

Columbia University
Graduate School of Arts & Sciences
Human Rights Studies Master of Arts Program

Special Operations Forces: Guardians of Human Rights and Our Constitutional Legitimacy

Michael Paul Heitz

Thesis Advisors:

Michel Paradis – Lecturer in Law, Columbia Law School & Georgetown Law Center
Philip C. Bobbitt – Professor of Law, Columbia Law School & University of Texas School of
Law

Submitted in partial fulfillment of the
Requirements for the degree of
Master of Arts

June 2018

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Abstract

Human rights advocates seem to buy into only the “Magna Carta” theory of human rights. That is, for the most part, they point only to written instruments like the Bill of Rights or the ICCPR to define what our human rights are. These rights are ordained and granted by the elites and the powerful. This has its merits. However, I argue that, although written instruments are important, in the United States our system is based on the idea that we set our own human rights through a lived constitutional system that facilitates the reification of the values of the people. The people do not need to be granted our own rights because we are the referent to which any right must cohere. That is, beyond courts, gods, societies, ethnic groups, and treaties, there is the people, and it is up to us to decide what counts as a “human right.”

Given this idea of human rights, despite what one may think, Special Operations forces can and do protect human lives, human rights, and our constitutional legitimacy in counter-terrorism situations. They are the most effective response to global decentralized terrorist groups. They are capable of fighting amongst civilians, protecting and sparing civilian life, in ways that conventional military forces are not. They spare other soldiers’ lives by carrying out tasks that would take a higher death toll on conventional military units. They work with locals in ways that older counter-insurgency scholars could not have imagined possible. They are more capable of taking hostages and rendering enemies hors de combat than conventional military units. Finally, in doing all this they protect the legitimacy of our human rights regime, the legitimacy of our Constitution, and most importantly innocent people.

Keywords: Human Rights, Constitutional Law, Counter-terrorism, Political Theory, Constitutional Theory, Special Operations, Military.

I. INTRODUCTION¹

“WL’s [White Liberals] think all the world’s problems can be fixed without any cost to themselves. We don’t believe that. There’s a lot to be said for sacrifice, remorse, even pity. It’s what separates us from roaches” – Dr. Paul Farmer

[at Dachau] "The impact of seeing those people behind that fence left me saying, only to myself, 'Now I know why I am here.'" - LT. Dick Winters

Human Rights do not exist. That is, despite the religiosity of many human rights advocates and international lawyers, there is no external referent, outside of humans and our values, which dictates that any individual has any right or liberty. It is people who matter, and human rights can follow only from this. In this paper, I will argue that special operations forces protect human rights by protecting the innocent, reducing casualties, and protecting our Constitutional legitimacy, but at base, this paper is about putting the focus onto people and their protection and choices. There is only us, and we decide.

We have decided, in fact, that there are certain things to which all human beings are entitled and which no humans should be subjected to as a matter of morality and value. And, in some of these instances, we have codified or legislated law to protect, enforce, or substantiate these values, with varying success. In all these instances we jealously guard our rights and ways of life, whether it is the right to wear a burka or to own a dog and enjoy an evening on the front

¹ Thank you to Professors Paradis for his comments and for his time and especially for his ability to rebut my strongest points of view in ways that very few can or do. Thank you also to Professor Bobbitt for his time and his comments and for his endless inspiration by writing what I want to say much more intelligently, much earlier, and must more comprehensively than I ever could. To Kristina Eberbach and Gergana Halpern for their help and support despite the relentless pace of student inquiries. To Professors Elazar Barkan, Bruce Cronin, Bobby Chesney, Lauren Fielder, Rainer Braun, Danielle Ikawa, and Colin F. Jackson for comments on earlier work which served as the basis and inspiration for this final paper. And to the countless American hero aid workers, soldiers, and Spec ops warriors who have inspired me.

porch with a lemonade.² Human rights real people are concerned with boil down to the right to life and the right to live.

In the United States, human rights are protected by legal tools of varying power, jurisdiction, and permanence. The most important of these legal tools is the Constitution for the United States of America. It does not list rights or many values, and its direct legal application is limited. In fact, you will find stronger and more easily applicable human rights legal protections in legal codes like New York City's human rights law or the New Jersey Law Against Discrimination. Yet, the Constitution is a powerful legal tool with which we endeavor to bring about a better world for our people and, among other things, protect their human rights through fair process and decision making under the benign influence of good laws under a free government.³

As a democratic system recognizing that the people, not the state, are the sovereign, its adequate protection of and respect for human rights is a necessary condition to its continuing acceptance and legitimacy as a governmental system. One of the most pressing issues for such a democratic system in modern times is how to preclude harm to innocent individuals from decentralized terror groups while simultaneously deterring terrorist organizations at scale and respecting human rights and civil liberties. This tension creates an awkwardness that must be navigated but is difficult to balance. Among the United States Government's most powerful tools for simultaneously protecting individual human rights and the general welfare in the age of global decentralized terror networks are our special operations forces. To repel terrorism we must appeal not only to law and strategy but also tactics.

² See Akhil Reed Amar, *America's Unwritten Constitution* 2012, 95-138.

³ *Washington's Farewell Address*.

This idea is abhorrent to both international human rights advocates and civil libertarians. How could those highly trained warriors, whose purpose is to kill, advance human rights in any way? However, the truth of the matter is that these special operators are a necessary condition to fighting international terrorism successfully. Contrary to the European Court of Human Rights's opinion in *McCann v. UK*, the use of SOF in uncontrolled environments actually militates against unnecessary killings. These forces rescue hostages, distribute medical care, and limit death tolls in close combat. Perhaps more importantly, they can give policy makers the beginning of a bottom-up approach. A SOF centered bottom-up approach would be more sensitive to the realities on the ground. Some SOF like Army Special Forces, for whom foreign language training is a must, are skilled at making diplomatic inroads with the local populations whose ultimate responsibility it will be to rise from the tyranny of terrorist groups.⁴ Female cultural support teams in SOCOM and JSOC are also highly skilled at gaining the trust of and aiding women in the culturally conservative areas most affected by terrorism.

II. VALUES & AN AMERICAN CONSTITUTIONAL CONCEPTION OF HUMAN RIGHTS

“America did not invent human rights. In a very real sense, it is the other way around. Human rights invented America.” – President Jimmy Carter, 1981⁵

“The truth is, after all the declamation we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” – Alexander Hamilton 1788⁶

The concept of human rights is inherent within us. To give an honest theory of human

⁴ See, SFC Tim Kennedy & Dr. Mike Simpson, *Sheepdog Project* Episode 1: So it Begins... (Active Duty Special Forces soldier and former Army Ranger and JSOC Doctor discuss situational awareness and informational advantages of Green Berets).

⁵ Jimmy Carter, *President Jimmy Carter's Farewell Address* (January 14, 1981) accessible at <http://www.jimmycarterlibrary.gov/documents/speeches/farewell.phtml>.

⁶ Alexander Hamilton, *Federalist Papers* Number 84.

rights we must take a multi-disciplinary approach, consilience - as E.O. Wilson would call it.⁷ Altruism is a genetic, evolutionarily adaptive emotion, not some misguided utopian ideal.⁸ For example, capuchin monkeys seem to object to inequity and unfairness. When a monkey is offered celery after witnessing another monkey receive a grape he will emphatically reject the celery, presumably out of a perceived unfairness.⁹ When the same experiment is performed with chimpanzees the grape receiving chimpanzee will occasionally refuse to eat its grape until the other chimpanzee also receives a grape.¹⁰

Given the genetic basis of altruism, it is unsurprising that thought and value of rights is present throughout modern history or that there has been a direct correlation between its improvement and time.¹¹ The theory that underpins any honest idea of human rights is an acknowledgment of morality's near universality. It is "a single, radical, and complicated idea: human beings have rights simply by virtue of being human."¹² This radical idea is so powerful that it endures despots' attempts to repel it,¹³ academic attempts to discredit it as western imperialism,¹⁴ and revolutions carrying the banner for constitutional provisions protecting it.¹⁵

⁷ E.O. Wilson, *Consilience: The Unity of Knowledge* (1999). Accessible at: <http://www.wtf.tw/ref/wilson.pdf>.

⁸ See Peter Singer, *A Darwinian Left*, (1999) (Arguing that both altruism and self-interest are inherent in human nature, and, as such, should be incorporated into "Leftist" politics.).

⁹ Frans de Waal, *Moral Behavior in Animals*, (2011), accessible at https://www.ted.com/talks/frans_de_waal_do_animals_have_morals?language=en.

¹⁰ *Id.*

¹¹ See e.g., John Locke, *The Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT 121, 122-28 (Thomas I. Cook, 1947); Thomas Paine, *Rights of Man*, (Howard Fast, 1961); Steven Pinker, *The Better Angels of Our Nature* (2011).

¹² Ralph G. Steinhardt, et al., *International Human Rights Lawyering*, 1 (2009).

¹³ See <http://www.history.com/topics/joseph-stalin>

¹⁴ See *Joseph Stalin, HISTORY*; Jean-Francois Revel, *Anti-Americanism* (2001) (detailing how both left and right academics have railed against America, one of the rationales being that human rights is an excuse to widen the "American Empire.").

¹⁵ For example the French and American Revolutions of the 18th Century.

Values arise not due to an external referent but as a result of an interaction between our phenotype and sense data about our environment resulting in a belief – regardless of whether they exist because of evolution or intelligent design.¹⁶ We can parse through value beliefs. In fact, there is a substantive difference between the types of values in which we believe. Some value judgements are so different in degree from others that they are different in kind. Aesthetics judgments are, to nearly all people, less important than moral judgments.¹⁷ Likewise, some moral beliefs - which refer to values involving action, intention, knowledge, cause, and effect - are subordinate to, and often derived from, self-referential values of necessity. This is what we refer to nominally as human rights.

Human rights are irreducible brute rights, the value judgment cousin of Elizabeth Anscombe's brute facts.¹⁸ They are the few value beliefs that are, like Stephen Jay Gould's conception of scientific answers, "confirmed to such a degree that it would be perverse to withhold provisional assent."¹⁹ Russians are receptive to the idea of human rights even if they do not think they believe in them or have not been exposed to the concept before.²⁰ This gives credence to my idea that the concept of human rights is an inherent human oriented value.²¹ I would speculate that if an individual Russian, prior to being introduced to the concept of inherent human rights, was threatened with death or rape that Russian, like everyone else, would feel, very intensely, that this is something to be avoided at all costs.²² Along with this conception of

¹⁶ Steven Pinker, *The Moral Instinct*, THE NEW YORK TIMES (January 13, 2008); Peter Singer, *A Darwinist Left* (1999); Richard Dawkins, *The Selfish Gene* (1976).

¹⁷ Karl R. Popper, *The Open Society and Its Enemies Volume 1: The Spell of Plato* (1966) 64-66; Immanuel Kant, *Critique of Judgment* (1790); David Hume, *Of the Standard of Taste* (1757).

¹⁸ GEM Anscombe, *Brute Facts* (1958).

¹⁹ Stephen Jay Gould, *Evolution as Fact and Theory* (1994).

²⁰ Max Stackhouse, *Human Rights and Public Theology*

²¹ *Id.*

²² *Id.*

human rights, it is important that we recognize that humans are individuals in themselves – part of but not beholden to the collective. Max Stackhouse has tried to look to various cultures and theologies to see what, in fact, is essential to both theological rights and morality and to human rights generally.²³ However, if I read Stackhouse correctly, his public theology represents a collectivist foundation of rights, as opposed to an individualistic view.²⁴ He still assumes human rights are ordained by an apotheosis whether it is God, or the state, or the culture. I commend his altruism and popular method but condemn his collectivism.

Thus, I think the question is, “what value beliefs do individuals hold about him or herself with sufficient emotional intensity and commonality with other individuals so as to count as more than mere desire and warrant the title of human right?” If Rawls simplifies justice in law by asking to what rule we would all assent without knowledge of how it impacts ourselves, perhaps I would simplify justice in human rights by asking to which generalized deprivations we would all vehemently object with only knowledge of how their absence might impact ourselves.²⁵ Human rights are then correctly extended to all by virtue of an amalgam of the above self-interest and the presence of altruism in a just, open society of consent.

Because these values obtain in people as a matter of their nature, in the United States, and I would conjecture the general population of other countries, we generally do not conceive of human rights as something owed to us because some government or treaty body has “also granted”²⁶ them to us, nor are these rights claimed solely against the government. It is the people who are the sovereign, not the state.²⁷ It is the people who retain rights, not the state who

²³ *Id.*

²⁴ *Id.*

²⁵ See John Rawls, *A Theory of Justice* 16-17 (rev. ed. 1999).

²⁶ *The Magna Carta* (1215) accessible at <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

²⁷ Philip C. Bobbitt, *Constitutional Interpretation*, 4-5 (1991).

bestows them. Because the nature of human rights is such that, “To deny any person their human rights is to challenge their very humanity,”²⁸ human rights must be recognized as inalienable, or else governments would control what it is to be human. If rights were bestowed upon a people by an organization they can be taken away.²⁹ Just as you cannot draw breath for me, I cannot think freely if the government does it for me. In this context, a government exists only to protect the rights and liberties of its citizens, because those rights exist independent of the government and cannot be alienated from the people or to the government.³⁰ For example, note the language of the First Amendment to the Constitution, it says “*the* freedom of speech” shall not be abridged. The freedom of speech already existed, and the government is not empowered to abridge this already existing right. President John Quincy Adams, exercising his freedom of speech, made this powerful philosophical argument regarding the inalienability of rights during the Amistad Slave Case where illegally kidnapped slaves successfully mutinied and were jailed,

“It is alleged in the Official Journal, that war gives the right to take the life of our enemy, and that this confers a right to make him a slave, on account of having spared his life. Is that the principle on which these United States stand before the world? That DECLARATION says that every man is "endowed by his Creator with certain inalienable rights," and that "among these are life, liberty, and the pursuit of happiness." If these rights are inalienable, they are incompatible with the rights of the victor to take the life of his enemy in war, or to spare his life and make him a slave. If this principle is sound, it reduces to brute force all the rights of man. It places all the sacred relations of life at the power of the strongest. No man has a right to life or liberty, if he has an enemy able to take them from him. There is the principle. There is the whole argument of this paper... I say that the doctrine of Hobbes, that War is the natural state of man, has for ages been exploded, as equally disclaimed and rejected by the philosopher and the Christian. That it is utterly incompatible with any theory of human rights, and especially with the rights which the Declaration of Independence proclaims as self-evident truths. The moment you come, to the Declaration of Independence, that every man has a right to life and liberty, an inalienable right, this case is decided.”³¹

²⁸ Nelson Mandela, *The Mandela Visit; Excerpts from Mandela Speech to Joint Meeting of Congress*, New York Times (1990).

²⁹ *Id.*

³⁰ Bobbitt, 243-246 *Supra* note 8.

³¹ Note that this theory also explains the role of human rights in the law of armed conflict.

The idea that a collection of governments, including despots, kings, and dictators, can bestow upon the people their “human rights,” is repugnant to the core idea of human rights. So, for that matter, is the idea that some sort of council of elites can name my rights - as in the European Union and the European Council. So, for that matter, is the idea that a group of men in a stuffy room in 18th Century Philadelphia can dictate our rights. We, the People, get to choose what our own human rights are, and our Constitution facilitates this by forbidding the government to act in inappropriate ways and allowing and encouraging the People to participate and exercise control at various points. The upshot here, is that human rights are not a religion. They are deeply held beliefs, true, but their instantiations are based upon evolving values by and of the people.

Although too many state signatories believe that they are the sovereign and the people receive the rights they are so gracious as to bestow upon them (going all the way back to Magna Carta), some of the text of International legal and declarative instruments has it exactly right from an individualist, and ultimately altruistic, point of view.³² The following text of international human rights law implies and demonstrates a belief in the separate concepts of law and rights. The International Covenant on Civil and Political Rights states, “Every human being has the *inherent* right to life. This right shall be *protected* by law. No one shall be arbitrarily deprived of his life.”³³ The European Convention on Human Rights similarly states “Everyone’s right to life shall be *protected* by law.”³⁴ It is Malala herself who feels that she should not be

³² As Karl Popper conceives of Individual altruism.

³³ Article 6. (emphasis added)

³⁴ Article 2(1).(emphasis added)

attacked with acid or raped,³⁵ and these same self-referential feelings obtain in all people, in almost all circumstances, and almost always at the same intensity.

As such, one must distinguish human rights from the law that seeks to ensure them against encroachment. Because human rights are values, they are separable, despite what Bentham says, from the law which protects them.³⁶ Just because they are both value related human created fictions does not mean that law and human rights are the same. If human rights were merely coextensive with legal protections, what exactly was the Civil War fought over? If we accept the assumption that human rights are merely those rights protected by law, then we accept the assumption that at the time of the “Emancipation Proclamation” Lincoln sought to deprive slave holders of their human right to own slaves in exchange for something that was less-than a human right. Perhaps I am engaging in an obtuse bit of presentism, but this is morally absurd. It should be clear to any sensible reader not already assuming that law and rights are one in the same, that the Union finally asserted what President Adams argued. Slaves had human rights and the law was an unjust one which they had a moral duty to disobey.³⁷

Though human rights have no external justification, the creation of law in a democratic society is justified upon value judgments, including human rights. The most important statement in the philosophy of human rights comes from the Declaration of Independence. Most Americans, and many human rights activists and democratists know the words, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Equally as

³⁵See Malala Yousafzai, *I Am Malala*, (2013).

³⁶ Jeremy Bentham, *Anarchical Fallacies* (1816).

³⁷ See Martin Luther King, *Letter from a Birmingham Jail* (1963).

important is the following less celebrated line, “[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

The Declaration of Independence was not a democratic document, but Thomas Jefferson laid out a blue print for rights and a rights respecting government wherein we accept that all people are created equal and in possession of inalienable rights. It would not be brought to fruition, of course, of its own accord, but as Dr. King said, “When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.”³⁸ Nevertheless, human rights and laws are distinct, and while pervasive human rights abuses may undermine some human rights *law* as “utopian” these abuses do not imply that human rights or respect for human life and liberty are similarly utopian.³⁹ The weakness of enforcement mechanisms in some places does not change the human driven values of life, liberty, and the pursuit of happiness.⁴⁰ In other words, “these documents [laws] do not create new rights; they recognize them.”⁴¹

While I contend that the main purpose of the Constitution is to protect Americans’ human rights, it does not attempt compile a comprehensive list of rights. Despite the misleading common nickname, “the bill of rights,” you will not actually find the words “bill of rights” in the Constitution. Nor, for that matter, will you find a straight forward list of rights, at least not in the sense of the Universal Declaration of Human Rights. You will find rights named and

³⁸ Dr. Martin Luther King, Jr., *I Have a Dream* (1963).

³⁹ Steinhardt, 2 *Supra* note 21.

⁴⁰ Thomas Jefferson, *Declaration of Independence*.

⁴¹ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1-62 (1982) in *Id.* at 10.

incorporated by reference, such as the “freedom of speech” in the First Amendment, but these references are really carving out federal power more-so than naming rights. The Ninth Amendment buttresses this point. The Ninth says, “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others *retained by the people*.” This might seem undesirable to fans of the UDHR and similar documents – Ruth Bader Ginsburg has gone as far as saying that she would not model new constitutions on our own. However, it is important that we are allowed to dictate our own rights and their instantiations through a participatory, lived constitutional experience where laws are the exception and not the “rule” because in a truly democratic society all values must be taken into account across time to adequately represent and protect “ourselves and our posterity.”⁴²

The upshot of what I have written, is that when we want to know which values are human rights for which we may need to create laws we should look across individuals, similar to Stackhouse’s theological exploration. We should then ask, is this value belief, so common, so as to render the denial of the question, “do you believe that if your right to x is threatened you would react with intense emotions” perverse. If it is, and the right is one that is routinely threatened, then we should create legal or governmental protections. I imagine that the right to life, the right to be treated equally under the law, the right to be free from torture, the right of personal sexual integrity, and the right of personal identity would be a non-exhaustive list of exemplary rights that every individual would protect intensely.

The different levels of democratic protection for each right are not logically implied by the right itself because they are not coextensive or logically equivalent. However, we have

⁴² The Preamble to the United states Constitution.

already seen that once individuals feel empowered to speak out on behalf of their rights, it is probable that a democratic society and, if appropriate, the state will rightfully view those rights as rights worth protecting, or as narrower instantiations of broader rights. Consider the current reckoning against powerful, sexually abusive men (and the backlash asking for due process for the accused, some of whom may be innocent). Of course, the myriad possible instantiations of certain rights, such as transgender identity, create disagreements. However, the human empathic and sympathetic abilities are also intrinsic,⁴³ and we will continue to improve our protection of rights because of the hardworking people in government and NGOs, despite what may seem like steps in other directions around the world.

Of course, this has been partly a long-winded exercise in elucidating my own description of human rights combined with the general American theory of rights and liberties. However, it is important to have this theory of human rights, which is tied closer to actual people than the classic European Magna Carta-type theories of human rights, because without this explanation (or one similar), I am not sure one could fully grasp the importance of the American Constitution or Special Operators to real human rights protection. As Karl Popper has put it,

“the attempt to make heaven on earth invariably produces hell. It leads to intolerance. It leads to religious wars, and to the saving of souls through the inquisition. And it is, I believe, based on a complete misunderstanding of our moral duties. It is our duty to help those who need help; but it cannot be our duty to make others happy, since this does not depend on us, and since it would only too often mean intruding on the privacy of those towards whom we have such amiable intentions.”⁴⁴

⁴³ V. Gallese, et al., *Mirror Neurons and the Simulation Theory of Mind-reading* TRENDS IN COGNITIVE SCIENCES (1998) (12 ed., Vol. 2) 493-501.

⁴⁴ Karl R. Popper, *The Open Society and Its Enemies Volume 2: Hegel and Marx* (1966) 237.

III. AMERICAN CONSTITUTIONAL GROWTH INTO THE 21st CENTURY AND BEYOND

“A profound thought is always in a state of becoming; it adopts the experience of a life and assumes its shape.” – Albert Camus, 1955.⁴⁵

*“Man is not the enemy of man but through the medium of a false system of government.”—
Thomas Paine, 1791⁴⁶*

Philip Bobbitt in *Terror & Consent* gives us a theory of state and of terror. Since at least the princely states of the renaissance, the state’s form has evolved in a “mutually affecting relationship” with warfare – and since September 17, 1787, law.⁴⁷ New constitutional orders emerge after and because of epochal wars, and the form of those epochal wars change to suit the new constitutional order.⁴⁸ There is no “end of history” because, like natural selection, state evolution is not an ordered, linear progression toward a specified endpoint.⁴⁹ It is, instead, an adaptation to its environment. In the Constitutional context, the environment consists of the values and struggles of the people with war being one of the natural principal drivers of constitutional decisions. In fact, many of our democratic institutions are attempts at replacing war in constitutional and legal development.⁵⁰ In constitutions, as in biology, occasionally these adaptations cause a transition of species.⁵¹ We live such a transitive period.⁵²

The United States and its democratic and consensual allies represent two distinct but related concepts of statehood. On one hand, they are states of consent.⁵³ States of consent operate only with the consent of the governed. In a sense, the people of the United States “do ordain” our Constitution every day. Consent requires both assent and the ability to withhold it.

⁴⁵ Camus, 114

⁴⁶ Thomas Paine, *The Rights of Man* (1791).

⁴⁷ Bobbitt, 23-27; See Akhil Reed Amar, *America’s Constitution: A Biography*.

⁴⁸ Bobbitt, 23-27.

⁴⁹ Despite what Hegel, Marx, and Fukuyama might think.

⁵⁰ See Popper.

⁵¹ See Richard A. Richards, *The Species Problem* (2010).

⁵² Bobbitt, 9.

⁵³ *Id.* at 13.

These states of consent are opposed to states of terror – or non-consent. States of terror and states of consent perpetually threaten each other’s existence – this is exacerbated by today’s increasingly globalized and interconnected world.

On the other hand, they represent the emergence of human rights respecting “market states.”⁵⁴ These modern states of consent claim legitimacy by reacting to 21st Century values, promising to safeguard human rights and maximize their citizens’ opportunities.⁵⁵ They protect human rights through the rule of law, provision of basic human necessities,⁵⁶ and military power.⁵⁷ Their aim is to preclude anyone from preventing their citizens to do that which is their lawful right to do.⁵⁸ Market states maximize economic opportunities through the decentralization of control - moving from regulation to facilitation.⁵⁹ As such, people accept responsibility, raising risk.⁶⁰ This is opposed to nation states, which claimed legitimacy by promising to increase the material well-being of their citizens.⁶¹ In a market state, there are no guaranteed outcomes, but there are guaranteed minimums, rights, and opportunities. It is, in many ways, a purely anti-socialist and anti-fascist state which might resemble Karl Popper’s ideal of an individualistic altruistic society.

Market states are global in nature. Borders become increasingly transparent as the individual steps to the forefront of international politics and security.⁶² We are attempting to transition from a semi-zero-sum game theory world to a stag hunt. It is in the interest of

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 12, 20.

⁵⁶ Though Bobbitt might disagree here. It’s unclear where state welfare, which he argues will be abdicated, and basic necessities divide if at all.

⁵⁷ *Id.*

⁵⁸ *Id.* at 152.

⁵⁹ *Id.* at 11-12.

⁶⁰ *Id.* at 85.

⁶¹ *Id.* at 86.

⁶² *Id.* at 469.

international security to cooperate; states must “cooperate or die.”⁶³ Alliances, and with whom, are increasingly important.⁶⁴

The American Constitution is well-situated to receive these changes because it is participatory and lived, yet it has a strong textual and structural basis with an attention to practice and history.⁶⁵ The constraints of this paper are too small to allow for a rich exploration of Constitutional structure and interpretation. Suffice it to say that the Constitution has a flexible structure that, as noted before, does not name rigid rights and empowers the government of the people to act as we see fit. Thus, for example, we can vote for a President who will expand our global presence and embrace modern market state realities or we can vote for a President who will attempt to insure us against the globalized world by putting up walls. It is, as Hamilton, Wilson, Madison, other framers, and the American public intended, a uniquely American document that allows us to “promote the general welfare,” “establish justice,” “secure the blessings of liberty,” and “provide for the common defense.”⁶⁶ In other words, it is a constitution that facilitates action rather than rule us from the grave.

Because the constitution is mostly vague but not ambiguous, it allows us to interpret and choose among several modes of constitutional meaning. That is, the Constitution is Kirpkean in its rejection of the a priori-necessary and a posteriori-contingent distinction in favor of the inclusion of meaningful priori-contingents such as what is “necessary and proper” or when a punishment is “cruel and unusual.”⁶⁷ There are certain a posteriori necessities, as well, such as

⁶³ *Id.* at 510.

⁶⁴ See *G7 Summit: Trump Lashes out at Key Allies* BBC News, Accessible at <https://www.bbc.com/news/world-us-canada-44434558>.

⁶⁵ See Philip Bobbitt, *Constitutional Fate* (1984); Philip Bobbitt, *Constitutional Interpretation* (1991); Akhil Reed Amar, *The Bill of Rights*, (1992); Akhil Reed Amar, *The Unwritten Constitution*, (2012).

⁶⁶ The Preamble to the Constitution for the United States of America.

⁶⁷ See Saul Kripke, *Naming and Necessity* (1980).

the inclusion of minorities in the definition of “people.” We can and do interpret the constitution by means of several legitimate forms of Constitutional argument and look to a variety of legitimate constitutional evidence.⁶⁸ This interpretive flexibility allows us an adaptability to present circumstances that more rigid constitutions do not enjoy, while our core structure guarantees our system a persistence and endurance that unwritten constitutions are not promised. It is easier for an unwritten constitution to be so altered by changing values and threats that it becomes an entirely different constitution, and it is so difficult for a more rigid constitution to adapt that it might need to be abandoned entirely. This is what allows us to have a Constitution that adapts to changing values and rights but also protects those rights in times of emergency without recourse to an “emergency constitution” like Bruce Ackerman’s.⁶⁹ Both eventualities are threats, to a lesser degree, to the US Constitution, whereas presumably each extreme would only be threatened by one. However, balance is what has given the US Constitution 229 years of resilience despite changing constitutional orders.

In America, and other states of consent, we have successfully empowered individuals through legal and technological advancement and established high levels of liberty and justice. This has created new vulnerabilities. These vulnerabilities will inevitably be exploited in a Coase style bargain of force by enterprising opportunists in a world where the “frictions of war” for asymmetrical foes are greatly reduced.⁷⁰ Just as economist Hymen Minsky realized that real and perceived increases in market stability, given human nature, counter-intuitively contribute to increases in market *instability*, we should recognize that security, peace, and respect for human

⁶⁸ See Philip Bobbitt, *Constitutional Fate* (1984); Philip Bobbitt, *Constitutional Interpretation* (1991); Akhil Reed Amar, *The Bill of Rights*, (1992); Akhil Reed Amar, *The Unwritten Constitution*, (2012).

⁶⁹ See Bruce Ackerman, *The Emergency Constitution*; Lawrence H. Tribe, *The Anti-Emergency Constitution*.

⁷⁰ See Von Clausewitz, *On War* (1832).

rights are, given human nature, inherently insecure.⁷¹ It is in this way that our constitutional structures adhere to the second law of thermodynamics. As Stephen Hawking tells us,

“The explanation that is usually given as to why we don’t see broken cups gathering themselves together off the floor and jumping back onto the table is that it is forbidden by the second law of thermodynamics. This says that in any closed system disorder, or entropy, always increases with time. In other words, it is a form of Murphy’s law: things always tend to go wrong! An intact cup on the table is a state of high order, but a broken cup on the floor is a disordered state. One can go readily from the cup on the table in the past to the broken cup on the floor in the future, but not the other way around.”

We must intervene to protect our rights, people, and way of life because constitutionalism cannot just be left to its own devices. Justice is on the other side of hard work and adaptation because even a stable world trends toward chaos.

Therefore, it is important to understand that liberty & security and human rights & counter-terrorism are not antagonists. They are actually co-dependent. Without security, no one’s human rights will be protected, and without human rights there is not much for a government of the people to secure. A corollary is that we must recognize that the refusal of human rightists to call the war against terrorism a war, when we are being killed in Brussels, Baghdad, New York, Madrid, Orlando, Damascus, Paris, is a denial of fact. And the refusal of nationalist extremists to accept that human rights must be protected during war is a false choice.⁷² As Kenneth Roth says, human rights and counter-terrorism are essential allies, and, in fact, as I’ve argued above, this is the main purpose of a consensual, created government.

Since the government’s only legitimate *raison d’être* is to protect and ensure its people’s

⁷¹ See Hymen Minsky, *The Financial Instability Hypothesis*.

⁷² For an extreme example, See William C. Bradford, *Trahison des Professeurs: The Critical Law of Armed Conflict Academy as an Islamist Fifth Column*, 3 NAT’L SEC. L.J. 278 (2015) (where former Trump Official and law professor argues that those who promote human rights at the expense of LOAC are lawful targets – including law schools and law professors);

rights and those rights are so easily threatened, “the vigor of government is essential to the security of liberty; that in the contemplation of a sound and well-informed judgment, their interests can never be separated.”⁷³ The government’s broad powers must not exceed that which is necessary and sufficient to ensure the rights it claims to ensure, or these powers unduly threaten the very rights they secure. The actions taken pursuant to governmental power in a particular situation must be proportional. “The means must be proportional to the end.”⁷⁴ Finally, “We must plan for freedom, and not only for security, if for no other reason than that only freedom can make security secure.”⁷⁵ Thus, both security and liberty are necessary conditions to a good government and a human rights respecting society. The American Constitution is premised on this balance as a means of repelling tyranny and anarchy.

IV. TERROR & TERRORISM

*“The proclamation of the caliphate means that every Muslim has a duty to pledge allegiance to the new caliph of Muslims or otherwise dies the death of the time of Jahiliyaa.” – Mohammed al-Adnani, ISIS Spokeman.*⁷⁶

*“Civilians, then, are the key to the terrorists’ strategy. They kill civilians, and more often than not, they hide behind them--hoping that the prospect of more innocent deaths will help them escape retribution.” – Benjamin Netanyahu, 1986*⁷⁷

Freedom brings vulnerabilities.⁷⁸ Today’s unprecedented levels of individual empowerment and our newly interconnected world make it possible for individuals to band together to threaten international security and human rights.⁷⁹ Terrorists are adapting to

⁷³ Alexander Hamilton, *Federalist Papers Number 1*.

⁷⁴ Alexander Hamilton, *Federalist Papers Number 23*.

⁷⁵ Karl R. Popper, *The Open Society and Its Enemies Volume 2: Hegel and Marx* (1966) 194.

⁷⁶ Jackson, *Hunting Down*.

⁷⁷ Netanyahu, 10, *supra* note 52.

⁷⁸ *Id.* at 85.

⁷⁹ *Id.*

vulnerabilities in the way our societies are structured constitutionally.⁸⁰ This quasi-red-queen game between parasite and host results in terrorists rejecting the market states' legitimacy, either by lacking a belief that the state can truly be democratic⁸¹ or by rejecting the theory of democracy as a whole,⁸² while adopting its basic structure to exploit its vulnerabilities.⁸³ We have seen this in the rise of al-Qaeda and ISIS.

However, unlike state-terrorist relationships from the past, both market state terrorists and market states of terror present a true threat to the development and of market states.⁸⁴ Market state terrorists have evolved to the point where they affect the state of warfare, which allows them to influence states' evolution, possibly culminating in a victory for states of terror. Barbary pirates and anarchists were thorns in the sides of Kingly States and State Nations, but they could not change the state's evolution. These new terrorists threaten the United States Constitution in both ways explicated in the last chapter. They threaten to force us to change our value of certain human rights and of liberty in ways that would change our Constitutional values so far in degree as to render us a completely different country.

On the other hand, these terrorists threaten to dismantle structural, Constitutional values such as democracy and the rule of law so as to force us to abandon the Constitution wholesale. If private groups consistently and effectively punish others extra-judicially for behavior they deem unacceptable or consistently and effectively force people to behave in a certain way, what

⁸⁰ *Id.* at 23.

⁸¹ *See*, Octavian Manea, *Hybrid War as a War on Governance*, Small Wars Journal (Aug 19 2015)(I am always struck when I am talking here in Moscow with people who are close to the political and military circles by the mirror imaging that is at work, the extent to which they genuinely believe, at some level at least, that Western democracy is a sham, something manipulated by press barons, media spinners, political technologists.)

⁸² Osama Bin Laden, *Letter to the People of the United States of America*.

⁸³ *Id.* at 87.

⁸⁴ *Id.* at 13 (as to the threat to liberties).

good is law? If these terrorist groups and states of terror can effectively regulate our behavior in lieu of legal or democratic process – as North Korea did to Sony or Islamic terrorist threats did to South Park, doesn't that supplant law? An example of the types of problems created by the breakdown of law and legitimacy due to terrorism and illegitimate counter-terrorism actions can be found in the al-Nashiri Gitmo trial. Due to the breakdowns of law and procedure, the case has seen over a decade of essentially no progress, and now, after defense attorneys walked away claiming they could not ethically participate in the trial, it has been abated since February.⁸⁵ Thus, we have a man we accuse of masterminding the murder of American sailors who, as of now, we have no legal and practical way to either convict or release. What could be less legitimate?

In that scenario, where the American Constitution and the state constitutions provide no assistance in securing human rights or ameliorating pressing societal problems, isn't a government premised upon enmity, self-preservation, and coercion, a government of exceptions, more appropriate – or perhaps no government at all?⁸⁶ Neither a dictatorship, nor a world of disparate warring non-state tribes should be attractive to anyone who values human rights or democracy. Thus, today's terrorist groups are the most lethal and consequential yet.⁸⁷

More alarming still, is the potential that these terrorist groups have to increase their capacity to murder through the acquisition of weapons of mass destruction; they are almost certainly more willing to use them than any terrorist group or state yet.⁸⁸ The globalized market place facilitated by market states provides fertile ground for the WMD trade – look to the A.Q.

⁸⁵ Michel Paradis, *Why the Collapse of Al-Nashiri's Defense Team Matters* Lawfare, accessible at <https://www.lawfareblog.com/why-collapse-al-nashiris-defense-team-matters>.

⁸⁶ See Carl Schmitt, *The Concept of the Political* (

⁸⁷ Bobbitt. at 46.

⁸⁸ *Id.* at 59.

Khan network.⁸⁹ There is no real reason to believe this cannot or will not happen among terrorist groups. In fact, there is evidence that ISIS has acquired chemical weapons.⁹⁰ Since terror and consent can never peacefully co-exist because terror works to delegitimize states of consent, it stands to reason that if market state terrorists acquire true WMDs they may actively endeavor to use them against states of consent. Modern terrorists' potential for and history of destruction makes counter-terrorism and counter-proliferation no-fail missions. Further, it appears that in the market state evolution we will either triumph over states of terror or succumb to them.⁹¹ We have begun the "Wars Against Terror," and we are losing.⁹²

ISIS has emerged as the leading example of a market state terrorist group. They are decentralized, shadowy, and global. The Islamic State is able to recruit and operate globally, more violently, and more publicly than any terrorist groups before them – including al-Qaeda.⁹³ They claim to be the caliphate of all Muslims – God's Kingdom on Earth.⁹⁴ They do not respect borders and have taken land by force.⁹⁵ They have killed and maimed civilians in horrifying numbers.⁹⁶ Their most market state like feature, however, is that they are able to generate an incredible amount of revenue. By most estimates, they are (or were at their height) by far the wealthiest independent terrorist organization ever.⁹⁷ They offer the best salary available to terrorists. Thus, though they are illegitimate for the purposes of both consent and law, they are a virtual market state.

⁸⁹ *Id.* at 101-121.

⁹⁰ *ISIS' Chemical Weapons*, Arabinda Acharya FOREIGN AFFAIRS.

⁹¹ *Id.* at 4, "whether that change will result in the triumph of states of consent or states of terror."

⁹² *Id.* at 13. (This paper does not discuss the third prong of the Wars Against Terror, natural disasters.)

⁹³ Bobbitt, 85.

⁹⁴ William McCants, *The ISIS Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State* (2015), 1.

⁹⁵ *Id.* at 2.

⁹⁶ See Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, THE NEW YORK TIMES (August 13, 2015).

⁹⁷ McCants, 1.

Once we look at ISIS through the lens of the market state, I believe we also see that we are *not*, in fact, aligned against Muslims or Islam.⁹⁸ We fight terror and violence. Terror and violence are the defining factors that make ISIS a threat to humanity. Islam just happens to be a ready vessel for market-state terrorists to co-op – just as terrorism in the 20th Century lent itself to Communists and Nationalists and Terrorism in the 19th Century lent itself to Anarchists and racial supremacists. Islam speaks of the global Muslim population as one nation of people, an Ummah, governed without regard to state borders.⁹⁹ Jihad by the Ummah is the active advancement of the Muslim people – through education, politicking, or force.¹⁰⁰ As part of Jihad, if someone is genuinely found to obstruct a member of the Ummah from practicing his faith, the obstruction must be removed.¹⁰¹ Once one makes the false assumption that consensual government stands in direct opposition to good Muslim practice, it follows that Muslims must remove states of consent. All citizens are collectively guilty because the democratic system requires participation, as Bin Laden believed. This huge begged question is how market state terrorists have co-opted Islam to achieve their ends.

Islamic terrorism is not the only type of global decentralized terror with which states of consent must be concerned, and it is certainly not the only mode this new breed of terror can or will take. One is right to be concerned about all forms of ideologies which can use this sort of global form to harm civilians. The rising tide of Communist and Socialist action is worrying, along with its accompanying anti-democratic Post-modernist, and post-post-modernist, philosophical underpinnings and politically obsessed power-based critical legal theory. Even

⁹⁸ See Bobbitt, 3.

⁹⁹ S.K. Malik, *The Quranic Concept of War* (1979), 11-12.

¹⁰⁰ *Id.* at 59.

¹⁰¹ *Id.* at 17-24

more so, is the public displays of anti-democratic fascist, Nazi, and Confederate white supremacist philosophies. The events in Charlottesville and in so many other places show that white nationalism is becoming deadlier in the United States. James Alex Fields, Jr. is a terrorist who killed an innocent girl, and many of his fellow modern white supremacist have operated and become radicalized in a similar globalized decentralized fashion over the internet as parts of small groups of disconcerted losers. Further, the hybrid warfare tactics of would-be states of terror like Russia are worrying because of their effectiveness at destabilizing democratic states and societies of consent. However, there is no doubt that it in 2018 Islamic terrorism is the most exemplary form of modern terrorism, even if Russian hybrid warfare has greater destructive potential, and as such, that is where I will direct my focus for this paper.

A. GLOBALIZED, DECENTRALIZED TERROR

“How big of an asshole do you have to be before Ayman al-Zawahiri, the commander of al-Qaeda, Bin Laden’s former right-hand man, goes, ‘I can’t work with these guys. These guys are maniacs?’” -- Jon Stewart, 2014.¹⁰²

“We will conquer your Rome, break your crosses, and enslave your women... our children and grand-children will reach it, and they will see your sons as slaves on the slave market.” -- Mohammed al-Adnani, ISIS Spokesman.¹⁰³

Daesh, or ISIS, is a substantially new threat in both form and function from past threats like the PLO or al-Qaeda or even Hezbollah. Daesh wants to murder and conquer as quickly as possible using whatever means not only necessary but also most efficient, and it has shocked the world with both its success and cruelty.¹⁰⁴ This makes the depraved confederation an immediate threat that the world must neutralize. However, it is different in one other important way. It seems to have been able to sustain its own actions without the direct support of a foreign state

¹⁰² Jon Stewart, The Daily Show with Jon Stewart. Accessible at <http://www.thedailybeast.com/videos/2014/02/09/isis-too-hot-for-al-qaeda.html>.

¹⁰³ Jackson, 153, *supra* note 21.

¹⁰⁴ Naylor, 436-38, *supra* note 7.

sponsor of terror, unlike most other powerful terrorist groups, e.g., the Shiite jihadi groups supported by the Iranian Quds in Iraq.¹⁰⁵ Some estimates place Daesh as the wealthiest terrorist organization in the history of mankind far outstripping other non-state terrorist groups.¹⁰⁶ Due to its unprecedented independence, unmatched even by al-Qaeda at its height, Daesh has seemingly infuriated most of the world powers – as disparate in interest as Iran and the United States.¹⁰⁷ Thus, it is an imperative and immediate threat to International Human Rights and to the United States, but it does not have the explicit backing of a powerful government so the usual reluctance to change law *may* be mitigated in the international community.

The Islamic State’s theology represents a break from the Islamic extremism of the 80s, 90s, and 00s.¹⁰⁸ Usama Bin Laden and his al-Qaeda followers believed in jihad and the eventual rise of the Islamic State just as much as Daesh does.¹⁰⁹ However, al-Qaeda’s immediate priority was not to establish the Islamic State to accommodate the apocalypse.¹¹⁰ UBL and his chief deputy Ayman al-Zawahiri professed a desire to first win over popular Muslim support because they knew that the “West” i.e. NATO is too powerful to allow a brutal caliphate to take hold before they rallied the majority of Muslims.¹¹¹ They expressed this to the godfather of Daesh, al-Qaeda in Iraq leader Abu Musab al-Zarqawi.¹¹² Zarqawi held a more urgent apocalyptic view, and, as such, he cared very little about winning over popular Muslim support.¹¹³ He preferred to

¹⁰⁵ *Id.* at 295-308; Benjamin Netanyahu, *Terrorism: How the West Can Win*, 11-13.

¹⁰⁶ Jackson, 143, *supra* note 21.

¹⁰⁷ Tim Arango & Thomas Erdbrink, *Iran and US Both Attack ISIS, but Try Not to Look Like Allies*, NEW YORK TIMES, Dec. 3 2014, accessible at, http://www.nytimes.com/2014/12/04/world/middleeast/iran-airstrikes-hit-islamic-state-in-iraq.html?_r=0.

¹⁰⁸ McCants, 7-8, *supra* note 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

establish an Islamic State by force.¹¹⁴ This demonstrates that in a global decentralized organization, affiliated groups will be motivated by slightly different local and global goals. ISIS, when it was part of Al-Qaeda, was exemplary of this, and now that ISIS is globalized, the same phenomenon happens under its umbrella.

Around the time the U.S. Army Special Forces Detachment – Delta captured the Iraqi Dictator Saddam Hussein, Zarqawi convinced Bin Laden and Zawahiri to accept his group into al-Qaeda and give him free reign to operate in Iraq.¹¹⁵ He took the opportunity to begin a brutal campaign of murder and torture across Iraq, fortifying his stronghold.¹¹⁶ Zarqawi targeted both American military personnel and Shia civilians within Iraq.¹¹⁷ Again, where Bin Laden would have sought to unite Shia and Sunni, Zarqawi viewed them as enemies worthy of death.¹¹⁸ Further, al-Qaeda in Iraq largely operated among civilians as one would expect a global terrorist organization to do.¹¹⁹

Zarqawi's rise blindsided American military and political leaders, which seems a major oversight when one considers that the war in Iraq was waged, in part, for Iraq's supposed connection to terrorism.¹²⁰ When the Joint Special Operations Command killed Zarqawi in 2006, his successor Abu Ayyub al-Masri quickly put the wheels in motion to establish the Islamic State – against the advice and wishes of al-Qaeda senior leadership.¹²¹ Though, UBL,

¹¹⁴ *Id.*

¹¹⁵ *Id.*, Naylor, 233-237, *supra* note 7.

¹¹⁶ McCants, 31-43, *supra* note 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Naylor, 236-37, *supra* note 7.

¹²¹ *Id.* at 279-289.

skeptical as he was, seemed to give a post-hoc approval of the establishment of the Islamic State in Iraq for political reasons.¹²²

By 2008, coalition forces decimated most of the Islamic State in Iraq's senior leadership and the "State" had little to no territory.¹²³ In 2010, American forces killed both al-Masri and the mysterious Abu Umar al-Baghdadi. The Islamic State in Iraq was, for present purposes, dismantled.¹²⁴ It appeared that the Islamic State's extremely brutal tactics had backfired. However, once the United States, under United States President Barack Obama's order to follow Former President George W. Bush's agreement, pulled a majority of its troops out of Iraq, the Islamic State had another opportunity to seize power.¹²⁵

After a U.S. led airstrike killed al-Masri and Abu Umar al-Baghdadi, the personable Abu Bakr al-Baghdadi ascended to command of the State, pardoned by the Iraqi government, and established it as a formidable presence in Syria then Iraq.¹²⁶ The instability in both countries lent itself to Daesh's rise.¹²⁷ Al-Baghdadi took the position that the Islamic State's original failure was not indicative of a surplus of brutality but a deficit.¹²⁸ The remedy was to be even more cruel and inhumane.¹²⁹

What followed was a campaign that makes Zarqawi's look benevolent. It might be easier to list Human Rights Daesh has not violated than that they have. However, some of the most notable examples of Baghdadi's brutality are: the systematic rape of Yazdi women and girls

¹²² McCants, 14-17, *supra* note 2.

¹²³ *Id.* at 45.

¹²⁴ *Id.* at 45.

¹²⁵ *Id.* at 77-88.

¹²⁶ *Id.* Jackson, 141, *supra* note 21.

¹²⁷ McCants, 77-88, *supra* note 2.

¹²⁸ *Id.*

¹²⁹ *Id.*

(justified of course by warped understanding of Quranic provisions),¹³⁰ the institution of strict hadith law,¹³¹ the beheading of civilian US and British journalists and aid workers,¹³² the forced-marriage and eventual torture and murder of American humanitarian aid worker Kayla Mueller,¹³³ the utilization and indoctrination of young Muslim children,¹³⁴ the purposeful failure of distinction between Daesh fighters and civilians, ad infinitum. Furthermore, the Daesh threat is not contained to Iraq and Syria or even to the Middle East in general. The attacks in Paris and Brussels and the Russian airliner bombing adequately demonstrate Daesh's increasingly global reach both operationally and inspirationally.¹³⁵

Because of the immediate and brutal nature of its goals, Daesh has also recruited soldiers that al-Qaeda would never have admitted to its ranks – more common street thug than Jihadist warrior.¹³⁶ They have also been able to capture the hearts of some western Muslims at a rate that is baffling to many observers.¹³⁷ Building on UBL's legacy of decentralization and remote inspiration, they have expanded their media arm immensely.¹³⁸ The slick, well-produced *Dabiq* magazine as well as fandom among jihadi internet chatrooms has done wonders for its global recruiting efforts.¹³⁹ However, the most effective means of recruitment might just be that the

¹³⁰ Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, THE NEW YORK TIMES (August 13, 2015) accessible at <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html>.

¹³¹ McCants, 135-39, *supra* note 2.

¹³² See e.g., Mariano Castillo & Ben Brumfeld, *Obama Calls Hostage's Beheading by ISIS 'Pure Evil'* CNN (November 16, 2014) accessible at <http://www.cnn.com/2014/11/16/world/meast/isis-kassig-killing-images/>.

¹³³ James Gordon Meek, *ISIS Leader Abu Bakr Al-Baghdadi Sexually Abused American Hostage Kayla Mueller, Officials Say*, ABC NEWS (August 14, 2015) accessible at <http://abcnews.go.com/International/isis-leader-abu-bakr-al-baghdadi-sexually-abused/story?id=33085923>.

¹³⁴ Jackson, 145, *supra* note 21.

¹³⁵ *Paris Attacks: What happened on that night*, BBC (9 December, 2015) accessible at <http://www.bbc.com/news/world-europe-34818994>; *Brussels Attacks*, The Guardian, accessible at <http://www.theguardian.com/world/brussels-attacks>; Jason Hanna, Michael Martinez, & Jennifer Deaton, *ISIS Publishes Photo of what it says is bomb that downed Russian plane*, CNN (November 19, 2015) accessible at <http://www.cnn.com/2015/11/18/middleeast/metrojet-crash-dabiq-claim/>.

¹³⁶ McCants, 140-142, *supra* note 2.

¹³⁷ Jackson, 145, *supra* note 21.

¹³⁸ McCants, 142-45, *supra* note 2.

¹³⁹ *Id.* at 104; 142-45.

jihadis it recruits think its brutal tactics are just plain “badass.”¹⁴⁰ This willingness to be extreme has also extended its global network by winning it more than its fair share of more established Jihadi fighters, for example, Nigerian mass-murdering maniac Abubakar Shekau’s Boko Haram and 80% of al-Qaeda affiliate al-Shabaab.¹⁴¹

Although ISIS has started losing soldiers and territory in large numbers, it is an example of a pure market state terrorist group. Future market state terrorist groups, and possibly criminal syndicates like the Hells Angels and MS-13, will come in shapes and sizes, morphing to meet the market state with their own agendas, technologies, and goals, but ISIS will remain the prototype which all market state terrorist groups will emulate in some fashion – conscious or not.

V. PRECLUSION, DETERRENCE, AND NEW WAR AIMS

“Every act of creation is first an act of destruction.” – Pablo Picasso.¹⁴²

“Well, what's wrong with trying to help people, what's wrong with trying to bring peace, what's wrong with trying to make the world a little better?” - George HW Bush

“For me, an area of moral clarity is: you're in front of someone who's suffering and you have the tools at your disposal to alleviate that suffering or even eradicate it, and you act. I'm not recommending this work for everybody, but it's hard to turn back once you've seen it, and I've definitely seen it.” - Paul Farmer

ISIS will lose. We need not fear their establishment of a global caliphate of terror. However, we must still ask whether we will win. In the post-WWII and Cold-war period, an

¹⁴⁰ Daniel Byman & Jeremy Shapiro, *Be Afraid. Be A Little Afraid: The Threat of Terrorism from Western Foreign Fighters in Syria and Iraq*, THE BROOKINGS INSTITUTION, 13, accessible at <http://www.brookings.edu/~media/research/files/papers/2014/11/western-foreign-fighters-in-syria-and-iraq-byman-shapiro/be-afraid--web.pdf>.

¹⁴¹ Hamdi Allkhshali, *ISIS Leader Purportedly Accepts Boko Haram’s Pledge of Allegiance*, CNN (March 12, 2015) accessible at <http://www.cnn.com/2015/03/12/middleeast/isis-boko-haram/>; Robyn Kriel, *Al-Shabaab Faction Pledges Allegiance to ISIS*, CNN (October 23, 2015) <http://www.cnn.com/2015/10/22/africa/al-shabaab-faction-isis/>.

¹⁴² Rollo May, *The Courage to Create* (1972) 60.

enemy's defeat is no longer equivalent with victory.¹⁴³ Rather, because the United States is too powerful to be defeated by conventional means, we have seen a convergence of terrorism and warfare.¹⁴⁴ Asymmetrical warfare is the new norm against the United States and our allies, even for world powers like Russia.¹⁴⁵ This has profound implications not only for the *jus ad bellum* justifications for the use of force in general, but also for what manners and means are acceptable and proportionate not only to the proposed military objective to be targeted but to the overall war aim and terrorist threat.

The general war aim for the US in today's strategic counter-terrorism environment is to preclude violence against innocent civilians protecting human rights and constitutional legitimacy.¹⁴⁶ There are no parades in a war of vigilance, more like law enforcement than WWII. In fact, part and parcel with preclusion strategies is the goal of deterrence in a way that is like deterrence achieved by law. That is, where terrorists attempt to de-legitimize law, we seek, or should seek, to both supplement law by using tactics which take the place of law where there are gaps and legitimize these actions by following the law when we take them. If ISIS falls but we fail to protect the life, liberty and human rights of the innocent (or worse, purposely target the innocent), we have still lost and the legitimacy of our liberal democratic system. Sure, the focus of American Constitutionalism is on process, but the process is only justified by the final outcomes. If our outcomes are no different than those of dictatorships or tribal societies, this hard work has been for naught.

¹⁴³ Bobbitt, 186-189.

¹⁴⁴ I believe, of course, that we are at war with terrorist organizations.

¹⁴⁵ See, Samuel Charap, *The Ghost of Hybrid Warfare*, Survival (2016).

¹⁴⁶ *Id.* at 152.

Deterrence in the counter-terrorism context is not the type of deterrence one usually associates with international affairs. It is not an extended type deterrence like is found in nuclear non-proliferation or even necessarily a direct deterrence. It is a deterrence at scale. Samuel J. Rascoff uses airport security checkpoints as an easy example of counter-terrorism deterrence.¹⁴⁷

To win the wars against terror we must make changes to our strategy, policy, and law.¹⁴⁸ When Bobbitt says we must make these changes in the “wars against terror” he refers to vast wars on the related fronts of: counter-proliferation, counter-terrorism, and humanitarian aid (in this paper I discuss only counter-terrorism).¹⁴⁹ However, “wars against terrors” should be understood in another sense if we want to successfully preclude harm and deter terrorism. Each global organization, like al-Qaeda or ISIS, has its own war aims, strategies, and tactics; and each of its affiliates has slightly different regional or local war aims, strategies, or tactics culminating in an informal terrorist federalism – al-Shabaab, Abu Sayyaf, and Boko Haram might be thought of as Texas, California, and New York. Furthermore, states like Syria or Pakistan who tolerate terrorism in contexts where it assists them or operate in hybrid asymmetrical warfare themselves have their own disparate goals.

We are fighting small wars of policy, law, combat, and legitimacy against a range of goals, strategies, and tactics. To effectively counteract these varying wars of terror we must be capable of fighting on all planes. As Jack Goldsmith has explained in the cyber-terrorism context, doing this while maintaining our traditional values and strengths is a tall order.¹⁵⁰ Adding to this strain, strategy and policies in a state of consent must be public (though

¹⁴⁷ Samuel J. Rascoff, *Counterterrorism and New Deterrence* NYU Law Review vol. 89 issue 930, 846-856.

¹⁴⁸ *Id.* at 16.

¹⁴⁹ *Id.* at 3.

¹⁵⁰ Jack Goldsmith, *Strengths Become Vulnerabilities*, Lawfare.

operations and tactics need no always be). Secret policies and strategies undermine our democracy in and of themselves.¹⁵¹ "'Strategy' concerns the role of the State in defending itself from violence from other states [or certain kinds of terrorist groups]."¹⁵² In other words, counter-terrorism has changed, just as the world itself has.

There are several assumptions in counter-terrorism we have made that apply to terrorism of the past but not to this new form of terrorism. We must rethink our goals. Contrary to what the Europeans seem to think, as codified in *McCann v. UK*, we must be prepared to fight amongst civilians in lawless lands and situations, protecting as much life as possible, and Special Operations Forces are the best option for this necessary but not sufficient aspect of the protection of human rights against terrorism. We must recognize that, although government can and does overreach and infringe upon civil liberties, legitimate governmental might¹⁵³ is a necessary (but not sufficient) condition to protecting and enriching those human rights. We must act with legitimacy in the eyes of the people and our allies. We must also extend our view of counter-terrorism to look at the supply side, our own vulnerabilities, and at deterrence.

Two final intellectual points worth noting are what Bobbitt terms the connectivity paradox and Parmenides' Fallacy. The connectivity paradox is not a true paradox, it's more of a irony, but it states that because it is easier to communicate remotely it is important to maintain proximity in order to gain get your message across.¹⁵⁴ Parmenides' Fallacy, again not a true fallacy, refers to a mistaken value judgment regarding what we should be comparing in policy

¹⁵¹ See, Philip Bobbitt, *Constitutional Interpretation*, 64-82; See Philip Bobbitt, *The ACLU Goes to War*, Just Security accessible at <https://www.justsecurity.org/34885/aclu-war/>; Jameel Jaffer *Philip Bobbitt's War without Tears*, Just Security accessible at <https://www.justsecurity.org/34994/philip-bobbitts-war-tears/>; Philip Bobbitt, *The Bobbitt Version*, Just Security accessible at <https://www.justsecurity.org/35305/bobbitt-version1/>; Jameel Jaffer, *The Drone Memos: Targeted Killings, Secrecy, and the Law* (2016).

¹⁵² *Ibid.*

¹⁵³ Not just military might.

¹⁵⁴ *Id.* at 97.

objectives.¹⁵⁵ Traditionally people ask “is x better now than before?” Bobbitt wants us to ask whether x is better now than it would have been had we not acted. That is, ask if we are maintaining legitimacy bearing in mind the tendency to trend toward chaos and destabilization.

VI. JSOC AND SPECIAL OPERATIONS CAPABILITIES

“De Oppresso Liber.” – United States Army Special Forces Motto.¹⁵⁶

“That others may live.” - US Air Force Pararescue Motto

“To liberate the Oppressed.” - US Army Special Forces Motto

“To Save Lives” - FBI Hostage Rescue Team Motto

“Sauver des vies au mépris de la sienne; S'engager pour la vie.” - French GIGN Motto

Jessica Buchanan was a young American humanitarian aid worker. She had traveled to Somalia to protect Somali youths from landmines, but on a moonless January night she and her Dutch partner, Poul Thisted, found themselves confined to a compound twelve miles north of Adow. Their Somali pirate captors had kidnapped them four months earlier.

Resigned to her fate, Jessica longed for her loving husband, Erik, and regretted that she would die before they could have children and a full life together, but at that moment she was more concerned with trying to sleep on a mat despite surrendering 25 lb.’s to starvation and an increasingly lethal kidney infection. As her captors nodded in and out of their dreamy drug induced state, she heard a faint scratching outside the compound.

Back in Washington, President Barack Obama had been closely monitoring her situation. As private negotiators associated with her humanitarian aid network failed to secure her release,

¹⁵⁵*Id.*, at 183.

¹⁵⁶ <https://www.army.mil/medalofhonor/miller/history.html>, “To Free the Oppressed.”

her health rapidly declined. When it became clear that she would die in the hands of the Somali pirates, the President ordered the Joint Special Operations Command to conduct a rescue, an eventuality they had been no doubt drilling for weeks.

In fact, Jessica Buchanan would have a life with her husband and her new child. The faint scratching outside the Somali compound was the only harbinger of the twenty-four Naval Special Warfare Development Group (SEAL Team Six) SEALs who had parachuted into the area and silently patrolled up to her location. In a flurry of gunfire, the SEALs calmly eliminated the nine abductors and secured the captives. They escorted Jessica and Poul to the extraction zone and asked them to lie on the ground so they could shield them with their bodies until the helicopter arrived. Take this as one example of how JSOC and other special operations forces can, when properly implemented by civilian leaders, protect human life.

The protection of human rights is essential to the proper function of market states. Bobbitt claims “the chief protector of American constitutional rights is not the Lawyers Committee for Civil Rights or the American Civil Liberties Union or even the Supreme Court; it is the 101st Airborne Division.”¹⁵⁷ The upshot is that when human rights are abused by force, words are not sufficient. However, in the fight against market state terrorism, I argue that, although the 101st undoubtedly bravely protects American rights, it is the Joint Special Operations Command, “JSOC,” and other SOF that ensure international security and protect human rights. JSOC embodies the strategic ideals Bobbitt stresses in tactical form. The regular military forces more likely will need to take on a constabulary and humanitarian aid form to

¹⁵⁷ Bobbitt, 246.

contribute in the asymmetrical counter-terrorism mission while retaining their ability to fight large scale wars if international security is threatened.¹⁵⁸

Special Operations Forces today reflect the realities of fighting global decentralized terrorists in terms of tactical theory. Part of what our elite commanders did in response to the hydra-like decentralized nature of market state terrorists was to put the Find, Fix, Finish, Exploit, Analyze JSOC targeting cycle into action and churn out direct action raids.¹⁵⁹ This theory takes Admiral McRaven's theory of special operations and puts it into use for a new type of global war. Admiral McRaven's theory of special operations is concise. The Admiral defines a special operation narrowly as, an operation that is "conducted by forces specially trained, equipped, and supported for a specific target whose destruction, elimination, or rescue (in the case of hostages), is a political or military imperative."¹⁶⁰ Furthermore, special operations are conducted against fortified or difficult positions and commonly with less people. His definition largely excludes missions that aim to sponsor rebellions or train proxies such as unconventional warfare and foreign internal defense, and because this work is the "heart and soul" of the largest SOF unit, Army Special Forces, he leaves out a significant segment of the special operations community.¹⁶¹ Nevertheless, he focuses mostly on direct-action or what would become the "finish" phase of McChrystal's targeting algorithm, what General McChrystal calls JSOC's traditional strength.¹⁶²

The success of these direct-action missions depends upon achieving and maintaining "relative superiority."¹⁶³ A special operations force achieves relative superiority when that

¹⁵⁸ Bobbitt, 18.

¹⁵⁹ Stanley McChrystal, *My Share of the Task* (2014) 153.

¹⁶⁰ McRaven, 2-3.

¹⁶¹ Colonel Gary M. Jones and Major Christopher Tone, *Unconventional warfare: Core purpose of Special Forces*, SPECIAL WARFARE, Summer 1999, Vol. 12, Issue 3, 4, 4.

¹⁶² McChrystal, 153.

¹⁶³ McRaven, 4-5.

attacking force gains a decisive advantage over a larger or well-defended enemy.¹⁶⁴ That is, where an otherwise disadvantaged force turns the tables placing themselves, relatively and momentarily, superior to their target. The state of disadvantage is what McRaven calls the area of vulnerability.¹⁶⁵ Stated another way, SOF are inherently disadvantaged due to their offensive nature and small size, thus the area of vulnerability covers all time except during a SOF's state of relative superiority. Finally, only special operations forces will benefit from working toward relative superiority because the nature of conventional military conflict and strategy and the size of conventional military formations prevent them from achieving this kind of relative superiority.¹⁶⁶

The achievement of relative superiority depends upon six factors, or “principles of special operations.”¹⁶⁷ These principles are simplicity, security, repetition, surprise, speed, and purpose.¹⁶⁸ The principles are coextensive and many are mutually affecting with one or another variable, thus many times they are more like necessary conditions than factors.¹⁶⁹

Simplicity, which McRaven calls the most important yet elusive element, is a function of three elements: limited objectives, good intelligence, and innovation.¹⁷⁰ Generally, the limitation of objectives will need to be achieved by limiting tactical objectives because strategic and political objectives will be set as a larger part of the Counter-terrorism or Counter-insurgency mission.¹⁷¹ Quality intelligence simplifies by establishing some variables and eliminating many

¹⁶⁴ *Id.* at 4-5.

¹⁶⁵ *Id.* at 6-7.

¹⁶⁶ *Id.* at 8.

¹⁶⁷ *Id.* at 8.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 9.

¹⁷⁰ *Id.* at 11-14.

¹⁷¹ *Id.* at 12.

others, though McRaven notes that there will always be holes in the intelligence.¹⁷² Innovation simplifies an operation by allowing the attackers to overcome remaining unknown variables or hitherto impassable obstacles.¹⁷³

Security, insofar as special operations are concerned, consists mainly in keeping information about the timing and means of insertion of an attack away from the target. The way this aids relative superiority is to prevent your enemy from gaining intelligence that gives them the advantage of how and when a SOF will attack.

Repetition is somewhat self-explanatory. One must practice the operation to eliminate as many unknown or overlooked variables as possible, making the mission as simple and straight-forward as possible.¹⁷⁴ Furthermore, repetition aids innovation insofar as it facilitates the use of simplifying technology by turning an otherwise unstable variable, new technology, into a more concrete advantage over a previously insurmountable obstacle.¹⁷⁵ This is achieved by increased familiarity with this novel approach or technology.

Surprise is somewhat less intuitive. Rather than allowing a Special Operations Force to strike an unprepared enemy, the SOF must strike a prepared enemy in that enemy's weak point or at an unexpected time.¹⁷⁶ Typically SOF must use deception, timing, and the enemy's vulnerabilities to achieve surprise.¹⁷⁷

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 15.

¹⁷⁵ *Id.* at 15-16.

¹⁷⁶ *Id.* at 16.

¹⁷⁷ *Id.* at 17.

Speed is a necessity because of the nature of direct action raids.¹⁷⁸ Recall that relative superiority is all a SOF can hope to achieve. Thus, that on-site superiority is unlikely to last as the situation begins to change. Therefore, SOF must achieve their objective as fast as possible to avoid losing relative superiority.

The final principle is **Purpose**. This principle is two-pronged. First, the mission itself must have a clear mission statement that the operators understand e.g., “kill or capture Bin Laden” or “rescue aid workers.” Second, the individual men must have a cohesive sense of inspiration and commitment. Broad examples of this are easy to find in the SOF community and I would argue that it is in recognition of the difficulties SOF face that they are more adamant about team inspiration and self-confidence. McChrystal states that men in the tier one SOF units such as Delta seem to be more outwardly patriotic and believe in their country and mission.¹⁷⁹ Mottos and mantra such as “Rangers Lead the Way” and “To Liberate the Oppressed” serve as a reminder of the missions with which each unit is tasked. However, operators are only human and the psychological costs of war are high, thus inspiration and commitment, not to mention mental health and respect for the law, cannot be taken for granted even in the most professional and dedicated teams or units.¹⁸⁰

Because of the delicate nature of counter-terrorism we need a scalpel. If we are to protect civilians while sometimes fighting among them, then the most we can hope for is relative superiority. Thus, Special Operations are our scalpel. As the world’s premier special operations command, the go-to command for missions where “failure was not an option,” JSOC is the

¹⁷⁸ *Id.* at 19.

¹⁷⁹ McChrystal, 98-99.

¹⁸⁰ See Matthew Cole, *The Crimes of SEAL Team Six*, The Intercept; Nicholas Kulish and Christopher Drew, *A Deadly Deployment, A Navy SEAL’s Despair*, The New York Times.

world's most effective combat response to market state terrorism.¹⁸¹ As such, it is well suited to fight the wars on terror. JSOC mimics market state terrorism just as market state terrorism mimics the market state. It is decentralized with a flattened command structure.¹⁸² Just as market state terrorism is global and networked, JSOC is global and networked. It operates in the shadows and requires units to be available within four hours to launch a mission anywhere in the world.¹⁸³ It outsources much of its work to trustworthy locals and works with other organizations.¹⁸⁴ JSOC's two main missions, the 0300 and 0400 missions, are counter-terrorism and counter-proliferation, two of three areas of terror to be triaged under Bobbitt's theory.¹⁸⁵ Operators and individual units are given more independence than other military groups, mimicking the informal federalism of global terrorist organizations. Although it does not rise to the level of policy control that Bobbitt contemplates as sufficient to win the wars, JSOC nevertheless adopts many of Bobbitt's viewpoints, giving policymakers a powerful tactical ally in the wars against terror.

JSOC comprises four principal special missions units "SMUs": Army Special Forces Detachment-Delta "Delta," the Naval Special Warfare Development Group "DEVGRU" or "SEAL Team Six," the Army Intelligence Support Activity "The Army of Northern Virginia," and the Air Force 24th Special Tactics Squadron. Each of these SMUs has a grueling selection process. The SMUs typically recruit operators from the other elite special operations units such

¹⁸¹ Naylor, 4.

¹⁸² Naylor, 348.

¹⁸³ *Id.* at 61.

¹⁸⁴ *Id.* at 258, 139.

¹⁸⁵ *Id.* at 44, 73.

as the Navy SEALs and Army Special Forces. Furthermore, selected operators undergo a rigorous, unparalleled training regimen.¹⁸⁶

The Command regularly commandeers other special operations units to support and supplement the SMUs.¹⁸⁷ The 160th Special Operations Aviation Regiment “night stalkers,” the world’s premier clandestine aviation group, frequently handles air support and ingress/egress.¹⁸⁸ The 75th Ranger Regiment has frequently been utilized as a source of extra fire power due to its reputation as the world’s premier light infantry unit. In recent years, starting under then Vice-Admiral McRaven’s command, the Rangers have taken command commensurate with the SMUs.¹⁸⁹ JSOC commanders also frequently tap regular SEAL teams and Special Forces Combatant Commander’s in-Extremis Forces to reinforce its SMUs or act as quick reaction forces.¹⁹⁰ In addition to the control it exercises over these military units, it has developed a fantastic working relationship with intelligence and law enforcement agencies like CIA, FBI, and NSA.¹⁹¹ JSOC also enjoys substantial cooperation from foreign intelligence services and legendary foreign special operations groups like the British Special Air Service.¹⁹²

After the September 11, 2001 attacks on New York and Washington D.C., JSOC’s role in the fight against global decentralized terror networks expanded dramatically. In an implicit recognition of the evolving challenge of market state terrorism, it refocused from large set piece fiascos like Urgent Fury, the invasion of Grenada, to a nimble organization capable of feats like

¹⁸⁶ *Id.* at 7, 10, 43-44.

¹⁸⁷ *Id.* at 43-44.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Id.* at 357-359.

¹⁹⁰ *Id.* at 289-299.

¹⁹¹ *Id.* at 205, 139.

¹⁹² *Id.* at 498.

Operation Neptune's Spear.¹⁹³ This entailed the "convergence" of military, law enforcement, and intelligence capabilities.¹⁹⁴ This convergence was, in large part, greenlighted by the al-Qaeda Network Execute Orders.¹⁹⁵ Convergence may also be attributed to the Command's unique technological and tactical abilities. This mimics the convergence we have seen with warfare and terrorism, and I believe one can infer an implicit supply side analysis from it. JSOC has realized that market states are vulnerable in their intrinsic diffusive setting and has made itself diffusive enough to play platelet to the global terrorist disease. Furthermore, given the speed with which intelligence moves, convergence is also a product of the connectivity paradox.

JSOC has increased its in-house intelligence collecting capabilities beyond advanced force operations into the realm of legitimate human intelligence "HUMINT" and signals intelligence "SIGINT."¹⁹⁶ Advanced force operations "AFOs" are low visibility missions to prepare for future operations. For instance, Air Force special operators attached to JSOC have the capability to HALO jump into a potential mission spot and test the environment for weather and ground conditions to discern whether the chosen landing zone is an appropriate spot to launch an operation. HUMINT and SIGINT, by contrast, are general intelligence about the enemy and its movements and plans.

Today we are seeing intelligence collecting ability within JSOC that in some contexts exceeds the CIA's capabilities. JSOC has used technology much better than market state terrorists have. Each SMU has its own intelligence gathering capabilities. SEAL team Six's most prestigious and largest squadron is the Black squadron. This comprises mostly elite snipers

¹⁹³ *Id.* at 24, 398.

¹⁹⁴ *Id.* at 428-429. (Noting the Joint Interagency Task Force's ability to combine intel, law enforcement, and JSOC).

¹⁹⁵ *Id.* 166-168.

¹⁹⁶ *Id.* at 417.

who can infiltrate behind enemy lines in small numbers and return with actionable intelligence for the Direct Action squadrons.¹⁹⁷ When Donald Rumsfeld as Secretary of Defense took his first tour of JSOC, SEAL Team Six showed him its clandestine reconnaissance capabilities. An operator HALO jumped in front of the SECDEF, shed his jumpsuit and military uniform, and walked off wearing a business suit and carrying a brief case.¹⁹⁸

Delta has a similar capability with its G Squadron.¹⁹⁹ In addition to its contact with Iraqis who agreed to go undercover and collect HUMINT “Mohawks,” it has also been able to cultivate some of the world’s most intriguing non-official cover operatives. One such soldier was an Eastern European who joined the Army and eventually Delta. He was able to build a cover so strong that he eventually lived in Iran as a legitimate businessman. His identity was so secret that during his period of operation most of those in Delta, a unit already shrouded in secrecy, assumed he had left the Unit altogether.²⁰⁰ Delta also has developed considerable SIGINT capabilities through its covered aviation Echo Squadron and its cyber-warfare Computer Networks Operations Squadron.²⁰¹

The ISA by contrast has always had an “AFO on steroids” capability. Four thugs attacked an ISA soldier undercover in Lebanon as he walked down the street. They attempted to force him into a van. In the ensuing struggle, he was able to fight them off, but they shot him. Rather than blow his cover by immediately seeking medical assistance, he worked a temporary

¹⁹⁷ *Id.* at 357-58.

¹⁹⁸ *Id.* at 161.

¹⁹⁹ *Id.* at 427.

²⁰⁰ *Id.* at 204-207.

²⁰¹ *Id.* at 260-261,42.

medical fix which allowed him to exit the country under conditions keeping his cover. Only after he had reached a point of safety from prying eyes did he get professional medical help.²⁰²

JSOC as a whole has the capability to monitor enemies and ongoing operations with unbelievable technological advances. The concept developed by JSOC's drone capabilities is the "unblinking eye."²⁰³ Because terrorists move among civilians and the opportunity to strike them without civilian casualties is so rare, the "unblinking eye" is indispensable in its ability to constantly track terrorists and give JSOC the intelligence necessary to appropriately engage the enemy. It also gives on the ground real-time intelligence to policy makers.

In many ways JSOC is better equipped and trained to collect intelligence in lawless lands than CIA. They are much more comfortable in potential combat situations and battlefields. They are also typically better at working as a team. Further, because of the unforgiving terrain in many parts of the Middle East, their unparalleled mental toughness allows them to better traverse the elements. For instance, it is difficult to imagine many CIA officers climbing a mountain in the snow – when native Afghans can barely stand it – or sitting still collecting reconnaissance as a SEAL sniper would.²⁰⁴

In fact, simply being involved in combat gave JSOC operators the ability to collect particularly helpful intelligence. JSOC tracked a senior al-Qaeda operative in Somalia.²⁰⁵ The night stalker pilot given the lead chose to fire his AH-6 attack variant little-bird helicopter's mini-guns at the terrorist's car rather than launching rockets.²⁰⁶ The four terrorists riding in the

²⁰² *Id.* at 314-15.

²⁰³ *Id.* at 249.

²⁰⁴ Mark Owen, *No Hero* (2014) 195-207.

²⁰⁵ Naylor, 408-11, *supra* note 7.

²⁰⁶ *Id.*

vehicle were decimated, but the decision to use the mini-guns left a host of helpful intelligence for SEALs from Team Six's Gold Squadron to collect.²⁰⁷ This underscores JSOCs team mentality and ability to think forward in the moment.²⁰⁸ One can compare this with the Agency's decision making in the killing of Anwar al-Awlaki.

Infamous and controversial for his American citizenship, Awlaki was tracked in Yemen using CIA tradecraft.²⁰⁹ They were able to gain possession over his car and installed a camera allowing them to see exactly when he was present and when he would be far from any civilians.²¹⁰ Part of the plan to kill Awlaki involved a joint JSOC-CIA task force arriving at the scene after a drone strike to collect any possible intelligence.²¹¹ However, the CIA fired 12 hell-fire missiles about 45 minutes early, thus destroying his car and giving the task force no time to get to the scene to attempt collection.²¹²

This early trigger may have been a function of many things. It may have been that they were uncomfortable with the legality of killing two American citizens - another American was with him at the time of the attack.²¹³ It may have been the CIA's lower level of teamwork culture or its lack of familiarity with combat situations.²¹⁴ More likely, it was that AAA had very trickily eluded them earlier by switching cars under cover and the drone operators did not want another failure.²¹⁵ In any event, JSOC has its own intelligence collection abilities which rival or exceed CIA's in some departments.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 416-18.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Savage, 227-239, *supra* note 8.

²¹⁴ No Hero, 195-207, *supra* note 151.

²¹⁵ Naylor, 416-18, *supra* note 7.

JSOC and the other United States' Special Operations Forces, along with our democratic allies' SOF, are the best small military outfits in history. They have demonstrated an unmatched ability to hunt down enemy combatants, while operating so efficiently as to minimize the civilian casualty rate. On the Bin Laden Raid, the use of SEALs brought the casualty rate down from a potential 100 to 4 or 5. Because of their unique capabilities, they should be the “tip of the spear” for any counterterrorism combat mission. They will not, of course, be sufficient to carry out most counter-terrorism wars alone, humanitarian aid, cash flow, and local governance are also necessary; but they are undoubtedly the starting point in lawless areas.²¹⁶ They were overutilized by Bush, and underutilized by Obama due to his aversion to appearances of “boots on the ground.” It remains to be seen exactly how Trump will utilize them or if it will be coherent.²¹⁷

The capabilities our special operators developed during the Bush Administration are immense.²¹⁸ Most of these abilities could be used, but are not, in places like Iraq and Syria. They would be immensely helpful in both military strategy and the protection of human rights.

Special operators are more capable of capturing or rendering hors de combat terrorists preserving the terrorists' right to life where it is not necessary to kill them. In addition to those raiding and fighting skills, SOF like Marine Recon and Army Special Forces conduct Unconventional Warfare helping protect war-torn societies in more humane ways that theorists like Galula and Tranquieu, who theorized about colonial uprisings with conventional soldiers and not counter-terror wars with special operators, could not have imagined. Our special operators are able to train and equip rebel militias to foment a revolution and protect local people –

²¹⁶ See Starr *supra* note 81.

²¹⁷ Though, in private phone calls with special operators they are optimistic for Trump.

²¹⁸ See *generally* Naylor *supra* note 43.

referred to as unconventional warfare.²¹⁹ This job falls largely to the Army Special Forces, and now Marine Raiders, but other units can work this role outside of their specialties.²²⁰ Female cultural support teams are also brilliant at communicating with females in culturally conservative areas where females may not speak to strange males.

The Army Special Forces, “Green Berets,” used this tactic to great success in Northern Afghanistan with the “Northern Alliance” as its rebel militia.²²¹ This is also the tactic that President Obama has favored in both Libya and in the fight against the Islamic State.²²² This, of course, makes sense. We should arm rebel groups, if we have good reason to trust them, in the fight against human rights abuses. However, as we have seen in the past, these groups can then abuse human rights themselves. To counter-act that, and fulfill the responsibility to protect innocent civilians, we must have active special operations advance force operations “AFO” and direct action “DA” teams on the ground.²²³ These capabilities are especially vital given that we are fighting, not only the broader war against terrorism, but simultaneous local conflicts with affiliated militias. A bottom-up approach which can react to the cultural and tactical realities on the ground amongst several related but distinct environments, similar to the domestic one advanced by Samuel J. Rascoff, is only capable if we take SOF like the Green Berets’ seriously and allow them to operate among the people as we have seen them do with some success in Afghanistan.²²⁴ This kind of war-time ad-hoc federalism is the best way to react to the smaller

²¹⁹ *Id.* at 9.

²²⁰ *Id.*

²²¹ *Id.* at 122-123. See also Sean Naylor, *Not a Good Day to Die: The Untold Story of Operation Anaconda*, (2006).

²²² See Chesterman *supra* note 70; Starr *supra* note 81.

²²³ Naylor, 489 *supra* note 43.

²²⁴ Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, Texas Law Review (2010); See Frye.

scale wars against terrorism both tactically to defeat the smaller components of al-Qaeda or ISIS and strategically to protect human rights and maintain governmental legitimacy.

Although operators may not talk like it, JSOC respects the war aim to protect civilian lives. It is not composed of a bunch of lawless cowboys, in Afghanistan only about 10% of operations actually involved shots fired.²²⁵ The operators have shown that they know they are fighting amongst civilians. They have shown the capability to hold fire waiting for the necessary legal clearance and to detain when achievable.²²⁶ Take the mission to capture AQI big-shot Ghassan Amin. Delta operatives paid a visit to his farm. They locked the real farmers in the farmhouse and proceeded to do all the farm work in disguise. As Ghassan approached, none the wiser, they took him into custody.

A more famous example of the JSOC protection of civilian life is the Bin Laden raid. Pentagon lawyers were willing to sign off on up to 100 innocent civilian deaths to kill Bin Laden in a bombing raid.²²⁷ However, JSOC convinced the pentagon and Obama that sending SEALs was the better move. As it stands, no civilians were killed, no SEALs were harmed, and the only casualties were four terrorists, a terrorist's wife, and a Blackhawk.²²⁸

Perhaps more important to direct human rights protection than Unconventional Warfare, Direct Action, Advanced Force Operations, Man hunting, and Detention operations is what I will call JSOC's guardian function. It is not a law enforcement agency, but it is the world's premier counter-terrorist command.²²⁹ As such, it has weapons of mass destruction "render safe"

²²⁵ *Id.* at 424.

²²⁶ *Id.* at 269 (where operators needed to perform "call outs" similar to serving a warrant) *Id.* at 267-268.

²²⁷ Charlie Savage, *Power Wars* (2015) 261.

²²⁸ Mark Owen, *No Easy Day* (2012) 213-257.

²²⁹ *Id.* at 4.

abilities wherein SEAL Team 6 operators are trained to take nuclear weapons and make them unsuitable for use in combat.²³⁰ SEAL Team 6 also developed plans to interdict these weapons as they transited into and out of countries, “pathway defeat.”²³¹ The SEALs are also trained in worst-case scenario emergency destruct procedures.²³² In addition to the SEAL WMD capabilities, Delta has trained in “heavy breaching” nuclear facilities, such as the ones thought to be in Iran, Libya, or North Korea, while the SEALs lay down cover fire.²³³ An operation on a large state run nuclear facility would have Delta heavy-breachers get the SEALs in to the WMD facility so they can “render safe” any warheads therein.²³⁴ What other people would even dare attempt something like this? Let alone plausibly pull it off?

Bolstering their “guardian function,” JSOC, the SEALs in particular, are the world’s premier hostage rescue team.²³⁵ SEALs have pulled off daring High Altitude Low Opening raids to rescue nationals of American and foreign descent.²³⁶ One daring, successful rescue is the rescue of American Dr. Dilip Joseph.²³⁷ Dr. Joseph was in Afghanistan training healthcare workers when he was captured by the Taliban, as I said before humanitarian aid workers are essential to any counter-terror war.²³⁸ In the heat of the rescue, one SEAL, Nicholas Cheque lost his life, another, Edward Byers, laid down on top of Dr. Joseph to protect him while fighting hand-to-hand with Taliban fighters.²³⁹

²³⁰ *Id.* at 75-78.

²³¹ *Id.*

²³² *Id.* at 77.

²³³ *Id.* at 76.

²³⁴ *Id.*

²³⁵ *Id.* at 425-427.

²³⁶ *Id.*

²³⁷ *Former hostage recalls Taliban “morality”* CBS October 15, 2014 accessible at <http://www.cbsnews.com/news/man-captured-by-terrorist-group-taliban-dilip-joseph-survived-to-tell-his-tale/>.

²³⁸ *Id.*

²³⁹ *Id.*; Mark Morgenstein, *Navy SEAL receives Medal of Honor for Hostage Rescue*, CNN February 29 2016 available at <http://www.cnn.com/2016/02/29/politics/medal-of-honor-navy-seal-edward-byers/>.

JSOC also protects resistance leaders. During the height of the unrest in the Balkans, JSOC had a fairly elaborate and dramatic plan to spirit away Montenegrin President Milo Dukanovic, an enemy of the Serbian dictator Slobodan Milosevic if Milosevic tried to assassinate him in a move to crush opposition.²⁴⁰ It was SEAL Team 6 that was tasked with protecting the future President of Afghanistan Hamid Karzai's life during the initial fight against the Taliban.²⁴¹ One senior JSOC officer said that Karzai "owes his life to their skills."²⁴²

JSOC and other SOF understand that these wars for freedom and human rights security cannot be won quickly or with minimal effort. Even after SEALs killed UBL, it was clear to all that their work was not finished. You cannot defeat a decentralized organization by cutting off a central figure. There were no celebrations when the SEALs arrived back to base – just congratulations.²⁴³ In fact, JSOC launched twelve other operations that night, "the extraordinary had become routine."²⁴⁴

JSOC does of course, fall short of strategic and legal ideals and the lofty expectations of human rights advocates. JSOC and SOF specialize in killing to save lives. As such, they will not be able to establish lasting peace. Where there is no legitimate law, combat works in a piecemeal fashion. However, as we saw with the American Revolution, it is law and legitimacy which are ultimately responsible for establishing a lasting peace. JSOC is a secret tactical organization and as such, does not have the ability, on its own, to merge law and strategy. That is up to the American people and our civilian leaders. It is not a law devising body, and its sway is still limited by its three-star command status. All it can do is try to strategically plan around

²⁴⁰ Naylor, 69-70 *supra* note 43.

²⁴¹ *Id.* at 351.

²⁴² *Id.*

²⁴³ *Id.* at 257-294.

²⁴⁴ Naylor, 402.

existing law. Furthermore, although JSOC has increased in size and prestige, its extremely demanding selection processes and specialized skill set limits its man power. It also appears that the men of JSOC, at least the operators, have fallen victim to Parmenides' Fallacy. At the end of the campaign in Afghanistan in 2012, it appears that many operators felt that they were not making a difference. One Ranger said "Sir, fuck this. It doesn't matter... This raid for this low-level IED guy is not going to change anything."²⁴⁵ I think it is hard not to fall into this mode of thinking at the operator level, though. It reflects the lofty ideals of those who join the elite levels of SOF. They went through the grueling training and selection to make the world better than it is now, not to just keep it from getting worse.

Ultimately, however, their strength lies in the tactical theories and capabilities I have sketched above. They are what follows tactically from Bobbitt's theories of counter-terrorism and legitimacy. Their skillset and capabilities allow them to fight among civilians, minimizing civilian deaths. They take fewer casualties than would traditional military units, sparing the lives of younger, less athletic, and less well-trained soldiers. Because despite how political scientists and conservative judicial activists²⁴⁶ treat them, soldiers do, in fact, have human rights, even if for some reason the commentators want to either treat them as a collective structure.

We should, however, bear in mind that the use of force is not the only effective remedy to human rights crises, and, in fact, the use of force being the only remedy undertaken should probably be a violation of the law because the use of force alone can easily bring about circumstances that are patently opposed to the underlying human rights values, including the right to life. The use of force is a necessary but not sufficient condition to winning the war on

²⁴⁵ *Id.* at 424.

²⁴⁶ *See Parker v. Levy*, 417 U.S. 733, 752-55 (1974).

terror. The work of Non-governmental international and domestic organizations is crucial to any humanitarian effort, though depending on the war-zone it is likely that military personnel will be necessary to protect these civilians as well.²⁴⁷ Likewise, the flow of funds and the effective management of those funds is extremely important. The United States can learn from the wasteful spending in Afghanistan. Roughly \$113 billion dollars has been spent on fruitless efforts at Afghan reconstruction by the United States government, much of which has been either wasted or embezzled due to the widespread corruption within the country.²⁴⁸ By contrast, the United States spent \$13 billion on the Marshall Plan for all of Western Europe, and loaned Mexico \$25 billion to stabilize its economy.²⁴⁹ Furthermore, the military itself can be used in ways other than the use of force during human rights crises, as it was in aiding Puerto Rico recently or when it helped desegregate schools in rural America.²⁵⁰

VII. Conclusion

The American theory of human rights lends itself more readily to the actual protection of people and their rights than classical European formulations of rights in the tradition of Magna Carta. The Constitution is the source of many of the protections Americans simultaneously cherish and take for granted. Among these is the deployment of Special Operations Forces unlike those deployed in past wars. These people are capable of protecting people, combatting terrorists, limiting casualties to both civilians and combatants, and fighting in legitimate ways

²⁴⁷ See e.g. Naylor, 425-427 *supra* note 43. (Detailing how SEALs rescued humanitarian aid worker Jessica Buchanon and her Dutch colleague, Poul Hagen Thisted. The pair were kidnapped in Somalia while in the country to teach children how to avoid landmines.).

²⁴⁸ Nicole Gaouette, *U.S. inspector general paint grim picture of Afghanistan reconstruction* CNN April 7 2016 accessible at <http://www.cnn.com/2016/04/07/politics/afghanistan-reconstruction-inspector-general-report/>

²⁴⁹ *History of the Marshall Plan*, THE GEORGE C. MARSHALL FOUNDATION accessible at <http://marshallfoundation.org/marshall/the-marshall-plan/history-marshall-plan/>; Clinton authorizes loan to Mexico, HISTORY accessible at <http://www.history.com/this-day-in-history/clinton-authorizes-loan-to-mexico>

²⁵⁰ Bobbitt, 226-227 *Supra* note 8.

amongst civilians. They are not the only or the most important people in the fights against terrorism, but they are, as of 2018, indispensable. We must trace a line from Human Rights and values, to law and legitimacy, to strategy, to tactics. Only then might we successfully win the wars against terrorism.