

## SYMPOSIUM INTRODUCTION

### THE WAR OF SYMBOLS

*Victor Gold\**

Terrorism seeks to achieve political goals through fear. It usually pursues its goals by attacking targets invested with symbolic significance. The terrorist acts of September 11 were effective precisely because the World Trade Center was a symbol of American wealth and power. The swift and utter destruction of that symbol had the intended psychological effect, conveying the message that nothing and no one is safe. Americans' confidence in their personal security, their government, and themselves may never be the same.

While terrorism attacks the symbolic foundations of society, law reinforces those foundations. The law does this by using familiar moral principles and procedural safeguards to direct our response to terrorism, whether that response is in the courts or even on the battlefield.<sup>1</sup> This ameliorates the terror by demonstrating that our institutions still function and that the fundamental values embodied in our law, often the very values terrorists most despise, remain valid. The legal system in a free and democratic society can be the most powerful symbol that its people, not the terrorists, remain in control.

But while our legal system cannot be attacked physically like a building, the integrity of its structure is not guaranteed. Rather, that integrity depends upon our willingness to resist manipulating the system to inflict our revenge and give vent to our prejudices. It is always in times of fear that we are most in danger of forgetting the

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1. See Esther Schrader, *War, on Advice of Counsel*, L.A. TIMES, Feb. 15, 2002, at A1 (stating that lawyers in a top secret military operations center evaluate the legality of U.S. military strikes in Afghanistan).

principles on which our law rests.<sup>2</sup> And when we do forget those principles, we hand to our enemies a symbolic victory.

In this symposium, four scholars explore the challenges terrorism poses to a system of laws. In his article entitled *Democracy in the War Against Terrorism—The Israeli Experience*, Professor Emanuel Gross catalogues the legal issues confronted by a nation that has been the regular target of terrorism for its entire existence. The picture that emerges is of a society struggling to balance the need to ensure its physical security against the desire to preserve those values that lay at the heart of its spiritual and political essence. Professor Gross reveals that the Israeli legal system has confronted questions that may soon be raised in American courts: Can captured terrorists be tortured in the name of gathering information to prevent future attacks?<sup>3</sup> Can known terrorist leaders be targeted for death as a matter of self-defense?<sup>4</sup> Are terrorists to be accorded the protection of the laws of war?<sup>5</sup> What emerges from Professor Gross' article is an encouraging picture of a legal system that takes seriously its underlying moral ethos, often holding soldiers accountable and the government wrong. This is an aspect of the Israeli response to terror that the press usually passes over in its rush to depict the daily bloodletting.

Professor Theodore P. Seto, in *The Morality of Terrorism*, confronts threshold questions that must be confronted by any system of laws purporting to deal with terrorism in a principled way: What is terrorism?<sup>6</sup> Is terrorism moral?<sup>7</sup> In connection with the first question, Professor Seto demonstrates that international and domestic law provide definitions of terrorism that are deficient, both in terms of consistency and logic. In pursuit of a definition, he identifies the appropriate considerations to be act and motive, actor and legality, and the victim. In evaluating the morality of terrorism, Professor Seto first provides an overview of three major contemporary moral

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2. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218-24 (1944) (reasoning that wartime military and national security interests justified detention of citizens of Japanese ancestry).

3. See Emanuel Gross, *Democracy in the War Against Terrorism—The Israeli Experience*, Part III.

4. See *id.* at Part IX.

5. See *id.* at Part VII.

6. See Theodore P. Seto, *The Morality of Terrorism*, Part I.

7. See *id.* at Part II.

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theories. He then lays out his own, which he calls an evolutionary theory of ethics. Using game theory, Seto argues that our concept of what is moral derives from the motivation to behave in ways that increase the probability of survival. Seto challenges the reader's preconceptions of terrorism and morality through historical examples such as the Boston Tea Party and the actions of Holocaust survivors in their conflict with the British and the Arab world to create a Jewish state.

In her article, *Remedies for Victims of Terrorism*, Professor Georgene Vairo discusses the procedural and substantive law issues surrounding the claims of the victims of September 11. After reviewing the traditional claims that might be brought under state and federal law,<sup>8</sup> she considers the terms of the September 11th Victims Compensation Fund,<sup>9</sup> which Congress created in the aftermath of the attacks. Vairo notes that, while Congress displayed laudable motives in acting to support the victims of September 11, the resulting legislation raises complex separation of powers and federalism problems by supplanting the customary tort system with an administrative process. She questions whether the legislation represents "the camel's nose under the tent"—stealth tort reform.<sup>10</sup> Finally, Vairo considers whether administrative resolution of mass torts is to be preferred to traditional judicial procedures.

Professor Laurie Levenson's essay, *Detention, Material Witnesses and the War On Terrorism*, notes a trend in the law to permit preventative detention of individuals suspected of presenting a terrorist threat. Since the attacks of September 11, thousands have been detained for immigration law violations or on the ground they are material witnesses. These detentions have undermined the fundamental concept of innocent until proven guilty, as well as other procedural protections normally afforded individuals threatened with imprisonment. For example, new federal legislation gives the Attorney General the power to designate an alien as a terrorist threat.<sup>11</sup> Upon this certification by the Attorney General, the

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8. See Georgene Vairo, *Remedying Injuries of the Victims of Terrorism*, Part II.

9. See *id.* at Part III.

10. *Id.* at Part IV.

11. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001).

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individual may then be held in preventative detention for repeated six-month periods without the intervention of a court.<sup>12</sup> Professor Levenson acknowledges that society may use the law to protect itself, but expresses concern that preventative detention threatens liberties central to a free society.

The essays comprising this symposium are among the first attempts by scholars to address the many legal issues arising out of the war on terrorism. While addressing disparate topics, the essays all struggle with the challenge to adapt the law to a new and dangerous reality, while still preserving our essential liberties. The fact that we engage in this struggle is an important symbol that terror has not triumphed.

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12. *See id.*