of their positional solidarity with Islamists, however, vitiates the persuasive force their works might otherwise exert.

T. Moral and Physical Cowardice

For the ancient Greeks, *thumos* was the ferocious passion in defense of family, *polis*, and justice they believed was deeply embedded in human nature and would overcome fear and base instincts toward self-preservation when these values were threatened.⁶⁷⁴ Also known as “civic courage,” *thumos* has been declining in the West at least since the late 1970s, when Alexander Solzhenistyn warned of the catastrophic consequences of its failure at the height of the Cold War:

The Western world has lost its civil courage . . . [I]ntellectual elite[s] . . . base state policies on weakness and cowardice . . . [T]hey get tongue-tied and paralyzed when they deal

⁶⁷² See Paul Marshall, *Islamophilia*, COMMENTARY 61, 61-65 (June 2008) (reviewing NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008)) (describing a “profoundly regrettable tendency toward intellectual distortion” in a CLOACA academic’s mischaracterization of the severity of the Islamist threat).

⁶⁷³ d’Aspremont, *supra* note 77, at 16 (condemning academic “deceit, duplicity, and fraud.” CLOACA scholars can either be transparent about the “cap” they wear (scholar or militant) and keep these two functions separate or abandon the pretense to scholarship and “tak[e] to the street” and join militants in direct action. *Id.* at 17.

⁶⁷⁴ See generally Susan M. Purviance, *Thumos and the Daring Soul: Craving Justice*, 11 J. ANCIENT PHIL. 1 (2008).

with . . . terrorists . . . [F]rom ancient times decline in courage has been considered the beginning of the end.⁶⁷⁵

Although the West rallied to defeat Communism, the universal liberal civilization that followed deemed moral and physical courage unnecessary, and prior to 9/11 the ties that joined the nations of the West were already fraying. After 9/11, most Western nations either refused to do battle or, like Spain, exited once Islamists threatened their homelands. Americans, however, bifurcated into a majority strongly behind the counterattack and a liberal elite that denied the Islamists were their enemy or “hope[d] that by pretending that the enemy is simply misguided, or misunderstood, or politically immature, he will cease to be an enemy.”⁶⁷⁶ Worse, domestic blocs engaging in “ostrich politics”—burying their heads in the sand in the hope threats vanish—resented those willing to fight for exposing them as cravens desperate to disguise abstention and petrifying fear as wisdom. As liberal contempt for *thumos* infected the polity, it eroded social cohesion catalyzed by 9/11 and left the United States less self-confident and less capable of self-defense.⁶⁷⁷

Those whose cowardice impels them to recommend surrender and subordination under Islamic imperium in concession for survival either misunderstand their opponents or share their objectives.⁶⁷⁸ Among those most bereft of moral and physical courage and most contemptuous of those who possess it are CLOACA didacts who, risking nothing more life-threatening than paper cuts or eye strain, produce scholarship intended to convince Americans that the soldiers risking death and grievous bodily harm on their behalf are *not* performing valorous and sacrificial acts in defense of their *polis* because Islamists pose no threat or are nothing worse than an itch to be scratched with domestic criminal law. The inference to be drawn is that, rather than individuals deserving of

⁶⁷⁵ Solzhenitsyn, *supra* note 449.

⁶⁷⁶ HARRIS, *supra* note 474, at xiv.

⁶⁷⁷ See Chief Rabbi Sir Jonathan Saks, *How to Reverse the West's Decline*, available at <http://standpointmag.co.uk/node/4049/full> (“[W]hen a people lose the will to defend themselves” they “become easy prey[.]”).

⁶⁷⁸ See Curtis F. Doebbler, *How Can We Really Protect National Security*, 9 ILSA J. INT'L & COMP. L. 399, 405 (2003) (counseling concessions as the price of survival).

honors as noble bearers of *thumos*, U.S. troops are, at best, pitiable dupes, and at worst, moral culprits waging an unnecessary and illegal war.

U. *Anti-Americanism*

Although racial, religious, and cultural heterogeneity correlate with a global decline in nationalism,⁶⁷⁹ and despite a counterculture, born of the anti-Vietnam War movement and a post-Watergate skepticism about government, that proclaims genuine patriotism to be condemnation of the nation and its policies,⁶⁸⁰ the United States has thrice in the past century risked its blood and treasure to save the West and protect liberty and the rule of law. The American majority is still proud, self-confident, and able and willing to use force to defend national interests. Yet a chasm between mass and elite opinion is widening.

Many intellectuals ignore the virtues of their republic to focus on its vices real and imagined, and deliver demoralizing anti-American criticism as a “civic duty.”⁶⁸¹ Moderate critics huff that the country is a “pushy and preachy” nation after undeserved advantages in world affairs⁶⁸² that must abandon pretensions to hegemony and accept a graceful decline.⁶⁸³ Sharper neo-Marxist critics trumpet the basic badness of the United States and the inevitability of its destruction. “Guerrillas-with-tenure” claim the country must be defeated to eradicate racism, colonialism, militarism, Zionism, and capitalism.⁶⁸⁴ Academic extremists insist the United States deserved

⁶⁷⁹ Stanley G. Payne, *On the Heuristic Value of the Concept of Political Religion and its Application*, 6 TOTALITARIAN MOV. & POL. RELIG. 163 (2005).

⁶⁸⁰ See CITIZEN ESPIONAGE: STUDIES IN TRUST AND BETRAYAL 57 (Theodore R. Sarbin et al. eds., 1994) (describing countercultural anti-patriotism, which regards criticism, sabotage, and espionage as “higher patriotism” and love of country as “blindly jingoistic”).

⁶⁸¹ See generally Luban, *supra* note 491 (explaining patriotism as advocacy against the United States).

⁶⁸² Koh, *supra* note 376, at 1481.

⁶⁸³ See, e.g., RICHARD W. MILLER, GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER 125 (2011).

⁶⁸⁴ See generally ADRIAN GUELKE, THE NEW AGE OF TERRORISM AND THE INTERNATIONAL POLITICAL SYSTEM (2008) (examining this radical critique).

9/11,⁶⁸⁵ moving one to proclaim that “[a]nyone who can blow up the Pentagon gets my vote” and another to encourage a “million Mogadishus,”⁶⁸⁶ recalling the 1993 deaths of eighteen U.S. troops hunting Al Qaeda-allied Somali warlord Muhammad Aidid. Yet another claims “the [United States] is . . . a greater threat to peace and stability in the [Middle East] than ISIS.”⁶⁸⁷

CLOACA so clearly shares this disdain for the United States that it is difficult to rebut the inference that, like scholars in cognate fields, it longs for American defeat. Two CLOACA scholars concede as much, arguing that the only just resolution to the war in Afghanistan requires the United States to withdraw forces and cede rule to the Taliban—a not-so-subtle surrender proposal.⁶⁸⁸ Although others are less voluble in their disloyalty and more temperate in their writings, their work is conducive of the same dystopic future.

V. *Islamophilia*

“Islamophilia” is a condition of pathological solidarity with Islamism brewed from anti-Semitism, mutual Leftist-Islamist enmity toward U.S. constitutional government, xenophilia, and accord with

⁶⁸⁵ PODHORETZ, *supra* note 59, at 87 (noting that, for the academy, “the ultimate cause [of 9/11] is . . . U.S. foreign policy”); James Traub, *Harvard Radical*, N.Y. TIMES (Aug. 24, 2003), <http://www.nytimes.com/2003/08/24/magazine/24SUMMERS.html> (“[M]uch of the university world took the view that the United States must in some important way have been responsible for [9/11.]”).

⁶⁸⁶ AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 105 (Philip G. Altbach et al. eds., 3rd ed. 2011); HOROWITZ, *supra* note 305, at 34. Such irresponsible criticism moved a disgusted commentator to inquire, “What country underwrites an educational system that cultivates hatred for the nation so deep that scholars openly cheer for the country’s defeat and the deaths of its soldiers?” PATTINSON, *supra* note 666, at 204.

⁶⁸⁷ Musa al-Gharbi, *How Much Moral High Ground Does the U.S. Have Over ISIS?*, TRUTHOUT.COM (Oct. 13, 2014), <http://www.truth-out.org/opinion/item/26743-how-much-moral-high-ground-does-the-us-have-over-isis>.

⁶⁸⁸ See MILLER, *supra* note 683, at 103 (“The [US] has . . . a moral duty . . . to . . . conced[e] control of [Afghanistan] to the Taliban”). An eminent CLOACA scholar concedes the “ulterior motive” of CLOACA is to hobble Western forces by “declaring some of their tactics legally off limits[.]” FELDMAN, *supra* note 649, at 461, 630.

Islamist goals.⁶⁸⁹ The afflicted Islamophile, who “reveres the invaders and slanders the defenders, absolves the delinquents and condemns the victims, weeps for [Islamists] and curses Americans,”⁶⁹⁰ absolves Islamists of systematic violations of LOAC by (1) denying violations were committed, (2) declaring, as Muslims adhere to a “religion of peace,” that any violations were committed by non-Muslims,⁶⁹¹ or (3) justifying Islamist methods and means as self-defense against a West that pathologizes Muslims and targets Islam for destruction.⁶⁹² CLOACA denies that Islamists fight outside the strictures of LOAC and that there should be consequences for doing so, questions whether the West is entitled to self-defend, and promotes a legal regime in which methods and means available to the West contract and those available to Islamists expand. One need only face facts to conclude that CLOACA is a profoundly, even proudly, Islamophilic institution.

III. EFFECTS OF THE FIFTH COLUMN: DECREASED PROBABILITY OF AMERICAN VICTORY

The Islamist foe is winning, in part because CLOACA has been effectively wielding overwhelming combat power to discourage Americans from the use of the most effective methods and means of defeating Islamists and to encourage the conclusion that the United States is an immoral and unjust nation fighting an illegal and unnecessary war against Islam that must be terminated if the country is to reclaim its domestic and international legitimacy. So paralyzing

⁶⁸⁹ Moustafa Bayoumi, *The God That Failed: The Neo-Orientalism of Today's Muslim Commentator in ISLAMOPHOBIA/ISLAMOPHILIA: BEYOND THE POLITICS OF ENEMY AND FRIEND* (Andrew Shryock ed., 2010). Ideological congruities of Leftism and Islamism abound. See DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* 177 (2006).

⁶⁹⁰ FALLACI, *supra* note ‡, at 177-78.

⁶⁹¹ See, e.g., President George W. Bush, Remarks at the Islamic Center of Washington, D.C. (Sept. 17, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html> (“These acts of violence . . . violate the fundamental tenets of the Islamic faith . . . Islam is peace.”). To hold this view, one must maintain that Islamists are not Muslims, despite Islamist protestations to the contrary, because Islamist actions and intentions so contravene the *Qur'an* as to effectively write them out of the faith. This view has not generated consensus. HARRIS, *supra* note 5, at 109.

⁶⁹² ZUHUR, *supra* note 427, at 2-3.

is CLOACA's mischaracterization of this enemy as scattered bands of misguided "criminals" that many Americans assess the conflict as a law enforcement problem to be assimilated within a set of shared contemporary experiences that annoy without disrupting life as usual—along with visits to the DMV, dental appointments, jury duty, and traffic jams. If Americans have not yet surrendered, it would appear that they have not only abandoned the goal of defeating Islamists but also that they have chosen the comforting fantasy that they are not even at war. Even those Americans who know better do not, with few exceptions, intuit that the fate of the nation balances on a swordpoint, and most are so weary of this fourteen-year-old war that withdrawal of U.S. troops from conflict zones based solely on political timetables barely registers.

American political will is crumbling. The weaker side often wins asymmetric wars,⁶⁹³ and will again unless the U.S. counters a *trahison des professeurs*. The next Part recommends ways to neutralize this Fifth Column and win the Fourth Generation War with Islamism.

IV. RECOMMENDATIONS: NEUTRALIZING THE FIFTH COLUMN

A. *Admit that We are at War*

The West must admit that it is at war with undeterrable ideologues bent on erasing its civilization.⁶⁹⁴ A woefully untutored public and intellectually sclerotic leaders, too eager to pretend otherwise and unable to countenance that Islamism is evil, "[create] ambiguities and . . . [thus] much of the world's population remains

⁶⁹³ See Shannon French, *Murderers, Not Warriors: The Moral Distinction Between Terrorists and Legitimate Fighters in Asymmetric Conflicts*, in TERRORISM AND INTERNATIONAL JUSTICE 33-42 (James Sterba ed., 2003) (citing barbarian defeat of Rome, U.S. defeat of Great Britain, Vietnamese defeat of the United States, and Afghan defeat of Soviets).

⁶⁹⁴ Two hundred years ago, the Islamic Barbary Pirates offered the United States three options to end their depredations: (1) pay protection fees, (2) convert to Islam, or (3) wage war. JOSEPH WHEELAN, JEFFERSON'S WAR: AMERICA'S FIRST WAR ON TERROR 1801-1805 (2003). The first is no longer available. The second is surrender. The third is all honor permits.

unconvinced of the seriousness of the Islamist threat.”⁶⁹⁵ Worse, the enemy the West cannot name has not only attacked Western nations but has taken up residence within: 390,000 of the U.S. Muslim population of three million believe Islamists should attack civilian targets in the West to “defend Islam from its enemies,”⁶⁹⁶ while thousands of Islamists live quietly in the U.S. planning, training, and preparing such attacks.⁶⁹⁷ The time has long passed for comforting fictions or sweet anodynes. The West must acknowledge disturbing realities and “condemn what must be condemned, but swiftly and firmly.”⁶⁹⁸

B. Wage Total War

The West must wage total war. A counterinsurgency⁶⁹⁹ using low-intensity military force augmented by nation-building, rule-of-law development, and armed social work projects in the hope of transitioning the Islamic world to governance regimes less likely to spawn future generations of Islamists has failed.⁷⁰⁰ Total war requires far more against an enemy hostile to Western constitutional democracy and bent on conquest. *All* instruments of national power—including conventional and nuclear force and PSYOPs⁷⁰¹—

⁶⁹⁵ David Kilcullen, *Countering Global Insurgency*, SMALL WARS JOURNAL, Nov. 2004, at 40, available at <http://smallwarsjournal.com/documents/kilcullen.pdf>.

⁶⁹⁶ See MCCARTHY, *supra* note 239, at 22 (citing a 2007 Pew Research Center poll).

⁶⁹⁷ David Pace, *Al-Qaida Trained 120,000 Terrorists*, AZ. DAILY SUN (Jul. 13, 2003, 10:00 PM), http://azdailysun.com/al-qaida-trained-terrorists/article_16605f44-598e-545c-9860-00d434a35f61.html.

⁶⁹⁸ ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 235 (1960).

⁶⁹⁹ “[A counterinsurgency is] an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established . . . political authority” in which each party “aims to get the people to accept its governance . . . as legitimate.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 4.1 (15 Dec. 2006).

⁷⁰⁰ See *supra* note 38 and accompanying text.

⁷⁰¹ Threatening Islamic holy sites might create deterrence, discredit Islamism, and falsify the assumption that decadence renders Western restraint inevitable. Daniel Pipes, *Discarding War’s Rules*, N.Y. POST (July 22, 2003), <http://www.danielpipes.org/1169/lee-harris-on-why-the-us-is-discarding-wars-rules>. Yet the political climate in U.S. government, which instructs that Islamists are faithful adherents to a religion of peace and effectively countenances turning a blind eye to Islamism, is too stultifying a climate for creative strategizing; in 2012, the Chairman of the Joint Chiefs of Staff fired the instructor of a “Perspectives on

must be harnessed to win two decisive battles: (1) an offensive, to capture the hearts and minds of Islamic peoples, break their will to fight for Islamism, and leave them prepared to coexist with the West or be utterly eradicated, and (2) a defensive, to prevent Islamists from capturing the hearts and minds of peoples of the West, breaking their will to fight, and submitting the West to Islamism or eradication.

1. The Offensive Battle

Given that Western survival is at issue and Islamists are fighting a total war, self-imposed restraint is an unaffordable luxury, and the delaying action the United States and its allies have chosen to fight, using UAVs to screen their withdrawal, must give way to the use of all forms of combat power “in the way Americans used it on the fields of Virginia and Georgia, in France and on Pacific islands, and from skies over Tokyo and Dresden.”⁷⁰² The United States and allied governments have the moral duty to fight in every dimension with at least as much ferocity as was needed to defeat Nazi Germany and Imperial Japan, and to use all the methods and means crafted to deter and defeat the Soviet Union, even if it means great destruction, innumerable enemy casualties, and civilian collateral damage.⁷⁰³

LOAC is the mechanism whereby application of force to solve intractable disputes is kept from destroying the objects, norms,

Islamic Radicalism” course at the Joint Forces Staff College for developing a deterrence model built around the use of nuclear weapons to just those ends. Chris Lawrence, *Military Reviewing Training Material to Remove Anti-Islamic Content*, CNN (April 25, 2012), <http://security.blogs.cnn.com/2012/04/25/military-reviewing-training-material-to-remove-anti-islamic-content/>. Offensive PSYOPs must also be used to “destroy[] [Islamist] morale,” resolve, and “will to fight.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS para. 1-7 (15 Apr. 2005). As the U.S. envoy to the anti-ISIS coalition urges, the West must “contest” ISIS ideology on the “information battlefield” and expose it as the “un-Islamic cult it is[.]” Adam Schreck, *U.S. Official Urges Allies to Combat IS Ideology*, ASSOCIATED PRESS (Oct. 27, 2014), <http://bigstory.ap.org/article/7148d1d6039f437b9bbfeb44bd22b7cb/us-official-urges-allies-combat-ideology>.

⁷⁰² MICHAEL SCHEUER, IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR 241 (2004).

⁷⁰³ See Reisman, *supra* note 346, at 89 (“[A] government . . . will not last long if . . . it tells its electorate that [LOAC] prevents it from taking [necessary] action.”).

and principles constitutive of civilization. Yet LOAC was designed to govern interstate wars between parties whose reciprocal self-interest in compliance sustained the regime, and Islamist VNSAs fighting Fourth Generation War refuse to adhere to any rules whatsoever in an attempt to eradicate Western Civilization—thereby destroying the basis for LOAC.⁷⁰⁴ If it is not adjusted to facilitate eradication of jurispathic Islamists, then LOAC, if it depends for its compliance on its perceived utility and for its preservation on the continuity of Western Civilization, is endangered—in the first instance by Islamist repudiation and Western reprisals, and in the second by the existential threat Islamist victory represents to law more generally. Although neophobic tendencies to cling to “inherited arrangements” blind observers to “new arrangements [that] may better secure . . . [LOAC]’s fundamental goals,”⁷⁰⁵ a modified LOAC may better support a Western victory and the future of the regime itself. Rather than craft differential rules that benefit Islamists or interpret LOAC to advantage them as CLOACA urges, the West should consider that Islamists’ depredations disentitle them from the panoply of rights under LOAC. Failing to strip Islamists of these entitlements is unjust, as “[f]or [the Islamist] to claim that his rights remain intact in spite of the harm he has done to others is for him to claim that he deserves to be left in a better position than his victims.”⁷⁰⁶

As just desert, Islamists should be anathematized as modern-day outlaws shorn of rights and liable to attack by all means and methods at all places and times and to judicial execution post-interrogation.⁷⁰⁷ If law is only legitimate if predicated upon history, values, and survival imperatives⁷⁰⁸ and “[n]o society can afford . . . inflexible rules concerning those steps on which its ultimate fate . . .

⁷⁰⁴ Eric Posner, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 CHI. J. INT’L L. 423 (2005).

⁷⁰⁵ Reisman, *supra* note 346, at 83.

⁷⁰⁶ THE MORALITY OF TERRORISM: RELIGIOUS AND SECULAR JUSTIFICATIONS 292 (David C. Rapoport & Yonah Alexander eds., 2nd ed. 1983).

⁷⁰⁷ This approach risks conflating *jus ad bellum* and *jus in bello* and inviting other parties to engage in unrestricted warfare simply by asserting the justice of their causes. Yet the exception need not establish the rule: no future cause could ever be more just than defense of Western civilization against conquest by Islamists.

⁷⁰⁸ See PHILIP BOBBIT, THE SHIELD OF ACHILLES 6-7 (2002).

depends,”⁷⁰⁹ then outlawry of Islamists is an efficient means to hasten their demise and the sole reciprocal arrangement possible with a foe that already applies this regime to Western “infidels.” The West must shatter Islamists’ political will and eradicate those who do not renounce Islamism.⁷¹⁰ Commitment to rule of law is not only an end but also a means to an end. Every rule, doctrine, and policy must endure a rigorous justification process whereby its retention in the LOAC canon is predicated upon its contribution to victory.⁷¹¹

Fighting viciously with all methods and means does not imply the complete discard of LOAC. Morality and pragmatism endure, and some restraints can be observed with respect to lawful combatants and truly innocent civilians. However, there is intrinsic evil in Islamists and their cause, and should the West lose this war, it will lose its civilization and the laws which undergird it. Historically, where survival has been at stake, “the propensity to question and protest the morality of the means used to defeat the enemy [has been] markedly attenuated.”⁷¹² So, too, should doubts and disputes in this war be muted lest around them coalesce a new set of self-

⁷⁰⁹ WITTES, *supra* note 103, at 10.

⁷¹⁰ “With [Islamism] there is no common ground . . . on which to begin a dialogue. It can only be destroyed or utterly isolated.” 9/11 Report, *supra* note 7, at 362. The war in this the offensive battle against Islamism mirrors the war against Imperial Japan, when after the total defeat of Japanese arms, the occupation was conducted to ensure that “Japanese militaristic . . . ideology [was] . . . completely suppressed[.]” John David Lewis, “No Substitute for Victory”: *The Defeat of Islamic Totalitarianism*, 1 OBJECTIVE STANDARD 1 (2006-2007). Eradication of Islamism as the *de minimis* victory condition does not imply eradication of all Muslims. However, U.S. doctrine contemplates targeting the morale of an enemy’s civilian population to induce surrender because the civilian population bears responsibility for starting or continuing a war. Jeanne Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F.L. REV. 143, 172 (2001). If some Muslims in some places are sufficiently hospitable to Islamists that approbation of Islamist aims can be imputed to them, eradication of Islamism may require shattering the use of force to shatter the credibility of, and support for, this ideology; with and in this process, great collateral damage at those sites is likely.

⁷¹¹ See Kittrie, *supra* note 171, at 401 (“If there are ways of accomplishing . . . military objectives using law, the [United States] should . . . vigorously look for ways to . . . use law.”).

⁷¹² Andrew Mack, *Why Big Nations Lose Small Wars: The Politics of Asymmetric Conflict*, 27 WORLD POL. 175, 187 (1975).

imposed restraints that prevent Western forces from waging war with sufficient ferocity and resolve so that either Islamism is discredited and the political will of Islamist peoples to prosecute a *jihad* collapses, or, if necessary, all who countenance or condone Islamism are dead. Fomenting Islamic Civil War, and supporting the non-Islamist side, may be the most prudent path to this objective.

Fighting total war demands a mental reconfiguration away from wishful thinking, half-measures, and handwringing over the fate of mortal enemies and toward reawakening and acculturating the necessary fighting spirit. Spartanization of the West will require the deepening of the concept of citizenship to include duties as well as rights, and in particular, the duty to fight in defense of one's nation that has been all but extinguished over the past two generations.⁷¹³ It will also require the recovery of *thumos*, without which this collective spirit to fight, to prefer one's own people and civilization over an enemy's, and to vanquish that enemy cannot be conjured.

2. The Defensive Battle

As to the second battle—defending the political will of Americans to continue the fight against an Islamist foe bent on destroying their belief in the inherent goodness of their civilization and in their duty to defend it—Americans have hardly any inkling it is even being fought. In the fractious atmosphere of 2015 where cultural conflicts over guns, gay marriage, abortion, and the welfare state balkanize people into groups battling for the helm of the state, that national unity could ever be achieved, even in the face of an existential threat, would seem the stuff of science fiction had their

⁷¹³ See Pavlos Eleftheriadis, *Citizenship and Obligation: The Philosophical Foundations of European Union Law* 1 (Oxford Legal Studies Research Paper 45/2011, 2012) (charging members of a political community not merely with rights but duties, including military service), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928834. The duty to support national defense, conceived broadly, includes civil service. See President Barack Obama, Remarks at the Dedication of Abraham Lincoln Hall (Mar. 12, 2009) (“We must enlist our civilians in the same way that we enlist [military personnel.]”), available at <http://www.whitehouse.gov/the-press-office/remarks-president-dedication-abraham-lincoln-hall>.

ancestors not summoned forth common cause against Nazism and Communism twice in three generations. For the Greatest Generation, that the American people would not be unified, self-assured, and bent on total war against Islamism would have been too far beyond their capacity to comprehend as to be expressed here in words. Unless another profound transformation of minds causes it to appreciate the severity of the threat and to set aside lower-order differences in favor of social cohesion, the West will be defenseless before an enemy that spins doubt and despair from communal disagreement. Just as “exhibitions of indecision, disunity and internal disintegration within th[e] [United States] ha[d] an exhilarating effect on the whole Communist movement,” so, too, do U.S. cultural conflicts, particularly those revolving around interpretation and application of LOAC, encourage Islamist adversaries.⁷¹⁴ The warning issued by George Kennan at the dawn of the Cold War is as worth heeding now as then: “It is imperative that the [United States] create . . . the impression of a country which knows what it wants, which is coping successfully with the problem of its internal life and [can] hold[] its own among the major ideological currents of the time.”⁷¹⁵

C. Declare a Domestic Truce

Americans must declare a truce insofar as those issues which destroy unity of purpose and introduce doubts as to their right and duty of self-defense. While such a truce does not imply agreement as to all moral and political disputes, it withdraws issues bearing on national survivability from the political arena. Absent American victory, arguments over lesser-order “social” or distributional issues of gay marriage, abortion, and the welfare state are moot. The Greatest Generation knew that a Nazi victory would radically remake post-war America in the image of the enemy, and thus in that total war domestic opposition to war entry, aims, and conduct shrank to the vanishing point. Political leaders rallied the people to fight and win, and the military “ran the war . . . the way the . . . people . . .

⁷¹⁴ See generally George Kennan, *The Sources of Soviet Conduct*, FOR. AFF. 1 (1947).

⁷¹⁵ *Id.*

wanted it run”—with precious few restraints.⁷¹⁶ So, too, would Islamist victory supplant our way-of-life and impose *Shari’a*-based prescriptions inimical to the entire Left-Right spectrum, and so, too, must Americans cohere against this outcome.

Admittedly, this truce will resolve, for the duration of this war, arguments over how to balance security and liberty in favor of security. While such a truce might be too much to ask were it broadened to include a general moral agreement as to what is “right and wrong,” confined to this set of issues it is not only reasonable but necessary, for it is not the external enemy but the Leftist proclivity to “impose liberal solutions in military affairs . . . [that] constitute[s] the gravest domestic threat to American security” and which can only be relieved “by the weakening of the security threat or the weakening of liberalism.”⁷¹⁷ Because the Left sees the military as a danger to liberty, democracy, and peace, and because only the military and a militarized civil society can defeat the Islamist threat, the hostility of the Left to the means and methods of total war, as well as to the steps necessary to promote unity, moral certainty, and will to fight, must be attenuated. Recalling the nature of the United States as a rule-of-law republic, and the effect on domestic political will of CLOACA assertions that the United States has been fighting an unlawful and unnecessary war with illegal methods and means, the critical issue-area that this truce, or internal compact, must resolve, or at the very least withdraw from cultural and political arenas, is LOAC. Three questions must be answered in ways that defend American political will, interdict and defeat Islamic attacks, and support the offensive battle against Islamism: (1) What does LOAC require and prohibit? (2) What institution has primacy in creating, interpreting, and applying LOAC? And (3) What are the roles, rights, and duties of LOACA in interpreting and applying LOAC?

D. Rationalize LOAC

Only the most otiose or doctrinaire would dispute that the answer to the first question—“*What does LOAC require and*

⁷¹⁶ HUNTINGTON, *supra* note 617, at 315.

⁷¹⁷ *Id.* at 455-57. Facing existential threat, a polity must choose liberalism or survival. See generally CARL SCHMITT, *CONCEPT OF THE POLITICAL* (1932).

prohibit?”—depends upon philosophical commitments, value preferences, and political objectives. That the U.S. answer would afford Americans the greatest quantum of protection ought to be uncontroversial. To the extent the traditional view of LOAC comports more closely with U.S. security imperatives, self-interest directs the United States to reject most of the “progressive” developments in the field over the last forty years, including rules, institutions, and scholarship that accord Islamists advantage or otherwise shackle U.S. power. Reaffirmation of orthodox interpretations of LOAC as the lawful and ethical basis for defense of Americans against Islamism should assume many forms in many fora—including an aggressive public education campaign, “robust efforts to educate the media as to what [LOAC] does—and does not—require,”⁷¹⁸ and strategic communications to counter CLOACA disinformation.

However, just as the offensive battle calls into question whether LOAC is sufficiently permissive to facilitate destruction of Islamist will, the necessities of the battle to defend American political will further impugn regime adequacy. Comprehensive rationalization is needed: LOAC is instrumental, and to the extent it does not incorporate their values and imperatives Americans must reshape it. Some may question the legitimacy of auto-interpretation of LOAC, yet survival is its own justification. In 1861, Lincoln observed that “[m]easures, otherwise un[lawful], might become lawful, by becoming indispensable to the preservation of the . . . Nation.”⁷¹⁹ The existential threat *circa* 2015 merits as wide a margin of appreciation for U.S. leaders in divining the means and methods necessary to defend Americans and in proclaiming that these, by their indispensability, are lawful.⁷²⁰ Like Lincoln, Americans must regard law in instrumental terms and answer accordingly: LOAC permits everything and prohibits nothing that secures their survival. Americans are entitled not only to political leaders who employ any and all necessary measures but to the strong presumption such

⁷¹⁸ Dunlap, *supra* note 28, at 37.

⁷¹⁹ COMPLETE WORKS OF ABRAHAM LINCOLN 297 (J. A. Nicolay & J. Hay eds., 1905).

⁷²⁰ See Gross, *supra* note 448, at 1023 (accepting that the war against Islamism may require “Extra-Legal Measures” to “protect the nation and the public in the face of calamity”).

measures are legal, and to the salutary effects of this presumption upon their belief in the virtue of their cause and their will to fight for it.

E. Restore Ownership of LOAC to the Military

The answer to the second question—“*What institution has primacy in creating, interpreting, and applying LOAC?*”—follows from the first. CLOACA unaccountably frames LOAC debates in a manner that discounts national survival imperatives and extends LOAC beyond its functional and democratic limitations. The moment has arrived for restoration: it is the military upon whom the constitutional duty to defend Americans is incumbent, and in whom Americans repose trust. The responsibility it bears must accrue to it sufficient quanta of power and autonomy to execute its mission. Only the military has the expertise to determine the strategies, operational plans, and tactics necessary to defeat Islamism, and thus it should limn the parameters of compatible legal constraints with LOACA in support.

F. Eliminate the Fifth Column

The answer to the third question—“*What are the roles, rights, and duties of LOACA in interpreting and applying LOAC?*”—must reckon with the fact that so many of its preeminent figures function as a Fifth Column within, undermining American unity, resolve, and will to battle Islamism until victory. It is difficult in the short term to reconstitute the republican virtues that during World War II bound together the nation so tightly that no Fifth Column could have hoped to defeat Americans from within, but it is possible to dismantle the most important of the intellectual foundations that encourage Islamists in the destruction of American will to fight.

That Americans should seek to counter CLOACA as part of the defensive battle against Islamism is reasonable and necessary. The specific forms this counterattack might assume range in terms of increasing coercion along the following continuum.

1. Marketplace of Ideas

First, trusting that the free marketplace of ideas will vindicate the truth about Islamism and LOAC, and that Americans are informed and discerning enough to withstand CLOACA PSYOPs alleging U.S. illegality, one option is to do nothing. The risk is that nothing resembling equality-of-arms exists within the intellectual arena of legal academia. Liberals in LOACA so outnumber conservatives that they drown (or drive) out their voices, precluding anything even approximating a fair fight. Worse, the stultifying liberal bias and professional groupthink that pervade legal academia and inform media discussion and government policymaking are so potent as to deny opportunities to discover the very existence of ongoing debates about the Islamist threat and about the law that should govern war. Americans are left with the perception that all questions and issues arising in the Fourth Generation War with Islamism are settled and that the gates to the marketplace of ideas are closed. Their technical expertise, primacy in making and interpreting law, and GMAC alliances make CLOACA far too formidable an intellectual opponent for the lay public. With no forum in which to engage them, and precious few champions to battle on their behalf, American challengers to CLOACA face an all-but-impossible task.

2. Counter-PSYOPs: Why We Fight

U.S. PSYOP efforts have been AWOL⁷²¹ and little capability to “disrupt [Islamists’] ability to project [their] message[,] and promote a greater understanding of U.S. policies . . . and an alternative to [the Islamist] vision[,] actions, and worldview”⁷²² is available. Challenging the Islamist narrative need not devolve into

⁷²¹ French defeat by Algerian proto-Islamists suggests relative PSYOP incompetence bodes ill when states face VNSAs proficient in their use. See DAVID GALULA & BRUCE HOFFMAN, *PACIFICATION IN ALGERIA: 1956-1958* vi (2006) (“[The] field in which we were infinitely more stupid than our opponents . . . was [PSYOPs].”).

⁷²² NATIONAL STRATEGY, *supra* note 47, at 17. A decade ago, a proposal to create an office to inform Americans of the grounds for U.S. military operations fizzled under pressure from the Left. *Rumsfeld’s Roadmap to Propaganda*, National Security Archive Briefing Book No. 177 (posted Jan. 26, 2006), www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB177/. It must be implemented now.

an exercise in rank propaganda or the official distortion of truth to bury unpleasant realities in a manner similar to the Nazi and Soviet states. The United States should conduct a counter-PSYOP campaign that simply explains to Americans who their enemy is, why Americans fight, and the legality of methods and means the United States employs. This might include films, videos, and cyber content modeled after the 1940s federally-commissioned, Hollywood-produced documentary film series “Why We Fight” that countered enemy propaganda, explained the war aims of Germany and Japan, and reassured Americans of the justice of their cause.⁷²³ Along with a contemporary “Why We Fight” campaign, the United States should commission LOACA dissidents to counter the Fifth Column in scholarship and other media.⁷²⁴

Because CLOACA is devoid of pluralism, unwilling to separate knowledge-generation and dissemination from political advocacy, and is hostile to U.S. victory, more coercive solutions would reconstruct and discipline CLOACA to reclaim it from Islamists.

3. Loyalty Oaths

Educators have “extensive and peculiar opportunities to impress [their] views upon pupils in their charge”⁷²⁵ and too often their students “[cannot] withstand the poison . . . dropped into their minds.”⁷²⁶ The individual “bereft of . . . loyalty and devotion to [the

⁷²³ WHY WE FIGHT (U.S. Gov’t 1942-45); *see also* WHY WE FIGHT NOW: THE GLOBAL WAR ON TERROR (Cape Fear Filmworks 2008). The public sector must also “create, strengthen, [and] preserve conditions favorable to . . . national . . . objectives through the use of coordinated information, themes, plans, programs, and actions.” U.S. DEP’T OF DEFENSE, QDR EXECUTION ROADMAP FOR STRATEGIC COMMUNICATION 3 (2006), *available at* <http://www.defense.gov/pubs/pdfs/QDRRoadmap20060925a.pdf>.

⁷²⁴ *See* Newton, *supra* note 95, at 261 (suggesting a conservative counter-campaign). In light of past discrimination, universities might treat intellectual pluralism in LOACA as vital to the academic mission just as is racial diversity and take affirmative action in identifying, recruiting, hiring, and tenuring LOACA conservatives.

⁷²⁵ *Faxon v. Sch. Comm.*, 120 N.E.2d 772, 774 (Mass. 1954).

⁷²⁶ *Daniman v. Bd. of Educ. of New York*, 118 N.Y.S.2d 487, 492 (Sup. Ct. 1952), *aff’d*, 119 N.E.2d 373 (N.Y. 1954).

nation] is lacking in a basic qualification for teaching[,] [and] [i]n the. . . struggle for men's minds, the State is well within its province in ensuring the integrity of the educational process against those who would pervert it to subversive ends."⁷²⁷ Loyalty oaths—solemn appeals to a higher power warranting that affiants bear allegiance to the laws and goals of the state—have been part of the academy for a century.⁷²⁸ Faculty at universities that receive federal funds may be required, as a condition of employment, to pledge support for federal and state constitutions⁷²⁹ and swear “undivided allegiance to the [United States].”⁷³⁰ The Fourth Generation War with Islamism is analogous to the Cold War insofar as both place(d) the people in existential peril and require(d) the to ensure the allegiance of those in whom it reposed special trust. It asks little of CLOACA to accommodate itself to the defense of the polity that affords them safety and employment;⁷³¹ practitioners seeking admission to any state bar undergo far more extensive character and fitness exam and adhere to more restrictive behavioral standards than loyalty oaths impose. “The task of defending [LOAC] policies, as well as that of questioning the legal permissibility of those policies, falls to informed scholars, clergy, officials, journalists, and other . . . leaders.”⁷³² Federal and state governments should impose loyalty oath requirements upon LOACA. If CLOACA will not pledge loyalty, its members need not be retained in public employment.

⁷²⁷ *Thorp v. Bd. of Trustees*, 79 A2d 462, 470 (N.J. 1951), vacated as moot *per curiam*, 342 U.S. 803 (1951).

⁷²⁸ See Gabriel Chin and Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 438-42 (2003) (surveying the history of academic loyalty oaths).

⁷²⁹ *Knight v. Bd. of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd men. per curiam*, 390 U.S. 36 (1968).

⁷³⁰ IND. CODE §20-12-0.6-1(1) (now repealed).

⁷³¹ Legal academics need reminding that allegiance and loyalty are the price for status and security. Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J. L. & EDUC. 445, 464-65 (2003).

⁷³² *William v. O'Brien*, *The Jus in Bello in International Relations Studies*, 31 AM. U. L. REV. 1011, 1022 (1982) (“A law-abiding and just belligerent, however, should not be diverted from a just cause simply because many of its citizens and external critics accept as true what are, in fact, unfounded charges of war crimes and genocide.”).

4. Terminate Disloyal Scholars

A more proactive method to suppress disloyal radicals is to fire them. Islamists are heartened by their scholarly output and regard their presence within the academy as proof of American weakness and of the inevitability of Islamist victory; stripping tenure from LOACA members who express palpable anti-American bias, give aid and comfort to Islamists, or otherwise engage in academic misprision and corruption will deny the CLOACA Fifth Column the most important institutional terrain in the defensive battle. Although the question of how precisely to demarcate the zones of loyalty and permissible dissent remains open, suffering Islamist sympathizers and propagandists to inhabit LOACA and lend their combat power to the enemy is self-defeating.

5. Charge Material Support of Terrorism

CLOACA members whose scholarship, teaching, or service substantiates the elements of criminal offenses can be prosecuted.⁷³³ In concert with federal and state law enforcement agencies, Congress can investigate linkages between CLOACA and Islamism to determine “the extent, character, and objects of un-American propaganda activities in the U.S. [that] attack the . . . form of government . . . guaranteed by our Constitution.”⁷³⁴ Because CLOACA output propagandizes for the Islamist cause, CLOACA would arguably be within the jurisdiction of a renewed version of the House Un-American Activities Committee (Committee on Internal Security) charged with investigating propaganda conducive to an Islamist victory and the alteration of the U.S. form of government this victory would necessarily entail.⁷³⁵

⁷³³ See, e.g., 18 U.S.C. 2339B (2012).

⁷³⁴ 83 CONG. REC. 7568 (1938). Similar legislation in Israel would have created a committee to investigate the activities and funding of leftist human rights lawyers that “harm the legitimacy of the IDF.” *MKs Hold Stormy Debate Over Leftist Probe*, YNETNEWS.COM (Feb 2, 2011), <http://www.ynetnews.com/articles/0,7340,L-4022354,00.html>.

⁷³⁵ A renewed and broadened Smith Act would reinforce the duty of loyalty incumbent upon CLOACA. See, e.g., Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670; 18 U.S.C. § 2385 (2012) (providing imprisonment of one who

“Material support” includes “expert advice or assistance” in training Islamist groups to use LOAC in support of advocacy and propaganda campaigns, even where experts providing such services lack intent to further illegal Islamist activity.⁷³⁶ CLOACA scholarship reflecting aspirations for a reconfigured LOAC regime it knows or should know will redound to Islamists’ benefit, or painting the United States as engaged in an illegal war, misrepresents LOAC and makes “false claims” and uses “propaganda” in a manner that constitutes support and training prohibited by the material support statute.⁷³⁷ Culpable CLOACA members can be tried in military courts: Article 104 of the Uniform Code of Military Justice provides that “[a]ny person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or *other things* . . . shall suffer death or . . . other punishments as a court-martial or military commission may direct;”⁷³⁸ the Rule for Court Martial 201 creates jurisdiction over any individual for an Article 104 offense.⁷³⁹

6. Charge Treason

“Treason” occurs when an individual owing “allegiance to the United States levies war against them or adheres to their enemies.”⁷⁴⁰ National loyalty is an increasingly anachronistic

“prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the [United States] by force or violence[.]”).

⁷³⁶ Holder v. Humanitarian Law Project, 561 U.S. 1, 3, 18-20 (2010) (interpreting 18 U.S.C. §2339A(b), the material support statute).

⁷³⁷ See U.S. v. Mehanna, 2010 WL2516469 (D. Mass. 2010) (convicting a defendant for violating the material support statute by engaging in these acts on behalf of Islamists). The UK criminalizes “glorification of terrorism” and dissemination of pro-terrorist publications, and criminalizes conduct that results in prohibited effects. Terrorism Act, 2006, c. 11, § 3(8)(a) (U.K.). A similar U.S. statute would raise liberty concerns, but there is “a certain logic to using all tools at our disposal[.]” Phelan, *supra* note 30, at 115.

⁷³⁸ 10 U.S.C. § 904 (2012), UCMJ, art. 104; see also 10 U.S.C. §§ 801-946 (2012).

⁷³⁹ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(1)(A)(i) (2012) (“General courts-martial . . . may try any person for a violation of Article . . . 104[.]”).

⁷⁴⁰ 18 U.S.C. §2381 (2006).

virtue,⁷⁴¹ the crime is hard to prove, and only one treason indictment has been lodged in civilian courts since World War II. Yet in 2006, the United States indicted Adam Gadahn, an American who appeared in Al Qaeda videos urging U.S. troops to desert, claiming they were “cannon fodder” on the “losing side” of the war.⁷⁴² Disseminating propaganda manifesting an intent to betray the United States or giving aid and comfort to an enemy supports an inference of treason where the content is akin to “psychological warfare” against Americans,⁷⁴³ brands the United States an “aggressor” or employer of illegal methods and means, or casts aspersions on U.S. motives for war entry.⁷⁴⁴ Treason prosecutions shore up national unity, deter disloyalty, and reflect the seriousness with which the nation regards betrayal in war. Failure to prosecute these cases signals that the government is not fighting to win. CLOACA scholarship can be analogized to broadcasts, statements, and other communications that provided the factual predicates for previously successful treason prosecutions. Even the specter of charges might, if not transform loyalties, dampen CLOACA’s ardor.

7. Treat CLOACA Scholars as Unlawful Combatants

CLOACA scholarship and advocacy that attenuates U.S. arms and undermines American will are PSYOPs, which are combatant acts.⁷⁴⁵ Consequently, if these acts are colorable as propaganda inciting others to war crimes, such acts are prosecutable.⁷⁴⁶ CLOACA members are thus combatants who, like

⁷⁴¹ See Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason’s Return in Democratic States*, 42 VAND. J. TRANSNAT’L L. 1443, 1453-57 (2009) (surveying historical cases and noting difficulty of proof).

⁷⁴² First Superseding Indictment, *United States v. Gadahn a.k.a. Azzam al-Amriki*, SA CR 05-254(A) (C.D. Cal. Oct. 11, 2006), available at http://www.justice.gov/sites/default/files/opa/legacy/2006/10/11/adam_indictment.pdf.

⁷⁴³ *Gillars v. U.S.*, 183 F.2d 962, 966 (1950).

⁷⁴⁴ See generally *United States v. Batchelor*, 19 C.M.R. 452 (1955) (describing allegations in wartime that constitute treasonous conduct).

⁷⁴⁵ See Peter Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) Under Public International Law*, 57 AIR FORCE L. REV. 211, 226 (2005) (reaching this conclusion after surveying *opinio juris*).

⁷⁴⁶ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-T, App. Judg., Nov. 28, 2007. Criminalization of propaganda

all other combatants, can be targeted at any time and place and captured and detained until termination of hostilities.⁷⁴⁷ As unlawful combatants for failure to wear the distinctive insignia of a party, CLOACA propagandists are subject to coercive interrogation, trial, and imprisonment.⁷⁴⁸ Further, the infrastructure used to create and disseminate CLOACA propaganda—law school facilities, scholars' home offices, and media outlets where they give interviews—are also lawful targets given the causal connection between the content disseminated and Islamist crimes incited.⁷⁴⁹ Shocking and extreme as this option might seem, CLOACA scholars, and the law schools that employ them, are—at least in theory—targetable so long as attacks are proportional, distinguish noncombatants from combatants, employ nonprohibited weapons, and contribute to the defeat of Islamism.

V. POTENTIAL CRITICISMS AND RESPONSES

A. *Islamophobia*

The first criticism is that the assessment of the threat Islamism poses is grossly overblown. If Islamism is not an evil, totalitarian ideology and does not spur its followers to destroy the

is of recent provenance, yet at Nuremburg the Allies executed Julius Streicher for publishing virulently anti-Semitic newspapers that incited murder of Jews, and former Reichsmarschall Hermann Goering highlighted propaganda as an “essential part of [total] warfare.” *The Trial of German Major War Criminals*, THE NIZKOR PROJECT, <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-09/tgmwc-09-82-07.shtml> (last visited Mar. 22, 2015). For a detailed discussion of propaganda as an act of unlawful combatancy, see Richard Ashby Wilson, *Inciting Genocide by Words*, 36 MICH. J. INT'L L. no. 1 (2015, forthcoming).

⁷⁴⁷ See Major Joshua E. Kastenbergh, *Tactical Level PSYOP and MILDEC Information Operations: How to Smartly and Lawfully Prime the Battlefield*, ARMY LAWYER, July 2007, at 70 (“Civilians who take part in [PSYOP] campaigns . . . lose their protected status as non-combatants.”).

⁷⁴⁸ That use by ununiformed civilians of weapons from far beyond the “technical scope of armed conflict” is *per se* unlawful combatancy is the theory CLOACA advances to conclude that civilian CIA personnel operating UAVs from U.S. locales to kill Islamists abroad are unlawful combatants. See *Rise of the Drones II*, *supra* note 128, at 11. By analogy, CLOACA faculty in civilian garb, propagandizing on behalf of Islamists from U.S. law school offices, are also unlawful combatants.

⁷⁴⁹ See *Final Report*, *supra* note 203, at para. 47-76 (suggesting media and infrastructure used to produce and disseminate propaganda are military targets).

West to make way for the Caliphate, survival as a nation and civilization is not at stake. In fact, there may well be no compelling need for unity to defeat whatever quantum of threat Islamism does represent, if any. Existing LOAC may be adequate to the task; law enforcement measures may even suffice. With skillful statecraft that encourages Islamic moderates, a path toward peaceful accommodation, coexistence, and friendship between the West and the Islamic world may be negotiable. Any talk of civilization conflict or total war is therefore rooted, ultimately, in Islamophobia, which this Article stokes.

This imprudent critique is in deliberate disregard of the malevolent words and sanguinary deeds of Islamists splashed in ink and blood across the pages and sands of history. Rampant Islamism has resumed a struggle to achieve a goal that has eluded it for 1400 years. That religion might constitute the most violent variable in international relations is hard for Western minds to assimilate. It is frightening to accept that a long respite from religious warfare is over, and Islamism may well be separable from Islam. Yet to fail to acknowledge the Islamist threat as an existential challenge to Western Civilization, and to fail to unite to defeat that threat, would be the greatest dereliction of duty in history. Admitting that a survival imperative dictates the need to marshal urgency, unity, and courage, and to seize opportunities to defeat a threat—including a rationalized LOAC befitting a Fourth Generation War that pits honorable military forces against anticivilizational atavists—is not “Islamophobic.” It is a demonstration of *thumos*, and must be hailed as such.

B. Objective Criticism is Not Disloyalty

Another criticism is that CLOACA is a non-ideological group that has preserved objectivity and fidelity to the rule of law in the best traditions of the academy and the legal profession. By this view, when CLOACA scholarship advocates for changes in LOAC, it is careful to differentiate between saying what the law is and what it should be, and it has managed the evolutionary challenges arising from the emergence of a new species of rule-disavowing combatant

in a manner that supports the continuity and integrity of LOAC.⁷⁵⁰ If in its vigilant defense of law against barbarism it criticizes U.S. policies and generates combat power in so doing, it issues criticism and wields power not in collaboration with or on behalf of Islamism, but in support of the United States. Because the will of Americans to resist the depredations of Islamism is predicated upon their belief in the essential goodness of the nation they fight to defend, and because adherence to the rule of law is a primary constituent of this belief, CLOACA—sounding the alarm when the United States strays from the path LOAC commands—draws Americans a legal and moral roadmap redirecting the nation away from danger and enhancing its ability to prevail without sacrificing core values.

However, it is undeniable that an ideological orthodoxy profoundly out-of-step with the American people and their military drives CLOACA to discover, interpret, and apply LOAC in ways that counter traditional conceptions of the law that governed war between World War II and 9/11. Whether departing so sharply from the commands of tradition, necessity, and democratic legitimacy should be regarded as a badge of humanitarianism may be, for some, open to argument. That their scholarship and advocacy, by design or effect, invariably affords Islamists material and moral advantage in their operations against U.S. forces while beguiling Americans away from unity and moral certitude is an empirical fact. Moreover, that CLOACA never proclaims modifications or interpretations of LOAC that would benefit U.S. arms or reinforce American morale, and (almost) never decries Islamist violations of LOAC so frequent, systematic, and barbarous as to only be explicable as a deliberate battle strategy, reveals a professional cohort committed to the law in war but not as objective and apolitical scholars and not to a universal regime. Rather, the ineluctable conclusion is that CLOACA has entered the arena, chosen sides, and weaponized LOAC for use against its own people.

⁷⁵⁰ See David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 460, 466 (2011) (“[CLOACA] transcend[s] politics into a more neutral, objective realm of science, law, economics, [and] philosophy [without] aiding the enemy.”); *id.* at 460 (contending that CLOACA is “disinterested” in outcomes of wars).

C. Neo-McCarthyism

A trenchant criticism is that loyalty oaths, tenure revocation, and prosecution—measures to nudge radical CLOACA scholars toward supporting the military⁷⁵¹ and buttress the political will of Americans—signal a “McCarthyist” attack on the academy.⁷⁵² The U.S. Supreme Court itself, opining on the hoary principle of academic freedom, warned that “[t]o impose any straitjacket upon the intellectual leaders in our . . . universities would imperil the future of our Nation” and that academics “must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”⁷⁵³ Strong arguments can be made that academic freedom *requires* CLOACA to engage in spirited, even sharp, criticism of U.S. policies and conduct arguably transgressive of LOAC, and in this the exercise of academic freedom CLOACA supports the United States and its rule-of-law commitments. By this view, inducting CLOACA into the U.S. order of battle would denature academic freedom. Worse, if scrutiny and sanctions that force CLOACA to serve the state would compel it to “give up . . . critical reason[ing] in the free pursuit of knowledge,”⁷⁵⁴ imperil the nation, and trigger civilizational death, then proposals to criminalize the “disloyalty” of its members are cures more virulent than the disease.

This critique profoundly misrepresents academic freedom, which is not a sacrosanct right but a social contract in which the academic agrees to search diligently for and weigh all relevant information, specify assumptions, examine competing theories, and acknowledge epistemological and methodological limitations

⁷⁵¹ Robin Barnes, *Drafting the Priests of Our Democracy to Serve the Diplomatic, Informational, Military & Economic Dimensions of Power*, 27 BUFF. PUB. INT. L. J. 131, 158 (2009) (warning that loyalty oaths could “convert the professoriate . . . into a roving band of diplomats . . .”).

⁷⁵² See Gonzalez, *supra* note 329, at 242 (relaying claims of a “New McCarthyism” gripping the academy); Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J. L. & EDUC. 445, 446 (2003) (“As we attempt to hold faculty accountable[,] claims will be made that we are violating academic freedom.”).

⁷⁵³ *Sweezy v. State of N.H.* by Wyman, 354 U.S. 234, 250, (1957).

⁷⁵⁴ Scott Jaschik, *Academic Freedom After September 11*, INSIDE HIGHER ED. (Mar. 7, 2006), <http://www.insidehighered.com/news/2006/03/07/acfree>.

mitigating the strength of conclusions.⁷⁵⁵ In exchange, the people repose trust in, and grant continued employment to, the scholar, regardless of the destination(s) to which his search for truth leads. Academic freedom carries with it a “moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent;”⁷⁵⁶ it is not a blanket grant of immunity from the consequences of politicized “scholarship” but a contractual license conferring the “freedom to say that two plus two make four.”⁷⁵⁷ Scholars who insist, in thrall to a hostile ideology, that two plus two make five are precluded from searching for truth. Just as Cold War Communist Party membership entailed uncritical repetition of Party dogma, calling into doubt whether professor-members were fit for their positions,⁷⁵⁸ so, too, does scholarship in which two plus two make five, and five benefits Islamists, suggests CLOACA should be evicted from the bunker of academic freedom. World War II-era academics complied voluntarily with restraints on scholarship to preserve the secrecy of the Manhattan Project in building the atomic bomb. That academic freedom was no more imperiled then than it would be now to obligate CLOACA to favor the United States with its intellectual gifts indicates that temporary subordination of scholastic prerogatives to exigencies of state would not portend national doom.

D. Anti-Intellectualism

Some may fear this Article targets not only ideas about LOAC but their authors, “foreshadow[ing] a totalitarian-style purge of intellectuals such as . . . in Soviet Russia, fascist Italy, and Nazi Germany.”⁷⁵⁹ CLOACA warns that the “force” of its arguments can only be deflected by destroying the messengers, requiring depiction of its members as “extremist ideologues, glib-silver-tongued

⁷⁵⁵ See Fallon, *supra* note 518, at 19-26 (discussing the “moral and ethical” obligations associated with the concept of scholarly integrity).

⁷⁵⁶ G. A. Res. 59(I) (Dec. 14, 1946).

⁷⁵⁷ GEORGE ORWELL, 1984, 324 (1949).

⁷⁵⁸ See Sidney Hook, *Should Communists Be Permitted to Teach?*, N.Y. TIMES MAG., Feb. 27, 1949, at SM7 (describing debates over fitness of Communists to teach).

⁷⁵⁹ Glenn Gendzell, *Resisting McCarthyism: To Sign or Not to Sign California's Loyalty Oath*, 3 CAL. L. HIST. 349, 349-50 (2010).

subversives who speak . . . of American values but secretly sympathize with [Islamists]” to make them “legitimate military targets.”⁷⁶⁰ Some fear their antipathy to U.S. war policies will stir the “academic security apparatus [of] the corporate university” to rain personal and professional punishments on them.⁷⁶¹ Some expect “even those who have not taken up arms or planned attacks against the country, but . . . merely tried to support its long tradition of respecting the rule of law” by voicing dissent, will be accused, tried, and detained as unlawful combatants—or worse.⁷⁶² Treating academics as combatants because their scholarship lends support to Islamist LOAC narratives is, by this critique, a “radical rupture” caused by stretching the concept of combatant past the breakpoint.⁷⁶³

This critique insists that CLOACA owes no loyalty to the American people and cannot be brought to heel via criminal law or force of arms because as an intellectual caste it is constrained only by professional obligations that transcend state authority. Taken seriously, this argument would establish an aristocracy not only above the law but also able to exploit the law as a weapon against the very society that exalts it. This cannot stand: if and when CLOACA scholars commit treason, or otherwise engage in unlawful combatancy, they must answer for their delicts just as any others do. The perversity inherent in countenancing intellectual elitism as a basis for a defense against criminal prosecution and a grant of immunity from targeting in war is astonishing. This critique suggests that those with a more enriched capacity for understanding the nature of the threat, the linkage between legal regimes and victory, and of the criticality that the nation cohere in its moral resolve be held not to a higher standard by virtue of this knowledge but to a lower one, ostensibly because the more one learns about the

⁷⁶⁰ Frakt, *supra* note 392, at 352. Some fear government efforts to “attack the end users of [LOAC],” namely CLOACA. Sadat & Geng, *supra* note 302, at 155.

⁷⁶¹ Cheyfitz, *supra* note 669, at 716.

⁷⁶² MAYER, *supra* note 115, at 366. Some CLOACA scholars believe the government regards radical legal minds as “the equivalent of enemy combatants.” Luban, *supra* note 491, at 2020-21. If it cannot silence them, the United States will charge them as terrorists under the material support statute. See generally Alissa Clare, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651 (2005)

⁷⁶³ Frakt, *supra* note 392, at 343.

nation, the more one comes to realize it is not worth defending. This is untenable: if the United States cannot command the loyal service of its legal elites, it cannot prevail in a war in which information about LOAC is critical.

E. Jurispathic Attack on LOAC

A turn to the U.S. military for LOAC leadership and ascription to CLOACA of the malign motive of aiding Islamists in the constraint of U.S. military power may be deemed jurispathic, law-destroying acts.⁷⁶⁴ By this argument, U.S. auto-determination of LOAC is a parochial attack upon its universality, and ceding primacy to the military strips LOAC of its humanitarian *telos* and converts the remainder into a regime too weak to limit U.S. power and command respect.⁷⁶⁵

Yet only if LOAC facilitates self-preservation can the military—the institution ultimately accountable for defense of the American people—be expected to observe its constraints, and thus each and every pronouncement of CLOACA must be assessed for its effects on survival. When the West faces an existential threat from an enemy that abjures responsibility for observing LOAC and expressly aims to overthrow all regimes other than *Shari'a*, and where academic spin on the rules would render survival less likely, the insubordination of humanitarianism to efficiency and the academy to the military in determining and applying LOAC poses a much greater threat to law and the civilization it mutually reinforces than entrusting LOAC to the only institution with the capacity for and duty to defend both. CLOACA, and not the United States, has embarked on a jurispathic enterprise in articulating, interpreting, and applying LOAC. Whether Americans have the acuity to see this

⁷⁶⁴ See Luban, *supra* note 750, at 462 (noting that “legal success” for CLOACA will “constrain a state’s military forces by declaring some of their tactics legally off limits”). See generally Luban, *supra* note 442, at 151 (claiming CLOACA critics are jurispaths who undermine LOAC); McCormack, *supra* note 120, at 102.

⁷⁶⁵ See Sitaraman, *supra* note 84, at 1835 (condemning U.S. for treating LOAC as “merely another tool . . . to be changed whenever it . . . constrains strategy”); Luban, *supra* note 750, at 462 (stating that critics of CLOACA’s primacy over LOAC really want “to insinuate that law should never constrain armed might”).

and keep the faith that the U.S. remains committed to the rule of law and entitled to win will decide this war. Discouraging CLOACA aspirations for LOAC is a more forgivable sin than losing it.

F. Proto-Fascism

Some may harbor concerns that this Article incites authoritarianism insofar as it counsels militarization, withdraws debates over the enemy from the political arena, vilifies those who fail to acknowledge a grave threat, punishes disloyalty, and takes up law as sword and shield to defend and destroy political will. Some might quail at a perceived call to erect a police state that intimidates and propagandizes to stifle dissent⁷⁶⁶ and incorporates the worst characteristics of the enemy that sparked mobilization in the first place—disregard for the rule of law, imperialistic ambition, and subordination of rights to The Cause. Such supposition is baseless. This Article merely implores CLOACA to concede that mobilization on all fronts is as necessary a response to the current threat condition as it was during World War II. Loyalty is part of the burden of citizenship, even for dissenters as to the morality or rectitude of a given war. Rights are attended by corresponding duties, and the state may obligate citizens—even academics—to contribute to the struggle in those ways they are able.⁷⁶⁷ LOAC is an artifact fabricated to reflect and protect core values and goals, and it is fitting that it be shaped by its users to serve these values and goals. Slavish adherence to a dysfunctional rule-set is a suicide pact, and what seems illiberal today will be overdue the day after Islamists immolate U.S. cities with nuclear devices.⁷⁶⁸ The goal of the West is neither territorial nor imperial: it is simply to discredit Islamism and destroy the will of Muslims to fight on its behalf, thereby to make possible, if they allow

⁷⁶⁶ See, e.g., Luban, *supra* note 491, at 2020–21 (intimating the possibility of this criticism); Luban, *supra* note 359, at 9; MAYER, *supra* note 115, at 366.

⁷⁶⁷ See, e.g., PLATO, CRITO 43(a) (chronicling Socrates' decision to accept induction into the Athenian army to fight a war he opposed on the ground that because he had accepted the benefits of Athenian citizenship he was obligated to accept corresponding burdens, including military service).

⁷⁶⁸ A Congressional subcommittee predicts this will transpire in the near future. BOB GRAHM ET AL., WORLD AT RISK: REPORT OF THE COMMISSION ON THE PREVENTION OF WEAPONS OF MASS DESTRUCTION xv (2008).

it, a civilizational coexistence, or, if they will not, to wipe Islamism, and if need be its adherents, from the earth.

VI. CONCLUSION

The *Song of Roland* recounts that Charlemagne, victorious over Islamic forces by dint of Roland's sacrificial warning, orders treasonous Frankish courtiers arrested and their leader, Ganelon, tried. Despite the evidence, Ganelon's crafty counsel nearly sways the judges into an acquittal besmirching Roland's honor when Roland's kinsman, Thierry, interrupts to demand a judicially-sanctioned duel to ascertain guilt. When God intervenes, guiding the far-weaker Thierry in slaying Ganelon's champion, Pinabel, Roland is vindicated, and the convict Ganelon is drawn and quartered as the other traitors are hanged. The Kingdom of the Franks is saved. Yet as the *Song* concludes, the dogged Muslim remnant marches on, undaunted in its quest to extend the faith by the sword.⁷⁶⁹

History repeats. Civilizational conflict, machinations of internal enemies, sophistry perverting justice, and lionization of patriotic sacrifice are as relevant now as when the *Song* was transcribed. Just as the Islamist army could not imperil the Kingdom of the Franks but for turncoats within Charlemagne's court, so too are contemporary Islamists, incapable of destroying American political will themselves, reliant on a Western Fifth Column. CLOACA, conjuring a witches' brew from intellectual dishonesty, cowardice, anti-Americanism, and a desire for an Islamist victory among other foul ingredients, incants LOAC to trick war-weary Americans into blaming themselves for "torture," "illegal" wars, and the conflict with Islamism itself. Breaking the spell cast by this coven of academics is *sine qua non* for Western victory. Inexplicably, CLOACA, unmolested, keeps wielding scholastic arguments in a PSYOP campaign. The cumulative weight of its attacks, filtered through media and government and distilled into claims that Islamism poses no threat and to reclaim its legitimacy the United States must surrender and yield up its leaders for prosecution, has metastasized, inflicting potentially mortal damage upon U.S. political

⁷⁶⁹ SONG OF ROLAND, *supra* note 1.

will. ISIS, atrocities and terror in its wake, and recruits and weapons flooding its ranks, is poised to capture Baghdad and Damascus; Cairo is next; soon, the West? As Islamists expand into and target Africa, Asia, Europe, and the Americas, the United States and its allies, after suffering sixty thousand casualties post-9/11, withdraw from Afghanistan and return small but militarily insignificant contingents to Iraq.⁷⁷⁰ Not having chosen to win, the West is losing this war.

In a 1936 speech in Paris, future British Prime Minister Winston Churchill challenged the West to rouse from its torpor and war-weariness to confront the gathering evil of Nazism:

We must recognize that we have a great treasure to guard. The inheritance in our possession represents the prolonged achievement of the centuries . . . there is not one of our simple uncounted rights today for which better men than we have not died on the scaffold or the battlefield. We have not only a great treasure; we have a great cause.⁷⁷¹

A half-century later, on June 6, 1984, at a ceremony on Omaha Beach marking the fortieth anniversary of the beginning of the liberation of Europe from Nazism, President Ronald Reagan, addressing assembled U.S. Army Rangers who had scaled the cliffs at Pointe du Hoc under murderous fire that fateful French morning and, despite horrific casualties and the fanatical resistance of a determined foe, seized their objective, asked and answered another question that deserves revisiting:

Why did you do it? [You] . . . had faith that what [you] were doing was right, faith that you fought for all humanity[.] It was the deep knowledge—and pray God we have not lost it—that there is a profound moral difference between the use of force for liberation and the use of force for conquest. You were here to liberate, not to conquer, and so you and those

⁷⁷⁰ See Paul McLeary, *1000 82nd Airborne Troops Iraq-Bound in January*, DEF. NEWS (Dec. 19, 2014), <http://www.defensenews.com/story/defense/policy-budget/warfare/2014/12/19/iraq-isis-deploy/20643829/> (reporting January 2015 deployment of U.S. “advisors” to Iraq).

⁷⁷¹ Sir Winston Churchill, Address at the Théâtre des Ambassadeurs, Paris (Sept. 24, 1936).

others did not doubt your cause. You all knew that some things are worth dying for . . . and you knew the people of your countries were behind you.⁷⁷²

How, then, just twenty years later in 2004, could a senior Islamist strategist acknowledge he was waging a 4GW against the West he “expected to win[?]”⁷⁷³ In 2015, do we still recognize Western civilization as a coruscant treasure worth “taking every measure within our power to defend”? Does our civilization still produce citizens who can put aside the instinct for self-preservation and risk everything in the “deep knowledge” that “there is a profound moral difference between the use of force for liberation and the use of force for conquest”? Do we have “faith that what [we are] doing [i]s right” because we fight “for all humanity”? Do we “kn[o]w that the people of [our] countries are behind [us]”? Are we brave enough to face death on battlefields and scaffolds, too? Will we marshal all resources, including our minds, in our own defense? Or have we lost our belief in the goodness of Western civilization, surrendered faith in our cause, and hardened our hearts and minds against those who risk death on our behalf? Are we incapable of discerning that Islamism is the apotheosis of evil, or so demoralized and fagged that we, too, are betting on Islamists to win this war, and have devolved into a corrupt and contemptible culture lacking claws and courage to confront what creeps before our gates?

Western civilization has been “seize[d], encompass[ed], and ambush[ed]”⁷⁷⁴ by a Fifth Column, and will be vanquished, subsumed within the Caliphate, and ruled by *Shari’a* if a *trahison des professeurs* goes unchecked. Whether and how CLOACA might be induced to defect from the Islamist cause and cease “sabotaging [our] house by their hands”⁷⁷⁵ are cardinal important questions; methods of suasion, obligation, and coercion must be considered. With a loyal and intellectually honest LOACA serving *pro patria*, Western peoples, unshakeable in the legal and moral validity of their actions

⁷⁷² President Ronald Reagan, Remarks at a United States-France Ceremony Commemorating the 40th Anniversary of the Normandy Invasion (June 6, 1984).

⁷⁷³ Hammes, *supra* note 33, at 14 (referencing internal Islamist correspondence).

⁷⁷⁴ *Qur’an* 9:5, *supra* note 50.

⁷⁷⁵ Akram, *supra* note 56.

and freed of the doubts and despairs that damp courage and will, would win the war of ideas, sweep the fields of Islamists, and claim victory. Only if we muster the fortitude to declare, in respect to LOAC, that two plus two make four and compel CLOACA to stop saying “five” can we get on with this business.

The warison sounds; the warning is sent; the assistance of the sacred and the profane is summoned. Whether once again the West will heed the call, march apace against the Islamist invaders, and deliver justice swift and sure to disloyal courtiers abasing it from within, or whether the West has become deaf to the plaintive, fading notes of one encircled knight who long ago called forth its soldiers and calls them yet again, will decide if the *Song of Roland* remains within the inheritance of future generations of its peoples. If the West will not harken now to Roland and his horn, neither it, nor its peoples, nor the law they revere will outlive the bleak day of desecration when Islamists, wielding their *Sword*,⁷⁷⁶ strike his *Song*, all it represents, and all it can teach, from history.



⁷⁷⁶ *Qur'an* 9:5, *supra* note 50.