
DISTINGUISHING SOLDIERS AND NON-STATE ACTORS: CLARIFYING THE GENEVA CONVENTION'S REGULATION OF INTERROGATION OF CAPTURED COMBATANTS THROUGH POSITIVE INDUCEMENTS

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ABSTRACT

While attention has understandably been focused on the coercive tactics used to question detainees held at Guantanamo Bay and elsewhere in secret prisons, much less has been written about the use of positive inducements to bribe detained combatants into cooperating with their captors. For the most part, commentators have suggested that the Geneva Convention raises no obstacles to the use of positive inducements, even against prisoners of war. While I agree that positive inducements are permissible against members of non-state groups such as al Qaeda, I argue that the Geneva Convention should be read as prohibiting the use of such inducements against members of the armed forces of nations, because doing so involves tempting detained POWs into betraying their home nations. The crux of my argument is based on the Geneva Convention's restrictions on compelling or seeking volunteers from POWs to perform labor that materially assists the war effort against their home countries. It seems perverse therefore to allow them to volunteer potentially critical military information. I further distinguish positive inducements to commit espionage in non-armed conflict situations on the ground that the induced betrayal is the same, but the exploitation of detention and captivity is not. The conclusion that the Geneva Convention prohibits the use of positive inducements against POWs, however, does not mean that positive

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inducements are barred against detainees who are members of non-state groups. Here, I argue that the non-state group's claim of its members' loyalty is not entitled to the same degree of protection as a nation's claim to its citizens' loyalty. While this conclusion may appear circular in privileging nations, it is a structural consequence of the restriction of the right to use military force. Finally, I consider whether positive inducements could be expected to work against suspected al Qaeda members.

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I. INTRODUCTION

The current global war on terrorism, launched by the United States in late 2001 after the September 11, 2001 terrorist attacks, has focused attention on the suitability and applicability of international humanitarian law – specifically, the Geneva Convention Relative to the Treatment of Prisoners of War¹ – to armed conflict between a nation-state and a non-state group such as the terrorist group al Qaeda, as well as irregular militias, such as the Taliban fighters who harbored al Qaeda in Afghanistan. Early on, the Bush Administration concluded that captured al Qaeda fighters were not entitled to prisoner of war status because, as a non-state group, al Qaeda was not a signatory to the Geneva Convention and that the Taliban detainees, while covered by the Geneva Convention, had nevertheless forfeited their right to prisoner of war status *en masse* due to violations of the laws of war. Nevertheless, the Administration stated that it would treat suspected al Qaeda and Taliban detainees “consistent” with the Geneva Convention.² Reports soon surfaced, however, that the military was subjecting detainees to treatment that ranged from sexually humiliating to outright torture.³ More recently, the Central Intelligence Agency admitted that it had destroyed videotapes of interrogations of some high-level al Qaeda detainees involving the use of highly controversial, coercive methods such as waterboarding.⁴

Even if the suspected Taliban and al Qaeda fighters are not entitled to prisoner of war status, the Supreme Court’s 2006 decision in *Hamdan v.*

¹ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention].

² See, e.g., Thom Shanker & Katherine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12.

³ See MICHAEL RATNER & ELLEN RAY, GUANTANAMO: WHAT THE WORLD SHOULD KNOW 41 (2004); Matthew Hay Brown, *Freed U.S. Detainees Claim Abuse; The Allegations Could Stir Up Anti-American Sentiment, Already at a Fever Pitch in Islamic Nations*, ORLANDO SENTINEL, Mar. 17, 2004, at A1; Neil A. Lewis, *Frequent Prisoner Coercion Alleged, Guantanamo Personnel Detail Regular Abuse of Those Held at Base*, HOUSTON CHRON., Oct. 17, 2004, at 23; Carol Rosenberg, *3 GIs Punished for Detainee Abuse Mistreated Inmates at U.S. Military Prison at Guantanamo Bay*, PITTSBURGH POST-GAZETTE, Nov. 12, 2004, at A11; Charlie Savage, *Ex-Detainees Detail Alleged Abuse at US Base*, BOSTON GLOBE, Aug. 5, 2004, at A1; see generally ERIK SAAR & VIVECA NOVAK, INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER’S EYEWITNESS ACCOUNT OF LIFE AT GUANTANAMO (2005).

⁴ See, e.g., Scott Shane, *Prosecutor to Review Official Handling of C.I.A. Tapes*, N.Y. TIMES, Feb. 10, 2008, at A23.

*Rumsfeld*⁵ held that they were at least entitled to Common Article 3 protections. So known because it is repeated in each of the four Geneva Conventions, Common Article 3 provides that “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” captured fighters shall be protected from “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment.”⁶

Hamdan’s holding that suspected al Qaeda fighters were entitled to the protections of Common Article 3 resolved one area of uncertainty over the application of the laws of war to non-state actors, specifically, whether suspected members of terrorist groups can be lawfully subjected to torture or coercive interrogation; they cannot.⁷ However, Common Article 3 falls short of addressing clearly all aspects of interrogation. Interrogation techniques such as waterboarding, sleep deprivation, and sexual humiliation no doubt either qualify as torture, cruel treatment, or humiliating and degrading treatment, but terms such as “outrages upon personal dignity” and “humiliating and degrading treatment” are unavoidably ambiguous, and a treaty signatory could always interpret them narrowly.⁸

Also left unclear is the lawfulness of the use of positive inducements as a means of interrogation of enemy combatants, whether prisoners of war or Common Article 3 protectees. Positive inducements – or carrots, rather than sticks – are, of course, commonly used to obtain guilty pleas from criminal defendants, and American law erects no *per se* barrier to such tactics.⁹ Some defenders of the Bush Administration have nevertheless argued that providing suspected al Qaeda or Taliban fighters with prisoner of war status would undermine antiterrorism efforts, for such

⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁶ Third Geneva Convention, *supra* note 1, art. 3.

⁷ Whether a government agent who coerces or tortures a person entitled to Common Article 3 protection could nevertheless claim successfully an affirmative defense such as necessity is a fascinating question but one well beyond the scope of this Article. The infamous and much-criticized Office of Legal Counsel “torture memo” argued that such an agent might well be able to do so. See U.S. Dept. of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, at 2, 39-46 (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>.

⁸ See Mark Mazzetti, *Letters Outline Legal Rationale For C.I.A. Tactics*, N.Y. TIMES, Apr. 27, 2008, at A1 (noting debate over narrow reading of term “outrages” in Common Article 3 by Department of Justice); Eric Posner, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9 (noting Bush Administration’s efforts to interpret Common Article 3 narrowly so as to justify its treatment of Guantanamo detainees).

⁹ *Brady v. United States*, 397 U.S. 742, 752-53 (1970).

status would prohibit the use of any inducements. Human rights groups have countered that no such prohibition exists, reasoning that the Geneva Convention does not explicitly forbid the use of positive inducements as a means of interrogating prisoners of war.¹⁰

I suggest that the situation is considerably more complicated than is generally depicted, given the inappositeness of the Geneva Convention to the conflict global war on terrorism. The human rights group position is arguably defensible from a pure textual reading of a key provision of the Geneva Convention, but it is a reading that violates the spirit of the Convention. Such a reading allows a detaining nation to tempt a prisoner of war into betraying his or her nation. Other provisions of the Geneva Convention make clear that prisoners of war cannot be used to further the war effort against their own nation, even though they can be compelled to work in a limited set of non-military industries. In short, it seems rather strange that a detaining nation would be forbidden from tempting a prisoner of war into performing some menial service that aids the war effort, yet is allowed to tempt the prisoner of war into giving up valuable military information. Even if the Geneva Convention does not explicitly forbid the use of positive inducements as an interrogation tool, it should be so understood.

The opposite view, on the other hand, may track the “war on terrorism” rhetoric to an unreasonable extreme. Although there are aspects of the law of war that are relevant to the detention of enemy combatants who are suspected members of non-state terrorist groups such as al Qaeda, there is a fundamental difference between nations and non-state groups. Nations have a special status under international law; in limited circumstances, they – and no other entity – are permitted to use military force.¹¹ Furthermore, the bond between citizen and nation is different than that between member and non-state group. Citizens owe their nations loyalty such that betrayal of the nation is punishable as treason. Groups, on the other hand, claim no such degree of loyalty. As a result, the use of positive inducements as an interrogation tool against suspected members of non-state groups does not intrude upon the same type of loyalty obligation that citizens owe. True, the non-state groups may feel betrayed, and they may expect loyalty from their members, but those feelings and expectations are not ones that are entitled to the same recognition as those of nations.

In this Article, I propose that the Geneva Convention should be understood as forbidding the use of positive inducements to interrogate prisoners of war who are members of the armed forces of a nation, but that such inducements would be permitted against persons who are members of non-state groups captured during armed conflict against such a non-state group.

¹⁰ See *infra* Part III.C.

¹¹ See *infra* Part V.A.

Part II provides an overview of the relevant international humanitarian law regulating detention of combatants during armed conflict, with particular focus on the Supreme Court's interpretation of one key provision of the Geneva Convention in its *Hamdan* decision. Part III examines interrogation and armed conflict, beginning with a review of non-coercive interrogation tactics and the laws of war, then moving to the post-9/11 debate about whether the Geneva Convention forbids positive inducements, and closing with a discussion of the values underlying the Geneva Convention. Part IV demonstrates that American soldiers who give up military information in response to inducements from captors may violate domestic and military laws ranging from treason to knowingly giving intelligence to the enemy. This Part also explains why inducements to commit espionage, though inflicting the same harm on the target's home nation, do not exploit the fact of detention, and can therefore be left to the domain of domestic laws. Part V then turns to non-state groups and argues that they are not entitled to the same degree of loyalty from their members as nations are from citizens. Therefore, inducing cooperation from detainees who are members of non-state groups does not place such detainees in legal jeopardy from their home nations. Finally, Part VI considers the practical question of whether positive inducements would be effective against suspected members of al Qaeda.

II. COMMON ARTICLE 3, *HAMDAN*, AND THE INCONGRUITY OF THE GENEVA CONVENTIONS TO NON-STATE ACTORS

The logical starting point for analyzing the restrictions, if any, on the use of positive inducements in interrogation of captured combatants is, of course, the Third Geneva Convention of 1949, which codifies important aspects of international humanitarian law (also known as the law of war) regarding detention and interrogation of prisoners of war.

A. *The Geneva Convention (Including Protocol I)*

The four Geneva Conventions of 1949 regulate treatment, respectively, of wounded and sick armed forces in the field;¹² wounded, sick, and shipwrecked naval forces;¹³ prisoners of war;¹⁴ and civilians.¹⁵ They constitute a revision of the original 1929 Geneva Conventions, updated to take into account the lessons learned from World War II. It is the Third Convention that bears upon the treatment of Guantanamo detainees, for pris-

¹² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114.

¹³ Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217.

¹⁴ Third Geneva Convention, *supra* note 1.

¹⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

oner of war (POW) status confers a detailed set of rights and privileges in captivity, including protection from coercive interrogation and torture.

Although critics of the United States have called for the Taliban detainees to be treated as prisoners of war, most critics concede that al Qaeda fighters are not entitled to be treated as prisoners of war because al Qaeda is not, and cannot be, a signatory to the Geneva Convention.¹⁶ On the other hand, many European government officials and numerous human rights groups have consistently called on the United States either to charge Guantanamo detainees with crimes or to release them – a more extreme position than according prisoner of war status to suspected al Qaeda members.¹⁷ It is more extreme because a prisoner of war can be detained for the duration of hostilities without proof of any criminally culpable conduct; in fact, as far as the Geneva Convention is concerned, no status hearing of any sort is called for if a prisoner is accorded POW status.¹⁸ This is because detention as a POW is for the purpose of preventative incapacitation, and therefore the Geneva Convention focuses on the conditions of confinement.

It may seem equitable to accord POW status to suspected al Qaeda and Taliban fighters who are being detained as enemy combatants. The justi-

¹⁶ See Press Release, Human Rights Watch, *Bush Errs in Geneva Convention Rules* (Feb. 6, 2002), <http://www.hrw.org/en/news/2002/02/06/us-bush-errs-geneva-convention-rules> (arguing that, unlike al Qaeda members, Taliban fighters probably should be given prisoner of war status). *But see* Sean D. Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants,"* 75 GEO. WASH. L. REV. 1105, 1106-07, 1113-20 (2007) (arguing for expanded protection); H. Wayne Elliott, *POWs or Unlawful Combatants? September 11 and its Aftermath*, Crimes of War Project, available at <http://www.crimesofwar.org/expert/pow-elliott.html> (arguing that al Qaeda members could possibly qualify for POW status under Article IV of the Geneva Convention); Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Donald Rumsfeld, Defense Secretary (May 29, 2002), available at <http://hrw.org/press/2002/05/pentagon-ltr.htm>, (arguing that al Qaeda members are still protected by the Geneva Convention, though letter was unclear as to whether they, with some exceptions, would be entitled to POW status).

¹⁷ See, e.g., Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantanamo*, N.Y. TIMES, Feb. 17, 2006, at A6; David Ignatius, *The Way Out of Gitmo*, ACRON BEACON J., July 9, 2006, at B2 (noting opposition to Guantanamo by several European government leaders); Press Release, Human Rights Watch, *U.S. Should Release Some Guantanamo Prisoners* (Mar. 5, 2003), <http://www.hrw.org/en/news/2003/03/05/us-should-release-some-guantanamo-prisoners> ("Under the Geneva Conventions, the United States must release those [Taliban] soldiers unless they are being charged with war crimes or other criminal offenses.").

¹⁸ Article 5 of the Third Geneva Convention states that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, [are POWs] such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Third Geneva Convention, *supra* note 1, art. 5.

fiction for holding such persons without necessarily having to charge them with criminal conduct is through invocation of the laws of war; they are combatant enemies of the United States subject to detention to prevent him from continuing to fight against us.¹⁹ Because detention is for preventative incapacitation, not punishment, however, there are corresponding limits to how detainees may be treated. Punishment, for example, may well be limited to infractions of the rules of detention, and not for the violent activity underlying the detention itself.

Yet, there are a number of problems with direct application of the Geneva Convention to suspected members of non-State groups such as al Qaeda. These problems stem from the fact that the 1949 Geneva Convention addressed armed conflict between traditional nation-states and therefore makes assumptions about the parties to the conflict that may not be valid in asymmetric warfare involving irregular combat units or non-state actors.

Consider, for example, the elaborate provisions of the Convention subjecting prisoners of war to military discipline so as to reduce the necessity of the detaining power's use of force to ensure cooperation.²⁰ Articles 39, 43, and 44 premise different treatment of captives depending on their military rank; among other things, "[o]fficer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power. . . ."²¹ Such a provision may make little sense when the enemy is a non-state group whose fighters do not have "ranks" to speak of. Similarly, Article 43 of the Convention calls for the conflicting parties to "communicate to one another the titles and ranks of all the persons mentioned in Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent rank."²² Unlike nations, which maintain embassies with one another and thus have an avenue for official communications, adversaries such as the United States and al Qaeda have no formal relations,²³ and are highly unlikely to develop such avenues.

¹⁹ See generally Tung Yin, *Ending the War on Terrorism One Terrorist At a Time: A Non-Criminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149 (2005) [hereinafter Yin, *Non-Criminal Detention*].

²⁰ See COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 238 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY].

²¹ Third Geneva Convention, *supra* note 1, art. 39; see also *Id.* art. 43, 44.

²² *Id.* art. 43.

²³ Nevertheless, a few non-State groups have, on occasion, maintained open lines of communication with nations to engage in prisoner exchanges. See, e.g., Isabel Kershner, *Israel: Hezbollah Turns Over 1986 Letter From Missing Airman*, N.Y. TIMES, Oct. 23, 2007, at A6 (noting prisoner exchange deal between Israel and terrorist group Hezbollah); Greg Myre, *Sharon Faces New Questions Over an Exchange of Prisoners*, N.Y. TIMES, Mar. 4, 2004, at A13.

Realizing the challenge that asymmetric warfare (primarily, guerilla warfare) posed to the application of the Geneva Convention,²⁴ the international community proposed and ratified Protocol I Additional to the Geneva Conventions in 1977. Protocol I did not address the incongruity of detaining guerilla fighters in a system with rank-based privileges, but it did extend possible POW status to irregular fighters such as guerrilla fighters (and possibly terrorists):

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) During each military engagement, and
- (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.²⁵

Notably, President Ronald Reagan declined to submit Protocol I for ratification to the U.S. Senate. According to President Reagan, Protocol I would “give recognition and protection to terrorist groups” by allowing them to claim that they were fighting “wars of national liberation,” without having to distinguish themselves from the civilian population at all times.²⁶ Some portions of Protocol I may nevertheless be accorded status as customary international law, binding on all nations whether they ratified Protocol I or not, but those portions do not involve protection for guerilla fighters and the like.²⁷

²⁴ See, e.g., FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 87 (2001).

²⁵ Protocol Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of International and Armed Conflicts (Protocol 1) (with Annexes, Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts dated 10 June 1977 and Resolutions Adopted at the Fourth Session) art 44, June 8, 1977, 1125 U.N.T.S. 17512.

²⁶ Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Concluded at Geneva on June 10, 1977, S. TREATY DOC. NO. 100-2 (1987).

²⁷ See, e.g., L. Lynn Hogue, *Identifying Customary International Law of War in Protocol I: A Proposed Restatement*, 13 *LOY. L.A. INT'L & COMP. L.J.* 279, 279, 280-81, 286-87 (1990); Howard S. Levie, *The 1977 Protocol I and the United States*, 38 *ST. LOUIS U. L.J.* 469, 469-70 (1993).

B. Common Article 3

Even if a combatant – that is, a person taking part in hostilities whether complying with the laws of war or not – is denied POW status, he may fall within the protection of Common Article of the Geneva Conventions. Known as Common Article 3 because it is found in each of the four Geneva Conventions, Article 3 states in relevant part:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.²⁸

Furthermore, Article 3 prohibits:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.²⁹

Having already concluded that suspected al Qaeda detainees were not entitled to POW status, the Bush Administration was prepared in 2006 to rewrite the Army Field Manual to make clear that suspected al Qaeda detainees were not entitled to the more general Common Article 3 protections.³⁰ The Supreme Court's decision in *Hamdan v. Rumsfeld*,³¹ however, settled the issue differently.

Hamdan involved a habeas petition filed by a Guantanamo detainee who was challenging his prosecution in a military commission, for alleged violations of the laws of war. In a 5-3 decision,³² the Court held that the Geneva Conventions, being part of the law of war, were judicially enforceable as part of the Uniform Code of Military Justice's grant of authority to the President, and that suspected al Qaeda fighters such as

²⁸ Third Geneva Convention, *supra* note 1, art. 3.

²⁹ *Id.*

³⁰ See Julian E. Barnes, *Army Manual to Skip Geneva Detainee Rule*, L.A. TIMES, June 5, 2006, at A1.

³¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³² Chief Justice Roberts did not participate in the case, as he had been on the D.C. Circuit panel whose decision was being reviewed by the Court.

Hamdan were entitled to the protections of Common Article 3.³³ Shortly after *Hamdan*, Navy Secretary Gordon England directed the Defense Department to comply with the terms of Common Article 3.³⁴

For those concerned about unchecked executive power, particularly the war crimes prosecutions of enemy combatants in military commissions, *Hamdan* was a welcome decision.³⁵ Although the phrase “all the judicial guarantees which are recognized as indispensable by civilized peoples”³⁶ might not be as determinate as, say, some of the guarantees of the Bill of Rights,³⁷ it is at least on the level of due process and likely provides adequate content for evaluating military trial procedures. However, Common Article 3 has much less useful to say about interrogation techniques. Torture is explicitly forbidden, so it is safe to conclude that interrogators are forbidden from using it to extract information from detainees. “[H]umiliating and degrading treatment”³⁸ similarly appears to bar the sorts of sexual abuses that occurred at Abu Ghraib and Guantanamo Bay.³⁹ Yet, Common Article 3 lacks the detailed explication of conditions of detention that the Geneva Convention sets forth for POWs. Thus, Common Article 3 leaves unresolved whether an offer of additional food is simply an inducement, or coercion. The Geneva Convention, on the other hand, mandates a minimum standard of food allotment, and thus, offers of food above that standard can be understood as inducements, whereas failure to meet that standard absent cooperation can be understood as coercion.

³³ For more on the *Hamdan* decision, see generally Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism*, 42 TULSA L. REV. 505 (2007). In 2008, a military tribunal acquitted Hamdan of conspiracy charges but convicted him of material support of terrorism charges. See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1.

³⁴ See Office of the Sec’y of Defense, *Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense*, July 7, 2006 (copy on file with author).

³⁵ See, e.g., Jonathan Hafetz, *Vindicating the Rule of Law*, 31 FLETCHER F. WORLD AFF. 25, 25-26 (2007). Congress responded to *Hamdan* by passing the Military Commissions Act (MCA), which President Bush signed into law. The MCA purported to reverse legislatively that part of *Hamdan* that read a recent statute, the Detainee Treatment Act, as leaving federal courts open to pending habeas petitions filed by Guantanamo detainees. In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court held that the MCA attempted to suspend habeas unconstitutionally. That sequence of events, however, has no bearing on *Hamdan*’s substantive analysis of Common Article 3.

³⁶ Third Geneva Convention, *supra* note 1, art. 3.

³⁷ See U.S. CONST. amend. V, VI (providing right against double jeopardy, to assistance of counsel, to trial by jury).

³⁸ Third Geneva Convention, *supra* note 1, art. 3.

³⁹ For one example, see SAAR & NOVAK, *supra* note 3, at 222-28.

Since Common Article 3 acts as a minimum floor, it arguably permits the use of some interrogation tactics that would be forbidden if used against POWs. Of course, such tactics cannot violate Common Article 3 itself, but positive inducements would fit comfortably within the gap between Common Article 3 and POW status.

III. INTERROGATION AND ARMED CONFLICT

Warring nations have long seen captured enemy fighters as potential sources of military information.⁴⁰ The value of strategic information such as troop movements or sailing dates during wartime is so paramount that the Supreme Court thought it obvious that such information could be enjoined before publication despite the strong presumption against prior restraints.⁴¹ During World War II, Japanese captors tortured American submarine crewmembers in an effort to extract information about the ships' weapons, operational range, and sonar and radar detectors; pilots were tortured to find out from which aircraft carrier or land base they had launched.⁴² While the Germans, British and Americans rarely resorted to such brutal practices, they too went to great lengths to extract military information from prisoners of war through deception or coercion.⁴³ American interrogators successfully obtained intelligence from Japanese POWs about "armaments, tonnage, cruising speed, and maximum speed" of Japanese naval vessels, as well as drawings of submarines and other critical information.⁴⁴

Torture, of course, is an extremely controversial topic, with opponents arguing that the practice is morally repugnant to civilized nations and that it leads to unreliable information because those subjected to it will say whatever they think they need to say to stop the agony.⁴⁵ Others take a

⁴⁰ A.J. BARKER, *PRISONERS OF WAR* 59 (1975); R.C. HINGORANI, *PRISONERS OF WAR* 83 (1982) (noting that captivity "gives some additional advantages to the captor . . . [i]mmediately after capturing the enemy personnel, he often subjects them to interrogation for the purpose of identity as well as for seeking strategic information"); see also KALSHOVEN & ZEGVELD, *supra* note 244, at 58 ("To the authorities of the Detaining Power a prisoner of war is mainly of interest as a potential source of information.").

⁴¹ See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (dicta); see also *Snepp v. United States*, 444 U.S. 507, 510 (1980) (upholding prior restraint against publication of book by former CIA agent due to national security concerns). *But see* *United States v. New York Times Co.*, 403 U.S. 713, 714 (1971) (The Pentagon Papers Case) (dissolving prior restraint on publication of historical study of causes of Vietnam War).

⁴² BARKER, *supra* note 40, at 61.

⁴³ For a fascinating account of mostly American interrogations of Japanese POWs during World War II, see generally ULRICH STRAUS, *THE ANGUISH OF SURRENDER: JAPANESE POWS OF WORLD WAR II* (2003).

⁴⁴ *Id.* at 134, 137, 140-41, 240.

⁴⁵ See, e.g., TONY LAGOURANIS WITH ALLEN MIKAELIAN, *FEAR UP HARSH: AN ARMY INTERROGATOR'S DARK JOURNEY THROUGH IRAQ* 243 (2007).

consequentialist view, arguing that when the stakes are high enough, the ends justify the means.⁴⁶ Without downplaying the importance of this issue, I shall not discuss it further, for my interest lies in exploring the use of positive, rather than negative, inducements.

A. *Relevant Interrogation Methods*

1. Non-Coercive Deception

Professional interrogators who are legally forbidden from using torture or coercion may resort to trickery or deception in an effort to extract confessions from criminal defendants. In fact, criminologist Richard Leo has described modern police interrogations as having “many of the essential hallmarks of a confidence game.”⁴⁷

For example, courts have upheld confessions that were induced when police officers lied to criminal suspects about incriminating evidence that did not actually exist.⁴⁸ The rationale behind allowing this tactic is that only a factually guilty person would be deceived, because an innocent person would know that he or she was being lied to.⁴⁹ This kind of lie is therefore seen as different from one about, say, criminal procedure, where an innocent person might still be deceived about his or her constitutional rights.

Another example of a deceptive police tactic is “questioning outside *Miranda*,” where police detectives continue to interrogate a criminal suspect despite the invocation of *Miranda* rights. In a representative

⁴⁶ Michael Moore captured the dilemma in a 1989 law review article, later republished as a book chapter, in which he described himself as a “threshold deontologist,” meaning that acts such as torture, while generally forbidden despite producing net gains under cost-benefit analysis, nevertheless may become justified when the costs are sufficiently high: “It just is not true that one should allow a nuclear war rather than killing or torturing an innocent person. It is not even true that one should allow the destruction of a sizable city by a terrorist nuclear device rather than kill or torture an innocent person.” MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 669, 719, 723 (1997); Michael S. Moore, *Torture and the Balance of Evils*, 23 ISRAEL L. REV. 280, 282-86 (1989). For a critique of Moore’s argument, see Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000).

⁴⁷ Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y. REV. 259, 260-61 (1996).

⁴⁸ See, e.g., *United States v. Bell*, 367 F.3d 452 (5th Cir. 2004) (finding detectives falsely told suspect that they had physical evidence linking him to a sexual assault); *Holland v. McGinnis*, 963 F.2d 1044 (7th Cir. 1992) (acknowledging detectives falsely told suspect that his car had been reported near the scene of a sexual assault); see also Fred Cohen, *Miranda and Police Deception in Interrogation*, 26 CRIM. L. BULL. 534 (1990).

⁴⁹ See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORD. URB. L.J. 791, 801-03 (2006) (collecting cases).

instance, a police detective stated to the suspect, "Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court."⁵⁰ Contrary to the detective's assertion, statements obtained in violation of *Miranda*, while inadmissible in the government's case-in-chief, can be used to impeach a defendant who testifies in his or her own defense.⁵¹ The tactic of "questioning outside *Miranda*" exploited this rule. Police detectives thought they had nothing to lose by violating *Miranda*, because once a defense lawyer showed up, the criminal defendants would cease talking; this way, the police would at least obtain a statement that might be used either to impeach the defendant or to deter the defendant from testifying at all.⁵²

Rather than interrogate a defendant directly, police might resort to the use of an informant to elicit incriminating statements from the defendant. In one landmark case, police officers "wired" a cooperating witness's car with a listening device so that the witness's conversation with the defendant in the car could be recorded.⁵³ In another, police inserted a paid informant into a defendant's jail cell with instructions "to be alert to any statement"⁵⁴ Although the Supreme Court held such practices unconstitutional, it did so based on a Sixth Amendment right to counsel analysis, rather than as a Fifth Amendment due process violation.⁵⁵ As James Tomkovicz has noted, the Court's reasoning may be best understood as "exemplify[ing] our societal dedication to values beyond the ascertainment of 'truth' and our commitment to adversarial fair play."⁵⁶ In other words, the constitutional defect in deliberate government efforts to elicit confessions from defendants through informants lies not so much in concerns about the reliability of the confessions or about the voluntariness of the confessions, but rather in the special obligation that the Sixth

⁵⁰ See *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1044 (9th Cir. 1999) (quoting transcript of actual interrogation).

⁵¹ *Harris v. New York*, 401 U.S. 222, 226 (1971).

⁵² *California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327, 330 (C.D. Cal. 1996). Of course, extended questioning outside the presence of counsel can cross the line from non-coercive to coercive, and in the case discussed in the text, the state courts ordered the defendant's confession suppressed on the ground that it had been coerced.

⁵³ *Massiah v. United States*, 377 U.S. 201, 202-03 (1964); see also *Maine v. Moulton*, 474 U.S. 159 (1985).

⁵⁴ *United States v. Henry*, 447 U.S. 264, 268 (1980).

⁵⁵ James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 38 (1988) ("But the simple use of informants to elicit admissions from charged individuals is well outside an appropriately defined category of egregiousness.").

⁵⁶ *Id.* at 90-91.

Amendment imposes on the government to respect the criminal defendant's right to counsel.⁵⁷

Then there are passive forms of deception. While government use of an informant who actively engages a defendant in conversation to elicit incriminating information is a Sixth Amendment violation,⁵⁸ it is not such a violation if the informant is merely put into a position to listen to the defendant and where the informant takes no affirmative action to stimulate conversation.⁵⁹ This rule directly implies that undisclosed electronic monitoring of inmate cells would not violate the Sixth Amendment.⁶⁰

2. Positive Inducements

The old adage that “you get more flies with honey than vinegar” may also hold true when interrogating hostile persons. During World War II, for example, U.S. interrogators at the Fort Hunt prisoner of war camp “soften[ed] . . . up” German prisoners of war by treating them to fancy steak dinners and by playing games with them.⁶¹ According to one retired interrogator, “We got more information out of a German general with a game of chess or Ping-Pong than they do today, with their torture.”⁶²

Bound by a host of constitutional requirements, state and federal law enforcement officials do not have the freedom to use torture or coercion

⁵⁷ A similar dynamic applies in civil cases, though the source of the restraint comes from professional responsibility rules, not the Constitution. ABA Model Rule 5.3(b) imposes on lawyers a duty to supervise nonlawyer subordinates and to ensure that such persons’ “conduct is compatible with the professional obligations of the lawyer. . . .” MODEL RULES OF PROF’L CONDUCT R. 5.3(b) (1983). Thus, a lawyer must ensure that nonlawyer subordinates comply with ABA Model Rule 4.2, which prohibits communication with a represented person about the matter in dispute, absent court order or consent of the other lawyer. As a comment to Rule 4.2 explains, the non-contact rule “contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers . . . ; interference by those lawyers with the client-lawyer relationship and *the uncounselled disclosure of information relating to the representation.*” MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. (1983) (emphasis added).

⁵⁸ *Moulton*, 474 U.S. at 176; *Henry*, 447 U.S. at 271; *Massiah*, 377 U.S. at 207.

⁵⁹ *Henry*, 447 U.S. at 270-71.

⁶⁰ *Cf. Moulton*, 474 U.S. at 177 n.13 (reserving question of whether passive electronic monitoring is lawful).

⁶¹ See Petula Dvorak, *Fort Hunt’s Quiet Men Break Silence on WWII; Interrogators Fought ‘Battle of Wits’*, WASH. POST, Oct. 6, 2007, at A1. *But see* STRAUS, *supra* note 433, at 125 (contrasting gentler interrogation approached used on Japanese POWs with the “tough[er]” approach used on German POWs).

⁶² Dvorak, *supra* note 61, at A1.

to induce suspects to confess.⁶³ Some forms of deception, such as questioning outside *Miranda*,⁶⁴ or using informants to engage in conversations with the defendant to elicit confessions,⁶⁵ are prohibited as well.

Yet, over ninety percent of criminal convictions occur because the defendant pleads guilty.⁶⁶ Some defendants plead guilty without any inducement from the prosecutor, but many do so as a result of a plea bargain whereby the prosecutor agrees to drop charges or to provide some other benefit, such as an agreement to recommend a lighter sentence. Defenders of the practice of plea bargaining often analogize it to arms-length contracting, where prosecutors and defendants each offer something of value to the other side.⁶⁷ Even plea bargain critics agree that the defendant who pleads guilty pursuant to such a deal has received something of value; rather, a strong criticism is that the benefit received is significant enough that even innocent defendants may be induced into pleading guilty out of risk-aversion.⁶⁸ Indeed, the Tenth Circuit briefly barred the government from offering leniency in exchange for a co-defendant's truthful testimony on the ground that it violated the federal anti-gratuity statute, which made criminal the giving of "anything of value to any person, for or because of the testimony under oath . . . given or to be given by such person as a witness upon a trial"⁶⁹

Positive inducements thus play a major part in securing information from criminal defendants – namely, their confessions. The goal of military interrogation, of course, is usually not self-incrimination, but tactical and strategic information. Even here, though, there is reason to believe that positive inducements can lead to the acquisition of such information. For example, law enforcement efforts against organized criminal organi-

⁶³ See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 7 (1964); *Brown v. Mississippi*, 297 U.S. 278, 285 (1936).

⁶⁴ See, e.g., *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1045-47 (9th Cir. 1999); *Cooper v. Dupnik*, 963 F.2d 1220, 1245-48 (9th Cir. 1992).

⁶⁵ *Moulton*, 474 U.S. at 176.

⁶⁶ See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 n.330 (2001).

⁶⁷ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 577-79 (6th ed. 2003); Frank H. Easterbrook, *Criminal Procedure As a Market System*, 12 J. LEGAL STUD. 289, 297-98 (1983).

⁶⁸ See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 81 (2005); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38, 55; Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 n.1 (1981); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 96-97 (1977).

⁶⁹ 18 U.S.C. § 201(c) (2008); see *United States v. Singleton*, 144 F.3d 1343, 1359 (10th Cir. 1998), *overruled en banc*, 165 F.3d 1297 (10th Cir. 1999).

zations such as Cosa Nostra (the Mafia) succeeded in large part because government officials induced Cosa Nostra personnel to become government informants, either through a combination of threats of prosecution coupled with plea agreements or through financial payments and other benefits.⁷⁰ These inducements overcame, for those informants, the traditional “code of silence” known as “omerta” among Cosa Nostra; such members had “promised to kill without hesitation any police informant posing a threat to the Family, even if the informant were his son or brother.”⁷¹ When the government first began to confront Cosa Nostra, the “absolute loyalty” of its members, particularly as against the government, was its “great strength.”⁷² Eventually the government was able to induce a number of high-ranking Cosa Nostra members to testify “in exchange for leniency and placement in the federal Witness Security Program, which, for the first time, offered a Cosa Nostra figure who turned against his comrades hope of survival.”⁷³

Wartime inducements have primarily involved what might otherwise be considered necessities, such as extra food, candy, or cigarettes,⁷⁴ rather than money or other luxuries. In other instances, though, captors have offered positive inducements for apparent propaganda value or perhaps as a means of damaging the morale of other POWs. For example, during the Vietnam War, the North Vietnamese captured John McCain, then a naval pilot shot down on a bombing mission, and held him as a POW. They offered him, but not other POWs, early release, presumably because his father was a high-ranking Navy Admiral.⁷⁵ McCain refused the offer because he perceived that the North Vietnamese sought to influence his father through the release offer, and because his fellow POWs might be upset over the violation of the ordinary custom of releasing the longest serving POWs first.⁷⁶

⁷⁰ See, e.g., JOSEPH CANTALUPO & THOMAS C. RENNER, *BODY MIKE: AN UNSPARING EXPOSÉ BY THE MAFIA INSIDER WHO TURNED ON THE MOB* 135, 331 (1990); MICHAEL J. ZUCKERMAN, *VENGEANCE IS MINE: JIMMY “THE WEASEL” FRATIANNO TELLS HOW HE BROUGHT THE KISS OF DEATH TO THE MAFIA* 48-49 (1987).

⁷¹ *United States v. Salemme*, 91 F. Supp. 2d 141, 287 (D. Mass. 1999).

⁷² James B. Jacobs & Lauryn P. Gouldin, *Cosa Nostra: The Final Chapter?*, 25 *CRIME & JUST.* 129, 138 (1999).

⁷³ *Id.* at 131.

⁷⁴ See, e.g., RAYMOND B. LECH, *BROKEN SOLDIERS* 151-52 (2000); Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 *COLUM. L. REV.* 709, 727 (1956).

⁷⁵ See, e.g., JOHN MCCAIN & MARK SALTER, *FAITH OF MY FATHERS: A FAMILY MEMOIR* 226 (2000).

⁷⁶ *Id.* at 235. As a result of turning down the early release in 1968, McCain spent almost five more years as a POW. *Id.* at 340.

B. *The Laws of War and Interrogation*

Because interrogation has long been a part of military detention, the laws of war have necessarily adapted to regulate it. In this section, I trace the development of the laws of war's regulation of interrogation of captured prisoners to the modern rules set forth in the 1949 Geneva Convention, with a closing discussion of the debate over the availability of positive inducements as an interrogation technique under that convention.

Even early efforts to develop codified laws of war had considered the plight of captured soldiers, particularly with regard to interrogation. The 1863 Lieber Code, issued by the Department of War during the American Civil War as General Order No. 100, observed that "the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information."⁷⁷

Although the Lieber Code was binding only on the Union forces, it heavily influenced the 1929 revision of the Geneva Convention. Article 5 of that treaty stated in relevant part:

Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number. If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category.

No pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.⁷⁸

Though the text of Article 5 of the 1929 Geneva Convention seemed sufficiently clear to bar torture and coercion as methods of interrogating prisoners of war, the horrors of World War II led treaty drafters to craft a more specific provision in the 1949 Geneva Convention.⁷⁹ Article 17 of that convention states in relevant part:

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

⁷⁷ War Dep't, Adj. General's Office, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, at no. 80 (reprinted in RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 45, 59-60 (1983)) [hereinafter Lieber Code].

⁷⁸ Geneva Convention Relative to the Treatment of Prisoners of War art. 5, July 27, 1929, 47 Stat. 2021.

⁷⁹ COMMENTARY, *supra* note 20, at 163.

* * *

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.⁸⁰

There is a subtle but significant change between the 1929 and 1949 versions of the Geneva Convention. Where the earlier Convention extended the prohibition against “pressure” to questions “regarding the situation in their armed forces or their country,” the later Convention covers questions seeking “information of any kind whatever.” The impetus for this change was that during World War II, some nations “succeeded, by coercion, in obtaining information from prisoners of war about their personal circumstances, or that of their relatives.”⁸¹ Under “mosaic theory,” every single piece of information, no matter how seemingly innocuous, can help put together a picture of the whole.⁸²

In summary, the laws of war have tried to keep pace with nations’ use of negative inducements as means of interrogating POWs. The current version of the Geneva Convention explicitly bars coercive interrogation of POWs. However, the laws of war remain less clear about the permissibility of positive inducements as means of interrogating POWs.

C. *The Post-9/11 Debate Regarding Positive Inducements*

Perhaps because of the savagery of the 9/11 attacks, or the fear that further terrorist strikes against the United States were in the works, the apparent need to extract information from captured persons believed to be terrorists became more urgent. One of the flashpoints of the debate over whether to accord such persons prisoner of war status was the limits that such POW status would place on the government’s ability to interrogate them. In this section, I lay out the terms of the debate.

Following the 9/11 attacks and subsequent detention of numerous non-U.S. citizens at Guantanamo Bay, commentators debated whether the Bush Administration should be allowed to use positive inducements to extract information from detainees. A pair of former Justice Department lawyers, Lee Casey and David Rivkin, in arguing against application of

⁸⁰ Third Geneva Convention, *supra* note 1, art. 17. The 1929 Geneva Convention might arguably have reduced the scope of protection for POWs, since it changed the prohibited conduct from “pressure” to “physical or mental torture” and “any other form of coercion,” thereby going from the general to the specific. In practice, though, it is difficult to envision a “negative” interrogation technique that would comport with the 1929 Geneva Convention, yet fail the Lieber Code.

⁸¹ COMMENTARY, *supra* note 20, at 163.

⁸² For a lengthier description and criticism of mosaic theory, see Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitudes*, 58 ADMIN. L. REV. 845 (2006).

the Geneva Convention to captured persons suspected of being Taliban and al Qaeda fighters, asserted that a “strict interpretation of [the Geneva Convention] would eliminate even the offer of rewards for information, since this would have the effect of ‘disadvantaging’ anyone who refused to cooperate.”⁸³ According to Casey and Rivkin, such an interpretation is consistent with the intent of the Geneva Convention, as it recognizes the entitlement of soldiers “to keep their military secrets.”⁸⁴

The general view, however, has been to the contrary. For example, the International Committee of the Red Cross’s Commentary to the Geneva Convention notes that detaining States “will always try to obtain military information” from prisoners of war, and that “[s]uch attempts are not forbidden,” only those specifically identified, coercive tactics.⁸⁵ Human Rights Watch reached the same conclusion in a 2002 letter to then-National Security Advisor Condoleezza Rice, arguing that the United States was entitled to use “classic plea bargaining . . . or other incentives” in order to interrogate Guantanamo Bay detainees.⁸⁶

Advocates of the general view use a textualist approach to interpret the Geneva Convention. Article 17, which is titled “Questioning of Prisoners,” states that a prisoner of war is required only to give his name, “rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.”⁸⁷ It also states that a prisoner of war who refuses to provide this required information may be punished through loss of privileges that would have been accorded due to his rank or status.⁸⁸ Finally, Article 17 states that the detaining State is prohibited from using “physical or mental torture, [or] any other form of coercion . . . to secure from [prisoners of war] information of any kind whatever”; furthermore, any prisoner of war who refuses to answer questions “may not be threatened, insulted, or exposed to any unpleasant or disadvantageous

⁸³ Lee A. Casey & David B. Rivkin, Jr., *How to Treat a Captured Terrorist: Getting to the Heart of an Important Question*, NAT’L REV., July 4, 2005, at 20.

⁸⁴ *Id.*

⁸⁵ COMMENTARY, *supra* note 20, at 156, 163-64; *see also* KALSHOVEN & ZEGVELD, *supra* note 24, at 58 (“In order to secure this information [the detaining authority] may interrogate him, use kind words and create a congenial atmosphere to make him talk, listen in on his conversations, and so on.”); HINGORANI, *supra* note 40, at 83 (“[T]he Geneva Convention does not impose absolute prohibition on the seeking of information. . .”).

⁸⁶ Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Condoleezza Rice, Nat’l Security Advisor (Jan. 28, 2002), *available at* <http://hrw.org/press/2002/01/us012802-ltr.htm>; *see also* *Diluting the Geneva Convention*, N.Y. TIMES, Feb. 9, 2002, at A18 (arguing that prisoners of war “can be coaxed into providing information through plea bargaining and other positive inducements”); Kenneth Roth, *Time to Stop ‘Stress and Duress,’* WASH. POST, May 13, 2004, at A29 (“Various noncoercive methods, from inducements to trickery, can still be used. . .”).

⁸⁷ Third Geneva Convention, *supra* note 1, art. 17.

⁸⁸ *Id.*

treatment of any kind.”⁸⁹ In short, Article 17 mandates (1) what information the prisoner of war is required to provide to the detaining State; (2) what sanction the prisoner incurs for failing to provide that required information; and (3) what the detaining State is forbidden from doing. The statement of specifically prohibited conduct, one can argue, implies that all other conduct is not forbidden. This is, of course, a plausible method of interpretation.⁹⁰ But, it leads to a rather strange conclusion when contrasted with the Geneva Convention’s restriction on use of POWs for manual labor.

D. Geneva Convention Values

To understand what the Geneva Convention permits and what it prohibits, it is important first to identify the values embodied in the 1949 Geneva Convention. The most important value established in the Geneva Convention is that detention of enemy soldiers as POWs is justified on the basis of preventative incapacitation, not punishment or deterrence.⁹¹ POWs can be lawfully detained because of the danger they pose as long as the armed conflict continues, even though they may not be criminally liable for wartime killings due to combatant immunity.

1. Interrogation for identification purposes

The first consequence of justifying detention for preventative incapacitation is that a limited scope of interrogation is called for to identify detainees. As noted earlier, Article 17 of the Geneva Convention requires a prisoner of war to disclose name, rank, date of birth, and army, regimental, person or serial number (or equivalent information). The detaining power is entitled to this information for a number of reasons. First, the Geneva Convention accords different treatment for prisoners, depending on their military rank.⁹² Ascertaining each prisoner’s name and rank thus facilitates compliance with the Geneva Convention. Second, determining each prisoner’s identity – via name and rank – enables warring nations to exchange prisoner lists and to allow neutral organizations such as the Red Cross to pass amenities such as letters from loved ones. Exchange of prisoner lists can be an important tool in protecting

⁸⁹ *Id.*

⁹⁰ *See, e.g.,* Lindh v. Murphy, 521 U.S. 320, 330 (1997); Russello v. United States, 464 U.S. 16, 23 (1983).

⁹¹ *See generally* Yin, *Non-Criminal Detention*, *supra* note 19, at 165-70.

⁹² *See, e.g.,* Third Geneva Convention, *supra* note 1, art. 44. (“Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.”); *Id.* at art. 49 (“If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.”); *Id.* at art. 60 (setting forth five categories of monthly pay rates for prisoners of war depending on rank); *Id.* at art. 79 (designating most senior officer among prisoners of war as the prisoner of war representative).

POWs from being mistreated excessively during captivity, for an unusually high mortality rate among POWs would reflect poorly on the detaining nation. During the Korean War, for example, the death rate among U.S. soldiers in captivity was significantly higher than that among U.S. POWs during World War II.⁹³ However, U.S. POWs in the Korean War reported much better treatment once prisoner lists were exchanged between the United States and China.⁹⁴ What is important to note is that interrogation for identification purposes is not undertaken to provide the detaining nation with information useful in its military campaign *against* the enemy nation. (As a practical matter, however, POWs identified as high-ranking officers may expect to be the subject of greater interrogation efforts, whether through inducement or coercion.⁹⁵)

2. No reprisals

A second consequence is that reprisals against POWs are forbidden. During armed conflict, one side might engage in conduct toward POWs that clearly violates the Geneva Convention.⁹⁶ While complaints could be made to international judicial bodies such as the International Court of Justice or the International Criminal Court, nations may be tempted to resort to self-help in the form of reprisals – “an illegal act made in response to another State’s illegal conduct.”⁹⁷ Thus, if one nation were to deprive its detainees of food, the other nation might respond in kind against detainees that it holds. To the extent that the warring nations are in a repeated prisoner’s dilemma, Robert Axelrod’s famous computer simulation tournament demonstrated that “Tit for Tat” – responding exactly in kind toward the other side – is the strategy that best allows for cooperation to escape the dilemma.⁹⁸

The Geneva Convention, however, explicitly forbids “measures of reprisal” against POWs.⁹⁹ One conclusion to be drawn from this prohibi-

⁹³ See LECH, *supra* note 74, at 2 (noting mortality rate of 4 percent of Americans held as POWs by Germans or Italians, 34 percent of those held by Japanese, and 43 percent of those held in the Korean War in just a six month period).

⁹⁴ See *id.* at 150.

⁹⁵ For example, Navy Captain Okino Matao, described as “one of the three highest-ranking Japanese ever to fall into American hands” during World War II, was the only Japanese detainee taken to a “VIP facility reserved for cooperative prisoners.” STRAUS, *supra* note 43, at 161. There, he was given “all kinds of reading materials as well as great varieties of food and drink, all of which he consumed with gusto.” *Id.*

⁹⁶ See *supra* note 40 and accompanying text (noting how Japanese tortured U.S. submarine officers for military information).

⁹⁷ See DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 207 (2001).

⁹⁸ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27-54 (1984). Of course, this assumes that each nation places approximately equal value on the welfare of its POWs.

⁹⁹ Third Geneva Convention, *supra* note 1, art. 13.

tion is that, under the Geneva Convention, POWs are not instrumentalities to be used against their home nations. Reprisals are prohibited under this reasoning because they treat POWs as tools, rather than as enemy fighters subject to detention only for preventative incapacitation purposes.

3. Limits on POW labor

A third consequence is that POWs can be compelled to work only in non-military fields. Throughout history, detaining powers have forced prisoners of war to engage in productive labor. The Hague Convention set limits on such forced labor, stating that the tasks for prisoners of war “shall have nothing to do with the military operations.”¹⁰⁰ Examples of such forbidden labor included “the manufacture or transport of arms or munitions of any kind, or . . . the transport of material destined for combatant units.”¹⁰¹ However, ambiguities in the definitions of “direct connection with the operations of war” and “combatant units” rendered such provisions problematic, and “during the Second World War, the belligerents themselves took very different views.”¹⁰²

Following World War II, the drafters of the 1949 Geneva Convention undertook to clarify the limits of forced POW labor. After much debate, the drafters settled on what is now Article 50, which states in relevant part:

Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

- (a) agriculture;
- (b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;
- (c) transport and handling of stores which are not military in character or purpose;
- (d) commercial business, and arts and crafts;
- (e) domestic service;
- (f) public utility services having no military character or purpose.¹⁰³

The first type of work that prisoners of war may be compelled to work – that relating to the prison camp itself – is, as the International Commit-

¹⁰⁰ Hague Convention with Respect to Laws and Customs of War on Land art. 6, July 29, 1899, T.S. no. 403.

¹⁰¹ *Id.*

¹⁰² COMMENTARY, *supra* note 20, at 264.

¹⁰³ Third Geneva Convention, *supra* note 1, art. 50

tee of the Red Cross observed, “done by the prisoners of war in their own interest. . . .”¹⁰⁴ Of course, even basic maintenance of the prison camp arguably assists the detaining nation, in that absent such work by prisoners of war, the detaining nation would have to assign personnel to perform such tasks (at least, to comply with the minimum standards of upkeep imposed by the Geneva Convention). Nevertheless, the end result of such labor benefits the prisoners of war. The maintenance of the camp does not improve the detaining nation’s ability to conduct warfare against the prisoner of war’s home nation, apart from meeting treaty obligations.¹⁰⁵

The tasks specified in categories (a) through (f), however, are of a different character. Compelling prisoners of war to work in the field of agriculture may result in some marginal benefit to the prisoners, since they may be allotted some of the additional food produced. Even so, the benefit to prisoners of war is incidental to the main purpose of increasing the food production for the detaining nation’s domestic population. The other tasks, however, provide no benefit to the prisoner of war, only to the detaining nation. The benefit is not of a military nature, since Article 50 specifically prohibits prisoner of war labor on matters having a “military character or purpose.” Whatever ambiguities may remain, Article 50 strives to keep prisoners of war from being forced to help the detaining nation’s war efforts against their home nation, as opposed to the less malignant purpose of benefiting the detaining nation’s economy.

From a strict textual perspective, one could argue that the detaining nation is free to bribe or induce a prisoner of war into working on military tasks, because in that instance, the prisoner of war would not have been “compelled” to work. However, this is not the way that a leading commentary to the Geneva Convention reads Article 50. Rather, the commentary asserts that “[t]he Convention expressly forbids the employment of prisoners of war in three types of industry.”¹⁰⁶ The commentary further notes that this prohibition “must be considered as absolute, for in the event of a general war, these industries will always be turned over to armaments production.”¹⁰⁷

¹⁰⁴ *Id.* at 266.

¹⁰⁵ For example, the Geneva Convention requires that prisoners of war be given sufficient food “to keep [them] in good health and to prevent loss of weight or the development of nutritional deficiencies.” Third Geneva Convention, *supra* note 1, art. 26. According to one commentator, the “plain meaning” of this provision “is that the prisoner must be the last to suffer” in the event of food shortage. GEOFFREY BEST, *WAR AND LAW SINCE 1945*, 140 (1994).

¹⁰⁶ COMMENTARY, *supra* note 20, at 268.

¹⁰⁷ *Id.* Admittedly, a subsequent section of that commentary contains an ambiguous passage that could be read as holding that prisoners of war can volunteer for any kind of work, even that supporting the detaining nation’s military capacity. *See id.* at 278 (“The present Article 50 states that prisoners of war may not be compelled to assist in the handling of stores which are military in character or

This is a persuasive reading of the Geneva Convention in light of Article 7, which states that “[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention”¹⁰⁸ Thus, a prisoner of war would be forbidden from voluntarily acquiring the detaining nation’s citizenship, even if the prisoner of war were to decide that he preferred to fight on the side of the detaining nation against his own nation. This is true because, by acquiring the detaining nation’s citizenship, the prisoner of war would no longer be an enemy combatant entitled to the protections of the Geneva Convention.¹⁰⁹ The drafters of the Convention realized that this rule might disadvantage individuals by limiting their liberty; however, they opted for an absolute prohibition to avoid the intractable problem of determining when renunciation of Convention rights was truly voluntary, as opposed to coerced.¹¹⁰

This reading of Articles 7 and 50 is generally reinforced by Article 52, which sets a further condition on the employment of prisoners of war: “[u]nless he be a volunteer, no prisoner of war may be employed on labor which is of an unhealthy or dangerous nature. . . . The removal of mines or similar devices shall be considered as dangerous labor.”¹¹¹ If Article 50 were properly read to allow prisoners of war to volunteer to labor in any kind of prohibited industry, then Article 52 would be superfluous, since one would assume that the absence of any specific prohibition on volunteering would mean that a POW could therefore choose on his own volition to perform the otherwise prohibited task. Moreover, there would be considerable tension with the text and reasoning underlying Article 7, in that this sort of “volunteering” would usually be viewed skeptically.

Rather, Article 52 is most plausibly a compromise between the views of the British, who thought it “reasonable and proper” to compel prisoners of war to remove the mines laid by their own side, and that of the Canadians, Americans, and Australians, who wanted greater protections for prisoners of war.¹¹² Although the British position may have seemed draconian or punitive, it did have the virtue of favoring civilians; accord-

purpose. But although the Detaining Power may not compel them to do so, nowhere is it stated that they may not at any time volunteer to do such work.”). This passage comes in a discussion of Article 52, which, as discussed below, suggests that prisoners of war may volunteer to remove land mines laid by their own forces, even though such work would otherwise constitute handling military stores in violation of Article 50.

¹⁰⁸ Third Geneva Convention, *supra* note 1, art. 7.

¹⁰⁹ See Wilhelm, *Can the Status of Prisoners of War Be Altered?*, *Revue International de la Croix-Rouge*, July-Sept. 1953, at 21-22.

¹¹⁰ See FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, Vol. II-B, at 17-18.

¹¹¹ Third Geneva Convention, *supra* note 1, art. 52.

¹¹² See BEST, *supra* note 105, at 139.

ing to the British, the alternatives were to use their own troops or enemy civilians, both of which were unacceptable.¹¹³

In short, the best reading of the Geneva Convention is that POWs cannot be compelled to provide war labor of a “military character or purpose,” but also cannot renounce their protection from such compulsion by volunteering for such labor.

4. Anti-Human Shield Provisions?

One might argue that Article 50 should be read not as protecting POWs from furthering the military effort against their own nations, but rather as protecting them from being used as human shields. Arms factories, airports, and shipyards, for example, are all legitimate military targets during armed conflict.¹¹⁴ A detaining nation that compelled its POWs to work in such obvious targets might deter enemies from attacking those targets, thus gaining an unfair advantage against more humane nations.

Such a reading of Article 50, however, would appear to render redundant Article 23, which reads in relevant part: “No prisoner of war may . . . be used to render certain points or areas immune from military operations.”¹¹⁵ Detaining powers are thus already forbidden by Article 23 from using POWs to shield military targets.

Admittedly, the commentary to the Geneva Convention does distinguish what it calls “military objectives” from “other nerve centers of a country which, without being primarily of a military nature, nevertheless inevitably contribute, whether directly or indirectly, to the war potential of that country by virtue of their economic importance.”¹¹⁶ POWs assigned to work in urban centers on the latter will necessarily be housed near such nerve centers, and thus would unavoidably be potential casualties.¹¹⁷ The commentary in fact reads Article 50 as reinforcing this view because it prohibits detaining powers from requiring POWs “to work in the metallurgical, machinery and chemical industries.”¹¹⁸

It is hard to dispute the Commentary’s observation that Article 50 and Article 23 reinforce each other with regard to protecting POWs. However, it is preferable to read them to be complementary but not identical in function. Under Article 50, a detaining power is forbidden from com-

¹¹³ *Id.*

¹¹⁴ See, e.g., DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, July 18, 1956, at ¶ 40 (“Factories producing munitions and military supplies . . . warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations . . . may also be attacked . . . even though they are not defended”).

¹¹⁵ Third Geneva Convention, *supra* note 1, art. 23.

¹¹⁶ COMMENTARY, *supra* note 20, at 188.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

pling POWs from *working* in a munitions factory, but textually, it appears to have no bearing on whether the detaining power can simply *hold* the POWs in such a factory. Article 23, on the other hand, forbids the use of POWs as human shields and thus would bar the latter conduct. Since Article 23 has a broader scope with regard to protecting POWs from being placed in hazardous locations, it makes sense to read Article 50 as granting POWs some additional protections beyond those embodied in Article 23.

IV. INDUCING CITIZEN-SOLDIERS TO BETRAY THEIR NATIONS

This Part explores further the harm that a detaining power inflicts on an enemy nation when it uses positive inducements to tempt POWs into giving up valuable military intelligence. Using domestic American law as a framework, I consider the various military and civilian crimes that could be brought against a detained person who gives up military or classified information in response to an offer of a positive inducement. I then consider whether there is a meaningful difference between inducing a military detainee to provide valuable information versus inducing a foreign citizen to commit espionage.

A. *Crimes of Collaborators*

Not surprisingly, a United States soldier who provides an enemy captor with military or classified information because of promises of favorable treatment or other positive benefits violates U.S. laws, both domestic and military.

1. Misconduct as a prisoner

A U.S. soldier who voluntarily divulges military information in exchange for positive benefits offered by enemy captors might be guilty of misconduct as a prisoner. Article 105 of the Uniform Code of Military Justice states:

Any person subject to this chapter who, while in the hands of the enemy in time of war –

(1) *for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or*

(2) while in a position of authority over such persons maltreats them without justifiable cause; shall be punished as a court-martial may direct.¹¹⁹

Because of the requirement in subsection (1) that the detriment caused by the defendant's cooperation be inflicted on fellow prisoners resulting

¹¹⁹ 10 U.S.C. § 905 (1956) (emphasis added).

in “reduced rations, physical punishment, or other harm,”¹²⁰ this provision would likely be limited to instances where the defendant is induced to provide information about fellow prisoners. The paradigmatic example might be disclosure of escape plans by other prisoners.¹²¹ The provision in subsection (2) pertains to those POWs who by virtue of rank or selection by other prisoners is provided authority under the Geneva Convention.¹²² This provision would be even more limited in reach than that of subsection (1).

Nevertheless, Article 105 does establish that U.S. soldiers are forbidden from improving their own lot by “ratting out” their fellow prisoners. In short, this provision might be thought of as establishing a norm that places the welfare of the group above that of the individual.

2. Knowingly giving intelligence to the enemy

Next, Article 104 of the Uniform Code of Military Justice punishes by death or other such punishment, any soldier who “without proper authority, *knowingly* . . . gives intelligence to . . . the enemy, either directly or indirectly.”¹²³ A prisoner of war who yields military information to captors appears to fall within the literal terms of this prohibition. Presumably, a prisoner of war who was tortured or coerced into providing such information would be able to raise a defense of duress to such charges if prosecuted; however, the duress defense likely would not be available to a prisoner of war who agrees to give up such information for positive inducements.

In practice, military prosecutions under Article 104 have been uncommon.¹²⁴ While there need not be a formally declared war in existence to trigger this provision, there does need to be a military conflict involving U.S. troops.¹²⁵ In 2004, Specialist Ryan Anderson, a U.S. national guard member, was sentenced to life imprisonment for providing information about U.S. “troop strengths, tactics and methods of killing U.S. soldiers and destroying M1 Abrams tanks” to persons he thought were al Qaeda operatives.¹²⁶ Thirteen years earlier, in 1991, Specialist 4th Class Albert

¹²⁰ See Manual for Courts-Martial, United States pt. IV, para. 29 (2008 ed.), available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

¹²¹ See *id.*

¹²² See Third Geneva Convention, *supra* note 1, art. 79.

¹²³ 10 U.S.C. § 904 (2006).

¹²⁴ Since 2001, only two incidents of court martial under Article 104 for aiding and abetting the enemy have been reported. See Thomas Wagner, *Court deciding whether Lt. Col. goes on trial*, ARMY TIMES, Apr. 30, 2007 (noting as uncommon the Article 104 court martial of United States Army Lt. Col. William H. Steele for aiding the enemy while warden of Camp Cropper in Baghdad during Saddam Hussein’s incarceration) available at http://www.armytimes.com/news/2007/04/ap_steele_070430/.

¹²⁵ 13 Op. Att’y. Gen. 470 (1871).

¹²⁶ See Ray Rivera, *Guardman Found Guilty of Trying to Aid Terrorists*, SEATTLE TIMES, Sept. 3, 2004, at B1.

Sombolay pleaded guilty to espionage and aiding the enemy for having offered Jordanian representatives information about U.S. troop readiness during Operation Desert Shield.¹²⁷

Anderson and Sombolay's cases, it should be noted, were aggravated by the fact that each sought out the enemy of his own volition, and each espoused sympathy with the cause of that same enemy.¹²⁸ Anderson and Sombolay not only knew that they were providing valuable military intelligence to groups or nations actively hostile to the United States but also wanted to help those groups or nations use that information effectively against the United States. It is not a stretch to conclude that Anderson and Sombolay could have been charged with treason. Our hypothetical prisoner of war, on the other hand, has no desire to see the information used against the United States. Indeed, the prisoner of war may well hope that the captors are too incompetent to use the information effectively.

Yet, such distinctions are irrelevant as a matter of law (though perhaps not as a practical matter in terms of influencing prosecutorial discretion). The *mens rea* for Article 104 is knowledge, not intent.¹²⁹ Contrast the text of Article 104 with the anti-espionage provision of Article 106a:

Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits . . . to any [foreign government or military or naval force within a foreign country], either directly or indirectly, . . . information relating to the national defense . . .¹³⁰

The requisite mental state of Article 106a is either intent to harm the United States or to benefit a foreign nation, or reasonable belief that the information will be used to harm the United States or to benefit a foreign nation.¹³¹

The difference is subtle but important. Article 104 merely requires that the defendant *know* that he or she has given military information to the enemy. Article 106a, on the other hand, requires that the defendant either *intend* to harm the United States (or help a foreign nation), or *reasonably believe* that the information will be used to harm the United States (or help a foreign nation). Thus, it is easier for the prosecution to prove the requisite mental state of Article 104 than that of Article 106a, but the trade-off is that Article 104 has a narrower scope due to the

¹²⁷ *U.S. Soldier Convicted as a Spy in Gulf War*, N.Y. TIMES, Dec. 3, 1991, at A3 [hereinafter *U.S. Soldier Convicted*].

¹²⁸ See Sarah Kershaw, *Washington Guardsman Charged with Trying to Spy for Al Qaeda*, N.Y. TIMES, Feb. 19, 2004, at A1; *U.S. Soldier Convicted*, *supra* note 116, at A3.

¹²⁹ See, e.g., *United States v. Batchelor*, 22 C.M.R. 144, 159 (C.M.A. 1956).

¹³⁰ 10 U.S.C. § 906a (1985).

¹³¹ See *United States v. Richardson*, 33 M.J. 127, 130 (C.M.A. 1991).

requirement that the information have been given to “the enemy,” as opposed to any foreign nation. Furthermore, Article 104 is operative only during military operations, when reasonable soldiers would recognize that the enemy will use any information about the U.S. military for antagonistic purposes. Because Article 106a applies even during peacetime, it is reasonable to require the government to prove that a defendant intended for the information to be used against the country, or at least that he or she expected it would be used against the country.

3. Treason

Soldiers or civilians who voluntarily divulge military or classified information to foreign nations in response to positive inducements may be guilty of treason. Under U.S. law, treason consists of (1) adhering to the enemy; and (2) providing the enemy with aid and comfort.¹³² These are separate elements, and the second one requires proof by two witnesses of an overt act.¹³³

Practically speaking, a soldier probably would not face treason charges, since such charges would have to be brought in an Article III court; rather, the soldier would likely face equivalent military charges in a court-martial.¹³⁴ This is not to say that a U.S. prisoner of war who divulges military information because of positive inducements could necessarily be convicted of treason. Among other things, there might be significant problems of proof of the overt act, due to the two-person requirement.¹³⁵ Furthermore, such a prisoner of war would no doubt argue that he or she had no intent to betray the country, and thus did not adhere to the enemy.¹³⁶

Consider, for example, *Cramer v. United States*,¹³⁷ which is instructive despite not involving a soldier. Cramer was a naturalized United States citizen who had once lived with one of the 1942 German saboteurs who were the subject of *Ex Parte Quirin*.¹³⁸ Upon illegal reentry into the United States, saboteur Thiel met Cramer in a public location. The trial testimony against Cramer established merely that he “met Thiel and

¹³² 18 U.S.C. § 2381 (1994); *Cramer v. United States*, 325 U.S. 1, 29 (1945). During peacetime, treason also consists of levying war against the United States, but that theory of treason is not relevant for the purposes of this Article.

¹³³ U.S. CONST. art. III, § 3.

¹³⁴ See, e.g., LECH, *supra* note 74, at 233-34 (noting that Korean War POWs were court-martialed for “collaboration,” a charge virtually identical in language to treason).

¹³⁵ U.S. CONST. art. III, § 3.

¹³⁶ Cf. *United States v. Stephan*, 50 F. Supp. 738, 742 (E.D. Mich. 1943) (instructing jury “that defendant would not be guilty if his purpose was simply to help [an enemy soldier] as an individual, or if he did it through friendship or through sympathy”).

¹³⁷ 325 U.S. 1 (1945).

¹³⁸ 317 U.S. 1 (1942).

Kerling on the occasions and at the places charged and that they drank together and engaged long and earnestly in conversation.”¹³⁹ The Court found this evidence inadequate to satisfy the overt act requirement of giving aid and comfort, for there was no testimony as to “what they said nor in what language they conversed.”¹⁴⁰ Furthermore, the Court noted that “[t]here is no showing that Cramer gave them any information whatever of value to their mission. . . .”¹⁴¹

Nevertheless, treason embodies the central idea that citizens owe a duty of loyalty to their nation, and that violation of that duty is perhaps the most serious crime recognized by society.¹⁴² Even if providing military information to captors in response to positive inducements does not constitute actionable treason, it does represent a betrayal of the interests of the home nation. For example, the influential Lieber Code stated that “[h]onorable men, when captured, will abstain from giving to the enemy information concerning their own army. . . .”¹⁴³ Pictet’s Commentary to the 1949 Geneva Convention notes that a prisoner of war “may, and indeed must, refrain from giving military information to the Detaining Power. . . .”¹⁴⁴ The current Code of Conduct adopted by U.S. armed forces includes the following clauses:

I will accept neither parole nor special favors from the enemy.

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. . . .

When questioned, should I become a prisoner of war, I am bound to give only name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country or its allies or harmful to their cause.¹⁴⁵

4. Inducing betrayal

As demonstrated above, American law, military and domestic, establishes a legal duty, enforced by criminal sanctions, on the part of citizens and soldiers not to betray the nation in order to improve their own posi-

¹³⁹ *Cramer*, 325 U.S. at 36-37.

¹⁴⁰ *Id.* at 37.

¹⁴¹ *Id.*

¹⁴² See Ralph M. Carney, *The Enemy Within: A Social History of Treason*, in *CITIZEN ESPIONAGE: STUDIED IN TRUST AND BETRAYAL*, 19, 20-21 (Theodore R. Sarbin et al. eds., 1994) (“The impact on treason in the social order is considered so severe that societies impose the strongest punishment for the crime of treason. It is an unparalleled high crime.”).

¹⁴³ Lieber Code, *supra* note 77, at 59.

¹⁴⁴ COMMENTARY, *supra* note 20, at 156.

¹⁴⁵ Dep’t of Defense Instruction No. 1300.21, §§ E2.2.3, E2.2.4, E2.2.5 (Jan. 8, 2001); see also LECH, *supra* note 66, at App. B, at 297-98.

tion. Why, then, should a detaining nation be entitled to tempt POWs into violating that duty in order to secure an advantage against the POWs' home nation? It should not, particularly when one considers the values embodied in the Geneva Convention.

First, military detention is justified as preventative incapacitation.¹⁴⁶ The POW would, if released, be ordered by his home nation to return to fight. Detention of the POW for the duration of hostilities ensures that he poses no further threat to the detaining nation. Importantly, however, the detaining nation need not acquire any military information from the POW in order to achieve the goal of preventative incapacitation.¹⁴⁷

Second, the Geneva Convention's explicit prohibition against reprisals implies rejection of the use of POWs as instrumentalities against their home nation.¹⁴⁸ If POWs cannot be used, in essence, as bargaining chips to induce their home nation to comply with the laws of war, then it is difficult to see why they should be exploited as information receptacles to extract military information that would be useful against their home nation.

This conclusion is reinforced when one considers the stringent prohibition on the use of POWs to engage in manual labor of any military character, with the exception of those who volunteer to clear minefields.¹⁴⁹ This, however, leads to an odd contrast between Article 17 and Article 50 under the conventional reading of those two provisions. A detaining nation is barred from bribing or inducing a prisoner of war into working in industries that would benefit the detaining nation's military capacity, but it is free to bribe or induce a prisoner of war into divulging information that would benefit the detaining nation's military attacks. Though the value of military information can be overstated,¹⁵⁰ a prisoner of war who gives up key operational information almost certainly helps the detaining nation more than a prisoner of war who, say, helps load bombs onto a plane.

B. "Hot" Wars vs. the Cold War

Of course, armed conflict is not the only time that a country will try to obtain another country's military or diplomatic secrets. The Foreign Intelligence Surveillance Act of 1978 sanctions warrantless electronic sur-

¹⁴⁶ See supra note 89 and accompanying text.

¹⁴⁷ The only arguable exception might be efforts to induce a POW to disclose escape plans by other POWs.

¹⁴⁸ See supra note 87 and accompanying text.

¹⁴⁹ See supra note 108 and accompanying text.

¹⁵⁰ One military historian argues that military intelligence alone cannot ensure victory, as demonstrated by the fact that Poland was crushed by Germany at the beginning of World War II despite having cracked the German Enigma code. See generally JOHN KEEGAN, INTELLIGENCE IN WAR: KNOWLEDGE OF THE ENEMY FROM NAPOLEON TO AL-QAEDA 323-26, 348 (2003).

veillance directed at foreign powers and their agents on United States territory, so long as there are adequate measures to guard against inadvertent surveillance of American persons.¹⁵¹ In addition to electronic surveillance, recovery of shredded documents,¹⁵² and other such efforts, nations routinely attempt to recruit foreign citizens to commit espionage against their home nations.¹⁵³ Even countries that are strong allies are not above spying on each other. Perhaps the most notorious case (from an American standpoint) is that of former CIA analyst Jonathan Pollard, a native-born U.S. citizen recruited by Israel to hand over stolen classified documents.¹⁵⁴

Is there any meaningful difference between inducing a prisoner of war to divulge military secrets and inducing a diplomat to spy on his or her own country? In both instances, one country asks an alien to betray his or her nation.

The obvious and significant difference is that one scenario involves armed conflict and military detention, while the other does not. The laws of war, such as the Geneva Conventions, exist to regulate the conduct of war. The POW who is tempted by the offer of positive inducements is necessarily in the custody of a foreign power, and the POW's home nation can apply the coercive power of its domestic law only upon the POW's repatriation at the conclusion of the armed conflict. The citizen who is tempted by the offer of positive inducements to commit espionage against his or her home nation, on the other hand, is not in custody at all, and more importantly, is subject at that moment to whatever domestic laws that the home nation uses to coerce its citizens' conduct. In the United States, for example, a person who transmits classified information to a foreign nation (whether motivated by positive inducements or other purpose) may be guilty of espionage.¹⁵⁵ Accordingly, in the Cold War scenario, the home nation presumably possesses adequate tools to police

¹⁵¹ 50 U.S.C. § 1802.

¹⁵² For example, after militant Iranian students stormed the U.S. Embassy in Iran in 1979, taking a number of American diplomats and staff hostage, the captors attempted to piece together shredded U.S. documents in order to obtain classified information. See Mark Bowden, *Among the Hostage-Takers*, THE ATLANTIC MONTHLY, Dec. 1, 2004, at 76.

¹⁵³ See, e.g., *Tenet v. Doe*, 544 U.S. 1, 3 (2005) ("After respondents expressed interest in defecting to the United States, CIA agents persuaded them to remain at their posts and conduct espionage for the United States for a specified period of time, promising in return that the Government 'would arrange for travel to the United States and ensure financial and personal security for life.'").

¹⁵⁴ Compare RONALD J. OLIVE, CAPTURING JONATHAN POLLARD: HOW ONE OF THE MOST NOTORIOUS SPIES IN AMERICAN HISTORY WAS BROUGHT TO JUSTICE (Naval Institute Press 2006) with MARK SHAW, MISCARRIAGE OF JUSTICE: THE JONATHAN POLLARD STORY (Paragon House 2001).

¹⁵⁵ 18 U.S.C. §§ 793-798.

against its citizens' betrayal; the same, however, is not true of the actual armed conflict, where the POWs are in custody of the foreign nation.

Indeed, as a leading commentator on the Geneva Convention observed, "in war-time prisoners in the hands of the enemy are not really in a sufficiently independent and objective state of mind to realize fully the implications of a renunciation of their rights."¹⁵⁶ Long term captivity predictably leads to resentment and irritability among the detainees, who often revert to a "primitive infantile stage of humanity."¹⁵⁷ Insufficient food exacerbates the suffering of prisoners of war, and, not surprisingly, during the Korean War, almost 200 American prisoners of war were found to have informed on fellow soldiers or otherwise cooperated with captors for additional food.¹⁵⁸

Conditions of detention need not be so oppressive as to render persons susceptible to undue influence and pressure. In *Miranda v. Arizona*, the Court observed that police detectives made extensive use of "incommunicado interrogation of individuals in a police-dominated atmosphere" to extract confessions from suspects.¹⁵⁹ As is well-known, the Court responded by requiring police officers to warn suspects of their constitutional rights, including the right to remain silent and the right to counsel, prior to interrogation in custodial settings. In a later case, the Court distinguished traffic stops from custodial interrogation by noting that traffic stops are "presumptively temporary and brief," such that a motorist will not feel "completely at the mercy of the police."¹⁶⁰ The key elements that make an interrogation setting "custodial" include isolating the suspect in an unfamiliar setting¹⁶¹ and physically restraining the suspect such that the suspect does not feel free to leave.¹⁶²

The point of the *Miranda* comparison is not that prisoners of war should be given equivalent warnings, or that they should necessarily have access to lawyers.¹⁶³ It is to say, however, that if isolation in a police station can be so intimidating as to render a suspect's confession tainted by reason of involuntariness,¹⁶⁴ then any "decision" by a prisoner of war to respond to positive inducements offered by captors is presumably all

¹⁵⁶ COMMENTARY, *supra* note 20, at 89.

¹⁵⁷ BARKER, *supra* note 40, at 78, 80.

¹⁵⁸ *Id.* at 82-84.

¹⁵⁹ 384 U.S. 436 (1966).

¹⁶⁰ *Berkemer v. McCarty*, 468 U.S. 420, 437-438 (1984).

¹⁶¹ *Miranda*, 384 U.S. at 445-46.

¹⁶² *Minnesota v. Murphy*, 465 US 420, 430 (1984).

¹⁶³ *But see* Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 406-11 (2006) (analyzing procedural due process right of non-state fighters to appointment of counsel for purpose of challenging status as "enemy combatants").

¹⁶⁴ While not all police station interrogations are custodial, those that are not tend to involve suspects who voluntarily traveled to police stations. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977), *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

the more infirm. Like the criminal suspect taken involuntarily to the police station for questioning, the prisoner of war has no expectation that detention will be “presumptively temporary and brief.”¹⁶⁵

The situation is much different for the person induced by a foreign government to commit espionage against that person’s home nation. Although the harm that the foreign government seeks to inflict is in essence the same as in the prisoner of war situation – betrayal of the home nation – the influence brought to bear on the individual is based on temptation, as opposed to a desire to ease the conditions imposed by the foreign government itself.¹⁶⁶ It is one thing to exploit the misery that a nation inflicts on its own people; it is altogether another matter to exploit the suffering that a foreign government inflicts upon aliens, even if that suffering results from justifiable detention.

To be sure, merely because the foreign government is not directly responsible for the conditions that the individual seeks to ameliorate does not automatically mean that the individual’s decision to engage in espionage is truly voluntary. Consider the famous contract case *Post v. Jones (The Richmond)*,¹⁶⁷ in which three whaling ships came across another whaling ship, *Richmond*, that was slowly sinking with a full cargo load of oil and whalebone. The three whaling ships offered to buy as much of the *Richmond*’s cargo as they could carry at prices far below market value, pointing out that the *Richmond*’s alternative was to get nothing if the cargo sank with the ship. Although the three whaling ships ruthlessly exploited the *Richmond*’s distress, they had not caused that distress. Yet, the Court invalidated the sales contracts, concluding that maritime and admiralty law would “not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain.”¹⁶⁸ Key to the decision, however, was the extreme nature of the calamity that had befallen the *Richmond*. Complete loss of the cargo, which was the alternative to accepting the offers from the whaling ships, might be seen as equivalent to death; and while the whaling ships did not inflict that situation on the *Richmond*, they were profiting from it. Perhaps an analogous situation would be a transportation company that offers to help a person escape from a violent war scene for some exorbitant price, where remaining behind would lead to certain

¹⁶⁵ Cf. Welsh S. White, *What Is An Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2046-49 (1998) (arguing that continuous interrogation lasting beyond six hours should be deemed coercive).

¹⁶⁶ See, e.g., David Perry, “Repugnant Philosophy”: *Ethics, Espionage, and Covert Action*, in *ETHICS OF SPYING: A READER FOR THE INTELLIGENCE PROFESSIONAL* (Jan Goldman ed., 2006) (noting that foreign citizens spy for the United States for money, adventure, sex; out of concern or anger at their own government; or because they are blackmailed or deceived).

¹⁶⁷ 60 U.S. 150 (1857).

¹⁶⁸ *Id.* at 160.

death; courts might well apply the reasoning from *Post* to invalidate such a contract. Those examples, however, are far different from the ordinary situation where the United States recruits foreigners who want to defect to our country to improve their own living conditions.

In short, the betrayal that is sought by offering positive inducements to spies and POWs to provide military or classified information is identical. What is different is that one instance involves pure temptation, whereas the other involves temptation to alleviate the conditions of preventative incapacitation – even if those conditions comply with international law.

V. SOVEREIGN NATIONS VS. NON-STATE GROUPS

Admittedly, non-state actors such as suspected al Qaeda fighters endure conditions that are likely if anything to be more isolating and intimidating than those for soldiers in prisoner of war camps.¹⁶⁹ Therefore, one might conclude that any justification for prohibiting the offering of inducements to soldiers based on the psychologically coercive impact of the detention must apply as well to detained members of non-state groups.

The proposal of forbidding the offering of positive inducements to prisoners of war who are members of the armed forces of a sovereign nation but allowing such inducements to be used on members of non-state groups undoubtedly privileges nation-states. Is such a distinction justifiable? This Part answers that question by examining the various contexts in which nations are different from other sorts of entities, including non-state groups and corporations, concluding that nations are entitled to the loyalty of their citizens in a way different from anything else.

A. *How International Law Views Nations Versus Non-State Groups*

Nations were once the only subject of international law, with non-state groups and individuals left to the national arena. As renowned international lawyer Philip Jessup noted in 1948, “[T]he world is today organized on the basis of the co-existence of states, and . . . fundamental changes will take place only through state action, whether affirmative or negative.”¹⁷⁰

In recent years, though, non-state groups have “gained greater rights and duties directly from international law.”¹⁷¹ For example, in an important 1949 case, the International Court of Justice ruled in an advisory opinion that the United Nations, though not a nation-state, was “a subject

¹⁶⁹ See, e.g., CENTER FOR CONST. RTS., REPORT ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT GUANTANAMO BAY, CUBA 14-15 (2006), available at http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

¹⁷⁰ PHILIP JESSUP, A MODERN LAW OF NATIONS 17 (1948).

¹⁷¹ Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT’L L. 435, 438 (2005).

of international law and capable of possessing international rights and duties, and that it has a capacity to maintain its rights by bringing international claims.”¹⁷² This case did not, however, open the door to any and all non-state groups to claim recognition under international law. Rather, a non-state group must have legal personality, consisting of:

1. a permanent association of states, with lawful objects, equipped with organs;
2. a distinction, in terms of legal powers and purposes, between the organization and its member states;
3. the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.¹⁷³

These requirements obviously rule out claims by non-state groups such as al Qaeda to entitlement to legal personality under international law: al Qaeda is not made up of nations, and it has no legal powers – indeed, its currency is violent force, not power.

An important consequence of the way that international law views nations as opposed to non-state groups, even those with legal personality, is the entitlement to use force. Prior to the adoption of the United Nations Charter, nations had great latitude to use force, including – at least during ancient times – conquering other nations for territorial acquisition.¹⁷⁴ Indeed, this view was hardly limited to the ancient Greeks; almost all European nations acquired their territory originally through conquest.¹⁷⁵ This acceptance of territorial conquest persisted into the 20th century.¹⁷⁶ A social science graduate student writing in 1939 observed “that a considerable number of European authorities on the law of nations maintain that conquest is a legitimate mode by which a state may acquire territory.”¹⁷⁷

¹⁷² *Reparation for Injuries Suffered in Service of the United Nations*, 1949 ICJ Reports 174, 179.

¹⁷³ IAN BROWNLE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 553 (6th ed. 2003).

¹⁷⁴ Thucydides described the Athenian conquest of the Spartan colony of Melos as justified because the Athenians needed to maintain and grow their empire. In Thucydides’ imagined dialogue between the Athenian generals and Melian officials, the Athenians speak in terms of realism, not morality. The thrust of the Athenian argument for why Melos should surrender was not that Athens was *entitled* to conquer Melos, but rather that it was *able* to do so. HOBBS’S THUCYDIDES (Richard Schlatter ed., Rutgers University Press 1975) (1628).

¹⁷⁵ MATTHEW M. McMAHON, *CONQUEST AND MODERN INT’L LAW: THE LEGAL LIMITATIONS ON THE ACQUISITION OF TERRITORY BY CONQUEST* 47 (1940) (quoting HENRY WHEATON, *ELEMENTS OF INT’L LAW* 201-02 (1866)); *see also* MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 113 (1977).

¹⁷⁶ *See* LASSA OPPENHEIM, *INTERNATIONAL LAW* 288 (1st ed. 1905-06).

¹⁷⁷ McMAHON, *supra* note 174, at 6.

One of the significant accomplishments of the victorious Allied forces at the end of World War II was the prosecution of various German and Japanese leaders for the crime of launching “a war of aggression.”¹⁷⁸ In doing so, the Allies shattered the previous world view that conquest was an acceptable means of acquiring territory. By no means was the new view uncontroversial,¹⁷⁹ but the International Military Tribunal ultimately concluded that upon signing the 1928 Kellogg-Briand Pact, any use of war as “an instrument of national policy” would “be aggressive in character” and hence in violation of the Pact.¹⁸⁰ The then-newly created United Nations further cemented this major restriction on the use of force.

Under the United Nations Charter, nations have the right to use armed force in only two situations: (1) in self-defense, “if an armed attack occurs”;¹⁸¹ or (2) when authorized by the United Nations Security Council.¹⁸² With respect to the latter, the original intent was that member nations would provide military assets directly to the Security Council, but this has never happened.¹⁸³ Instead, once the Security Council has authorized the use of military force, “ad hoc coalitions of forces have been assembled for the task.”¹⁸⁴

What is apparent is that under the current scheme of international law, notwithstanding the U.N. Charter’s restriction, nations are privileged to use military force in limited and appropriate circumstances.

Of course, it would be naïve to think that people fight only because they are ordered by their nation to do so. The bloody sectarian violence in Iraq in the mid-2000s is a sober reminder that tribal loyalties and religious differences are just as powerful, if not more so, than motivations leading to armed conflict between non-state groups.¹⁸⁵ The reasons that al Qaeda leader Osama bin Laden has given for “declaring war” against the United States have ranged from wanting to force American troops to leave Saudi Arabia to condemning American support for Israel to mere

¹⁷⁸ Bert V.A. Roling, *Crimes Against Peace*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 385, 386 (A. Cassese ed., 1987). *But see* Anthony A. D’Amato, *War Crimes and Vietnam: The “Nuremberg Defense” and the Military Service Resister*, 57 CAL. L. REV. 1055, 1063 (1969) (calling the charges of “crimes against peace” and “crimes against humanity” “dubious and propagandistic”).

¹⁷⁹ *See* ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 155-57 (1962).

¹⁸⁰ *Id.* at 157.

¹⁸¹ U.N. Charter, art. 51.

¹⁸² U.N. Charter, arts. 42, 43.

¹⁸³ *See* BEDERMAN, *supra* note 97, at 222.

¹⁸⁴ *Id.*

¹⁸⁵ For a succinct description of the religious and cultural difference between Shiite and Sunni Muslims, see LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11*, at 47-48 (2006).

nihilistic desiring for death and carnage on a grand scale.¹⁸⁶ While some of these goals might be seen as somewhat equivalent to defense of territorial sovereignty,¹⁸⁷ the overarching theme of bin Laden's rationale is more in line with a religious clash. When questioned by journalist Peter Arnett about what the United States could do in response to bin Laden's 1996 declaration of war, bin Laden explained that "[t]he reaction came as a result of the aggressive U.S. policy toward the entire Muslim world, not just the Arabian Peninsula," and that the United States needed to stop interfering "against Muslims 'in the whole world.'"¹⁸⁸

That people are inspired to fight for reasons other than national solidarity, however, does not mean that such violence is sanctioned under international law and certainly not under domestic law. Suppose, for example, that Mexico launched a military attack against Southern Baptist churches in Arizona. Presumably, no one would dispute the right of the church members under either domestic U.S. law or international law to repel the actual attack against their churches.¹⁸⁹ However, it seems unlikely that the church members would be seen as anything other than invading criminals if they were to pursue their attackers across the U.S.-Mexico border, because they would not be privileged under international law to use armed force. It is up to the nation to respond further to the initial incursion.

B. *Public Attitudes About Loyalty to Nations Versus to Other Entities*

Another reason to treat soldiers of national armies differently from members of non-state groups lies in public attitudes about the loyalty owed to one's nation versus that owed to other groups, such as families and employers. For the moment, I am making a predictive observation, not a normative argument.

1. National loyalty

Nations have the power to demand loyalty from citizens (and to varying degree, aliens within the nation's territorial jurisdiction) and to enforce that demand by way of criminal laws, such as those prohibiting treason. Other group entities, such as corporations and associations, may have some legal recourse against members who "betray" them, but these remedies typically lie in contract or tort law established by the nation (or sub-national jurisdictions such as states or provinces) and are civil, not criminal, in nature.

¹⁸⁶ *Id.* at 247, 271.

¹⁸⁷ *Id.* at 246 (noting bin Laden's criticism of the Saudi royal family as being "subservient" to the United States).

¹⁸⁸ *Id.* at 247.

¹⁸⁹ For an extended discussion, see GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* 57-59 (Princeton University Press 2002).

Moreover, the nation can demand loyalty from its subjects even when its course of action arguably violates international law. There are, for example, strong arguments that the 2003 invasion of Iraq by the United States and its coalition was illegal,¹⁹⁰ though the arguments to the contrary are hardly frivolous.¹⁹¹ But even if there were a reasonable possibility of some global entity's concluding that the United States and its coalition allies *illegally* invaded Iraq, it is far from clear that any individual American citizens would thereby have been entitled to have assisted Saddam Hussein in fighting off the invaders, at least as a matter of domestic law. A number of U.S. soldiers who disobeyed orders to deploy to Iraq have been court-martialed.¹⁹² If soldiers can be court-martialed domestically for refusing to fight *for* the United States, then it is not implausible to conclude that a citizen could be prosecuted for offering to fight *against* the United States.

This is in part a consequence of the distinction between *jus ad bellum* (justice of war) and *jus in bello* (justice in war), whereby the reasons one fights a war are separate from the manner in which one fights the war.¹⁹³ A war may be unjust (for example, if it were an aggressive war aimed at capturing territory from a neighbor), but soldiers from that nation do not commit war crimes merely because they fight in an unjust war. The soldiers' responsibility is to fight in accordance with the laws of war. In other words, the nation's motivation for engaging in war is not the soldiers' concern. Thus, after World War II, the victorious Allied Powers

¹⁹⁰ See, e.g., Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 26 (2003); John W. Head, *Responding to 9/11: Lurching Toward a Rule of Scofflaw*, 15 KAN. L.J. & PUB. POL'Y 1, 1-2 (2005) ("Virtually all international lawyers . . . agree that the actions of the Bush Administration in attacking and invading Iraq in March 2003 were inconsistent with legal rules that have been in place for over half a century").

¹⁹¹ William H. Taft, IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003); Michael D. Ramsey, *Reinventing the Security Council: The U.N. as a Lockean System*, 79 NOTRE DAME L. REV. 1529 (2004). That any conclusion about the legality of the invasion will almost certainly be left to the academic journals is not because the legal issues are fundamentally irresolvable. Whether Iraq, assuming it possessed weapons of mass destruction and hostility toward the United States, posed a sufficiently "imminent" threat so as to entitle the latter to engage in a preemptive military strike as self-defense is undoubtedly a difficult question, but not one much different in substance than the question posed by claims of preemptive self-defense in homicide cases. Rather, the continuing inconclusiveness is due to the lack of any international entity empowered to adjudicate such disputes with a degree of finality.

¹⁹² See, e.g., Ariel Hart, *Soldier Who Refused to Return Is Found Guilty of Desertion*, N.Y. TIMES, May 22, 2004, at A10 (noting conviction of Staff Sgt. Camilo Mejia); *Court-Martial Ordered for Antiwar Reservist*, L.A. TIMES, Aug. 15, 2003, at 34 (noting court-martial of Lance Corporal Stephen Funk).

¹⁹³ See WALZER, *supra* note 174, at 21.

tried dozens of German and Japanese political and military leaders for crimes against humanity for beginning aggressive wars, stating in effect that World War II was (from the standpoint of the Axis Powers) an unjust war. Yet, individual German and Japanese soldiers were tried only for their own war crimes, and not for participating in an unjust war. In other words, individual soldiers are responsible for their conduct in terms of *how* they wage war, but not *why* their nation wages war.

If that is so, it reflects recognition that soldiers owe their home nations a degree of loyalty and duty not to question the decision to employ military force.¹⁹⁴

2. Family loyalty

The privilege accorded to nations in terms of demanding loyalty from their citizens contrasts with demands for family loyalty. After the 9/11 attacks, the government went to great lengths to develop Muslim informants, often by allegedly pressuring aliens to spy on friends and family.¹⁹⁵ The situations are not perfectly analogous to that of the hypothetical prisoner of war, because there may have been a strong element of coercion involved. Some of the Muslims approached by the government reported being threatened with revocation of green cards and subsequent deportation if they did not cooperate with the government. However, the government also allegedly offered rewards, such as consideration in immigration proceedings.

Put aside the coercive aspect of the government's efforts and focus instead on the alleged incentives that the government allegedly offered to induce Muslims in the United States to provide information on other Muslims in their local communities. One Muslim, an alien, reported reluctance to help the government in this way, for he felt it wrong to spy on friends and family.¹⁹⁶ This is certainly an understandable position; Dante's *Inferno* places betrayers of family along with betrayers of country in the Ninth Circle of Hell.¹⁹⁷

Yet, this is at best moral betrayal, not legal betrayal. Prosecutors have reached plea agreements with defendants requiring them to testify against spouses or parents. At an evidentiary level, the general marital privilege allows one spouse to refuse to testify against the other, but it does not require such forbearance; the privilege can be waived by the testifying spouse.¹⁹⁸ What is interesting is that the old rule – that one

¹⁹⁴ To be clear, I mean that soldiers are not entitled *as soldiers* to question the nation's decision to use force. *As citizens*, they would of course be entitled to participate democratically.

¹⁹⁵ See, e.g., Peter Waldman, *A Muslim's Choice: Turn U.S. Informant Or Risk Losing Visa*, WALL ST. J., July 11, 2006, at A1, A11.

¹⁹⁶ *Id.* at A11.

¹⁹⁷ DANTE, *INFERNO* (Mark Musa trans., Ind. Univ. Press 1971).

¹⁹⁸ See, e.g., *Trammel v. United States*, 445 U.S. 40 (1980).

spouse could prevent the other from testifying – was based not only on archaic notions of wives as chattel, but also the idea that it somehow preserved marital harmony.¹⁹⁹ In discarding that notion, the Court signaled legal acceptance of one spouse’s turning on another, reasoning that “[w]hen one spouse is willing to testify against the other in a criminal proceeding . . . their relationship is almost certainly in disrepair. . . .”²⁰⁰

Indeed, it is debatable whether spying or informing on one’s family members is always seen as morally bad. Ted Kaczynski, the notorious Unabomber, was captured only after his brother notified the government that the terrorist’s manifesto, which the *New York Times* had recently published, sounded similar to Kaczynski’s private letters to family members. The brother received some accolades,²⁰¹ no doubt in large part based on the recognition that the Unabomber was a violent criminal whose letter bombs had killed three people and maimed 29 others over a 17 year reign of terror. In short, a frame of reference exists in which one could say that Kaczynski’s actions violated the country’s laws, and therefore the brother’s helping the government stop Kaczynski was admirable because it made society safer, notwithstanding his betrayal of his own sibling.

This is precisely why nations are different from groups. Because of its status as a sovereign, the nation is able to define the terms of the loyalty that it demands, relative to that demanded by other types of groups. Family members may feel outraged at being “betrayed” by other family members, but if that betrayal was induced by the government, no recourse is available.

3. Employee loyalty

A third type of associational entity worth examining is the corporation (as well as related entities such as partnerships, limited liability corporations, and limited liability partnerships). As agents, employees owe their corporate employers a fiduciary duty, one that is violated not just by

¹⁹⁹ *Id.* at 52.

²⁰⁰ *Id.*; see also Milton C. Regan, *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2102 (1995) (“A spouse who is genuinely willing to testify against another has indicated that the marriage is providing insufficient current benefits to justify her continued loyalty to it.”).

²⁰¹ See generally Don Oldenburg, *What If He Were Your Brother?: When David Kaczynski Fingered the Unabomber Suspect, He Became the Star of a Morality Play*, WASH. POST, Apr. 11, 1996, at C01; Judy Mann, *The Hero of the Case*, WASH. POST, Apr. 12, 1996, at E03. This is not to say that there weren’t observers who condemned David Kaczynski as a betrayer, or at least felt conflicted about his turning in of his brother. See, e.g., William Glaberson, *Heart of Unabom Trial Is Tale of Two Brothers*, N.Y. TIMES, Jan. 5, 1998, at A12.

embezzlement or theft,²⁰² but also self-dealing even where there might not be tangible harm to the employer. For example, in *United States v. Jain*,²⁰³ the court affirmed a conviction of a psychiatrist who failed to disclose to his patients that he was receiving a kickback from doctors for generating referrals. The conviction stood despite the fact that there was no evidence that the patients received any different care than they would have absent the referral, nor any evidence that the patients were charged higher fees because of the referral.

Yet, there is an obvious limit to the corporation's expectation of loyalty from its employees: whistleblowing to the government. Even in instances where the corporation may view the government as the "enemy" (if, for example, the corporation is being investigated for possible criminal or civil violations), it cannot lawfully prevent the employee from disclosing information of potential wrongdoing to government investigators. Any efforts to dissuade employees from cooperating with the government could well constitute obstruction of justice.²⁰⁴

Admittedly, the analogy is far from perfect, because the fiduciary duty that the employee owes to the corporation is trumped by the corporation's obligation not to violate federal and state laws. But this difference only reinforces the observation that nations are entitled to a different, stronger bond of loyalty from citizens than are other entities. True, there are international organizations such as the United Nations, the North Atlantic Treaty Organization (NATO), and the World Trade Organization (WTO) that stand in some overseeing relationship to nations, but these organizations have no relationship with individuals. They can neither compel nor expect individuals to assist them against the wishes of their home nations.

4. Non-state groups, including terrorist groups

Finally, what about non-state groups, particularly those with violent or criminal goals? Such groups might well demand loyalty of their members, as with the Mafia's code of silence known as "Omerta."²⁰⁵ Members of the inner circle of al Qaeda had similarly "formally pledged themselves" to Osama bin Laden.²⁰⁶ They may even enforce such demanded loyalty through intimidation, threats, or violence, but they have no legal recourse against members who "betray" them. Indeed, under domestic law, a criminal co-conspirator who discloses the nature of

²⁰² *Carpenter v. United States*, 484 U.S. 19 (1987) (affirming conviction of defendants who profited off the information to be published in a daily financial newspaper).

²⁰³ 93 F.3d 436 (8th Cir. 1996); *see also* *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997).

²⁰⁴ 18 U.S.C. § 1512.

²⁰⁵ *See infra* note 69 and accompanying text.

²⁰⁶ WRIGHT, *supra* note 184 at 141, 194.

the conspiracy to government agents effectively withdraws from the conspiracy and cuts off his or her own criminal liability.²⁰⁷ There is simply no comparison between nations and non-state groups with regard to their legal entitlement to loyalty from their constituent members.

It is, however, worth acknowledging one wrinkle: self-determination movements – that is, “the right of cohesive national groups (‘peoples’) to choose for themselves a form of political organization and their relation to other groups.”²⁰⁸ Although generally accepted as customary international law,²⁰⁹ the right of self-determination has remained difficult to apply in practice, given its “two contradictory impulses: the revolutionary spirit of secession and group self-assertion and the conservative tendencies of state sovereignty and territorial integrity.”²¹⁰ The inherent challenge of determining when a non-state group acquires self-determination status is, however, not relevant to my proposal of distinguishing between nations and non-state groups. It is sufficient to say that whenever a non-state group qualifies under international law, it would be treated as the equivalent of a nation, and thereby entitled to demand loyalty from its fighters such that positive inducements would be forbidden as an interrogation tool.

5. The circularity of privileging nations?

Thus far, I have made only a positive observation that national loyalty is different in substance from that owed to family members or corporations. That this observation accurately describes reality does not necessarily justify perpetuating the asymmetry. It must be demonstrated that it is normatively desirable to maintain the privileged status that nations have been accorded, or else my proposal merely reinforces a circular rather than rational result.

If nations *should* have no greater claim to citizens’ loyalty than corporations do to their employees’ or families do to their members, then it might follow that inducements should be allowed to be used against all detainees, whether soldiers or not; or inducements should not be allowed to be used against anyone.

²⁰⁷ United States v. U.S. Gypsum Co., 438 U.S. 422, 464-65 (1978).

²⁰⁸ BROWNLE, *supra* note 172, at 649.

²⁰⁹ See, e.g., Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT’L L. REV. 167, 168 (2001).

²¹⁰ Gerry J. Simpson, Book Note, *Is International Law Fair?*, 17 MICH. J. INT’L L. 615, 631 (1996). Consider, for example, the general lack of international support for an independent nation for the Kurds, despite a strong claim under reigning international law principles. See generally Gregory J. Ewald, *The Kurds’ Right to Secede Under International Law: Self-Determination Prevails Over Political Manipulation*, 22 DENV. J. INT’L L. & POL’Y 375 (1994).

The proper way to think about this is to ask, what entities should be allowed to use military force lawfully (even if only in limited circumstances)? Expanding the set of entities that can use force would seem to run contrary to the major developments in international law over the past 60 years, which have been aimed at reducing the incidence of armed conflict. Privileging new categories of non-state groups to use military force would run the risk of increasing the amount of violent warfare. Moreover, given that international law currently restricts the use of military force to self-defense or enforcement of United Nations Security Council resolutions, it is difficult to see how non-state groups could fill the defensive role that nations have traditionally played.

To be sure, non-state groups such as Hamas and Hezbollah, both of which have been designated foreign terrorist groups by the State Department, do sometimes engage in military activities purportedly on behalf of the local population. For example, Hezbollah fighters started the 2006 Lebanon War by firing rockets into Israel, attacking Israeli armored vehicles, and killing three soldiers and capturing two others. The ostensible reason for the cross-border raid was to take hostages to use in exchange for a number of imprisoned Lebanese citizens supposedly detained in Israel.²¹¹ Whether such actions actually benefit the population is debatable. Whatever else one thinks of the Israeli occupation of the West Bank and Gaza Strip, it is hard to defend territorial incursions to kidnap Israeli soldiers, resulting in Israeli military responses that have predictably ravaged the local population. More importantly, though, non-state groups do not answer to the local populace; while certain totalitarian governments may be equally unresponsive to their population, they at least are subject to the jurisdiction of the United Nations.

VI. SOME CAUTIONARY THOUGHTS

In this final Part, I consider some additional points and concerns about the implementation of my proposal. First, I consider whether positive inducements could be expected to work on members of non-state groups such as al Qaeda.

A. *Will Positive Inducements Work?*

Of course, it is fair to ask whether there is any reason to believe that positive inducements would be effective as a means of eliciting cooperation from suspected al Qaeda members. If captured al Qaeda members are believed to be impervious to the temptation of positive inducements, then it is pointless to offer such inducements, and the interrogation

²¹¹ See Joel Greenberg, *Father of Captive Israeli Soldiers on Shalit Isn't Waiting for Government in Seeking Son's Release*, CHI. TRIB., Apr. 24, 2007, at 7 (describing efforts to broker prisoner exchange by father of Israeli soldier held hostage by Hezbollah).

debate will inevitably become one of balancing the perceived need for information against the immorality of coercive interrogation tactics.

As noted earlier, inducements play an important role in securing guilty pleas from criminal defendants, as well as in seducing foreign citizens into committing espionage against their home nations. And obviously, much of economics is based on the role that incentives play in affecting people's behavior. If anything, academic commentary has suggested that, in the context of police interrogations, inducements are too powerful.²¹² If inducements can provide strong enough incentives to cause many accused criminal defendants to plead guilty, then they would fail to work categorically on suspected terrorists only if terrorists were somehow different in this regard.

Since the 9/11 attacks, however, some interrogation experts have suggested that Islamic fundamentalists are different from criminals, even tight-knit ones such as Mafia members.²¹³ Certainly, the willingness of the 9/11 hijackers to kill themselves as part of the terrorist plot suggests an uncommonly fanatical commitment to a cause that differs materially from the types of persons to whom inducements are typically offered. To the extent that inducements work by exploiting the desire of the target to lessen potential unpleasantness imposed by a government, a person willing to die for his cause might be immune to such temptations.

However, we should not be so quick to assume that "terrorists" are monolithically resistant to inducements, or that Islamic fundamentalists are so utterly alien that we cannot induce them into changing their behavior.²¹⁴ Decades of studies have failed to identify psychological differences between terrorists and everyone else.²¹⁵ Indeed, common perceptions of terrorists as being devoutly religious, generally poor, and lacking in education turn out to be largely inaccurate,²¹⁶ even when applied to known al Qaeda members. For example, at the time of the 9/11 attacks, the top leadership of al Qaeda had highly technical back-

²¹² See, e.g., Bibas, *supra* note 66.

²¹³ James Graff, *Hate Club; For years terrorists linked to Osama bin Laden have quietly used European cities as operational bases—and potential targets*, TIME INT'L, Nov. 5, 2001, at 26 (quoting unnamed European interrogator as saying, "Unfortunately, I've never seen a turncoat among Islamist militants A lot of Islamists who seem to be confessing may actually be thinking, 'I'll tell them what they want to hear, but I'll never change.'").

²¹⁴ See LAGOURANIS, *supra* note 45, at 17-19 (former military interrogator's criticism).

²¹⁵ See, e.g., REX A. HUDSON, THE SOCIOLOGY AND PSYCHOLOGY OF TERRORISM: WHO BECOMES A TERRORIST AND WHY: THE 1999 GOVERNMENT REPORT ON PROFILING TERRORISTS 43-47 (1999); MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY 17 (2008); Bruce Hoffman, *Testimony: Lessons of 9/11*, RAND Corp. CT-201, 12, (Oct. 2002) available at <http://www.rand.org/pubs/testimonies/2005/CT201.pdf>.

²¹⁶ See HUDSON, *supra* note 214, at 48; SAGEMAN, *supra* note 214, at 47-62.

grounds: Osama bin Laden (civil engineering), Ayman al-Zawahiri (medicine), and Khalid Sheikh Mohammed (engineering); the operational leaders of the 9/11 plot were similarly well-educated: Mohammed Atta (architecture) and Ziad Jarrah (engineering).

In fact, there are examples of defection by al Qaeda members. Mohammed bin Moosalih, once Osama bin Laden's treasurer, defected to Saudi Arabia in 1998 after being arrested in Pakistan a year earlier.²¹⁷ Another al Qaeda treasurer, Medani al-Tayeb, defected to Saudi Arabia in 1995 after bin Laden rejected a Saudi offer to return to the fold.²¹⁸ Of course, defection to an Islamic country is not equivalent to defection to a western nation, particularly the United States, but there is at least one example of the latter: Jamal al-Fadl, described as "one of bin Laden's most popular and trusted men," fled from bin Laden after being discovered embezzling al Qaeda funds, eventually seeking protective custody from the United States.²¹⁹ The interesting aspect of al-Fadl's case is that his fear, which led him to betray bin Laden, resulted from greed, demonstrating that even al Qaeda members can succumb to financial temptation.²²⁰

This is not to say that every terrorism suspect will respond to positive inducements, nor should that be required before concluding that inducements should be used. And it is not to discount the importance of recognizing and adapting to cultural differences. Historic examples from World War II demonstrate as much. Allied Forces discovered that the interrogation techniques that successfully induced German POWs to cooperate – e.g., getting "tough" with them – failed with Japanese POWs.²²¹ The difference was that Japanese soldiers were expected to fight to the death, and hence, they viewed being taken alive as a POW as shameful and dishonorable. Accordingly, they accepted "tough" treatment as just deserts.²²² American interrogators changed tactics, treating them humanely and pleasantly; the Japanese POWs, used to harsh treatment from their own superiors, were surprised and disoriented by the

²¹⁷ STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* 398 (2005); Joseph Fitchett & Brian Knowlton, *Bin Laden's finances pose problem for U.S.; Terrorist's assets are as hard to target as his organization*, *GLOBE & MAIL* (Toronto), Sept. 2, 1998, at A15.

²¹⁸ WRIGHT, *supra* note 184, at 199.

²¹⁹ *Id.* at 197; Rosie DiManno, *Pulling bin Laden from the shadows*, *TORONTO STAR*, Sept. 9, 2006, at A01.

²²⁰ See also Mark Bowden, *The Dark Art of Interrogation*, *ATL. MONTHLY*, Oct. 2003 (noting claim by Israeli interrogator that some Palestinian prisoners would willingly spy on fellow prisoners in exchange for "an incentive such as an opportunity to settle with their families in another country. . .").

²²¹ STRAUS, *supra* note 43, at 125.

²²² *Id.*

Americans and became “vulnerable to exploitation for intelligence purposes” because “they had neither guidance nor experience” to resist.²²³

Key to American success in adapting interrogation techniques to Japanese POWs was the familiarity that certain interrogators had with Japanese culture and language. One American naval officer had such fluent command of Japanese that he “could bark questions at the awed prisoners using the vocabulary and rough phrasings used by Japanese officers in addressing enlisted men,” with the result that “[s]ome prisoners then responded reflexively with the ingrained Japanese desire to have the right answers.”²²⁴

Of course, radical Islamic fundamentalists are not the same as World War II-era Japanese soldiers. As a prescriptive matter, it may well be that American interrogators in the current global war on terrorism need better and more accurate training about Arab/Muslim culture, and not the stereotypical “us versus them” training described by a former military interrogator.²²⁵

B. *How Would We Keep Detainees in Line?*²²⁶

Positive inducements are offered to prisoners and detainees for reasons other than interrogation – specifically, to provide an incentive for them to behave while in detention. One might ask whether the proposal to bar the use of positive inducements as an interrogation technique against POWs would inhibit the ability of detention camp officials to keep POWs in line.²²⁷

At the detention camp on Guantanamo Bay, for example, detainees who are “compliant and willing to follow camp rules” are housed in a medium security facility with amenities such as ice water, electric fans, board games and playing cards, shared meals, and ample access to exercise yards.²²⁸ By contrast, other detainees were receiving no more than

²²³ *Id.* at 126.

²²⁴ *Id.* at 134. Fluency in the interrogation subject’s first language also figures prominently in Mark Bowden’s description of an Israeli intelligence agent’s highly successful questioning of Palestinian detainees. Bowden, *supra* note 219.

²²⁵ LAGOURANIS, *supra* note 45, at 17-19.

²²⁶ Thanks to Geoff Corn for prompting me to think about the issue raised in this subsection.

²²⁷ Since the proposal would allow inducements to be used when interrogating members of non-state groups, there would no concern in that instance over the use of inducements to obtain their cooperation in following detention rules.

²²⁸ See Kathleen T. Rhem, *Detainees Living in Varied Conditions at Guantanamo*, ARMED FORCES PRESS SERVICE, Feb. 16, 2006, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=25882>.

an hour a day outside cells smaller than those typical for death row inmates.²²⁹

But prohibiting the use of positive inducements in interrogation need not mean that they would be prohibited for other purposes, so long as the behavior sought to be induced could legitimately be related to the purpose of detention – that is, preventative incapacitation. Keeping POWs from rioting or from disrupting the detention facility relate to preventative incapacitation, for the detaining nation must be able to detain the POWs securely. Thus, just as the Geneva Convention permits detaining nations to compel POWs to work in keeping up the detention camp,²³⁰ it should allow inducements to seek cooperation in following camp rules.

VII. CONCLUSION

The conventional view that the Geneva Convention allows the use of positive inducements as an interrogation tool of POWs is wrong. It conflicts with the key values embodied in the Geneva Convention, and it enables detaining nations to exploit the fact of confinement to induce POWs to betray their home nations. While individual POWs might prefer to have the option of committing such betrayal in order to better their own conditions of confinement, the laws of war were not written solely for the benefit of individual soldiers.

Admittedly, this is a contrary interpretation of the Geneva Convention to that espoused by the International Red Cross and by most commentators. Along those lines, one might further argue that positive inducements would be less effective against disciplined soldiers, particularly those of an all-volunteer military such as the United States armed forces, than against conscripted soldiers who fight because they are forced to, not because they believe in their country.²³¹ Accordingly, allowing the use of positive inducements might encourage nations to develop codes of conduct for their armed forces and to develop and earn the loyalty of their soldiers.

But there is a distinctly Western, liberal democracy slant to this line of reasoning, based on the assumption that soldiers from such nations will be more dedicated, more loyal, and less susceptible to material temptations. Perhaps that assumption is borne out in reality, but it is important to keep in mind that the Geneva Convention eschews such *realpolitik*. For example, one could similarly argue that POWs are far more likely to want to defect when their captor nation is a liberal democracy than when

²²⁹ See Joseph Lelyveld, “The Least Worst Place”: *Life in Guantanamo*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 100, 111 (Richard C. Leone & Greg Anrig, Jr., eds., 2003).

²³⁰ See Third Geneva Convention, *supra* note 1, art. 50.

²³¹ Interestingly, this observation has been repeated to me by more than one military lawyer, all of whom have expressed skepticism at the idea that American soldiers would give up military secrets in exchange for better food.

it is a totalitarian government,²³² and that the Geneva Convention should therefore permit POWs to defect during wartime. Yet, Article 7 appears to foreclose this very argument.²³³

Because nations are different from non-state groups, however, and because the latter are simply not entitled to the same claim of loyalty from their members as nations are from citizens, inducing a member to cooperate with a detaining power against the member's group is an altogether different act. Nor could non-state groups (apart, perhaps, from self-determination movements) conceivably be given a status equivalent to nations to employ military force without reversing the overarching post-World War II trend of decreasing the situations in which armed force is used.

²³² This was the case at the end of the Korean War, when only about 20 American POWs wanted to defect to North Korea, while as many as 60 percent of Chinese and North Korean POWs were predicted to resist repatriation. See Jan P. Charmatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 *YALE L.J.* 391 (1953).

²³³ See *supra* notes 105-07. But see Charmatz & Wit, *supra* note 231.