

1 Introduction

Defining the Challenge

The proposition is this: that in a time of war the commander of an armed force . . . has the power . . . to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will. . . . [I]f true, republican government is a failure, and there is an end of liberty regulated by law.

—Justice David Davis, *Ex Parte Milligan*

These are the times that try men's souls.

—Thomas Paine, *The Crisis*

Epochal events in a nation's evolution are often transforming in ways that can only be clearly assessed through the objective lens of history. The passage of time provides the necessary temporal and emotional distance, which, in turn, permits critical examination of the whole rather than piecemeal assessment of the parts while in the vortex of change.¹ Certain events, however, trigger the need for immediate assessment and debate. Such events are often characterized by the degree to which they encroach upon and threaten the fundamental principles and freedoms that we embrace, and occasionally take for granted, in a democratic society. On September 20, 2001, President George W. Bush addressed a Congress and a nation still reeling in horror and disbelief from the unimaginable acts of cruelty that the world witnessed on September 11, 2001. In his speech to a devastated nation, President Bush articulated the collective sentiment of most Americans when he said, "All of this was

brought upon us in a single day, and night fell upon a different world." A different world indeed.

The tragic events of September 11, 2001, will undoubtedly be permanently etched in the memories of all Americans who were old enough to struggle with comprehending and rationalizing actions that were, by design, incomprehensible and irrational. For several weeks after the events, the surreal imagery of jetliners colliding with occupied skyscrapers on American soil played repeatedly to a stunned international audience. As with other acts of unspeakable violence throughout our nation's history, most Americans viewing the deadly imagery of September 11 will forever recall where they were the moment they first became aware of an unprecedented terrorist onslaught that, without warning, indelibly marked yet another day that will live in infamy. If the goal of these sudden and deliberate attacks was to instill fear and uncertainty in a seemingly invincible nation of people, then the attacks were an unmitigated success. For in the immediate aftermath, not only did the attacks engender a sense of vulnerability "in our own backyard," but they also induced widespread skepticism concerning America's ability to anticipate and prevent terrorism inside its own borders and within its current political, legislative, and judicial framework.

In an effort to address the myriad concerns that arose in the wake of the terrorist attacks, the government has proposed and/or implemented the following fundamental changes to America's institutions:

- Congress has enacted far-reaching legislation in record time with little or no debate.
- President Bush has issued a controversial military order without consulting Congress.
- A cabinet-level Office of Homeland Security has been created to coordinate U.S. national security efforts.
- The FBI has arrested and indefinitely detained hundreds of men of certain ethnic backgrounds while inviting hundreds more to "voluntary interrogations."
- The FBI has been given broader authority to search the Internet and other sources of public information for criminal activity—including entering public events for such purpose. This means that federal agents could, for example,

review e-mail and library patron records of those suspected of terrorist activity.

- FBI rules have been relaxed to make it easier for federal agents to get secret terrorism wiretaps.
- Attorney General John Ashcroft has proposed establishing a registry for any foreigner who might be considered an international security concern. This means that men between the ages of eighteen and thirty-five from approximately twenty Muslim and Middle Eastern countries would be fingerprinted, photographed, and required to complete a lengthy form.
- A program called TIPS (Terrorist Information and Prevention System) has been proposed to allow citizens to “help” in the antiterrorism effort by using their common sense to identify and report unusual, suspicious, and potentially terrorist activity. Although the program was scrapped in the wake of tremendous public outcry, the mere proposal of such a program is, in many respects, indicative of the government’s overzealous approach to combating terrorism within its own borders.
- Ambiguous “high alert” warnings are issued periodically to serve as a constant reminder that random terrorist violence is now a part of our daily existence.
- Off American shores and presumably outside the jurisdiction of U.S. courts, hundreds of suspected Taliban and al Qaeda terrorists have been captured, labeled “enemy combatants,” and are currently being “detained” at Guantanamo Bay, Cuba, without any apparent plans for implementing any type of judicial process to determine their guilt or innocence.
- Within the U.S. judicial system, American citizens suspected of or charged with terrorist-related crimes have endured differential treatment and, in the name of national security, have been denied some of the basic protections afforded criminal defendants by our Constitution.

With the current focus squarely on the undeclared war against terrorism in Afghanistan and Iraq, sweeping reforms within U.S. political and judicial systems have been effected with very little

debate, consultation, or analysis. Because this unparalleled transformation impacts and, in some cases, runs roughshod over fundamental principles inherent to a democratic society, America's overall response to the 9/11 terrorist attacks has brought into sharp focus basic notions of liberty, fairness, and justice memorialized centuries ago with the ratification of the U.S. Constitution. That is, in the seemingly directionless quest to eradicate terrorism, foundational principles once considered inviolable are now being called into question or brushed aside altogether. For example, in this new era of fear, suspicion, and uncertainty, it is commonplace to question and debate whether America's criminal justice system, with all of its flaws and foibles, is an appropriate venue for the terrorists who allegedly masterminded and perpetrated the worst terrorist attack in world history. Such debate often ignores the centuries of delicate give-and-take within the American constitutional form of government that facilitated the compromises so crucial to a justice system committed to principles of equality and fairness under the law. Why is this system suddenly so profoundly inadequate that it cannot be trusted to exact fair and just punishment for terrorist defendants? The answer certainly cannot be that the United States has never charged, convicted, or punished terrorists who planned and committed deadly acts on American soil. For one only has to look at the court proceedings in the first World Trade Center (WTC) bombing and the Timothy McVeigh trial to dismiss that notion. So we are compelled to dig much deeper for a rationale that may, in the end, require confronting the unwarranted fears, suspicion, and paranoia that have no legitimate place in shaping a system committed to fairness and equal justice under the law.

However, even allowing for the sake of argument that the American justice system requires alterations to fight (and presumably win) the war on terrorism, further questions remain, such as what specific changes are necessary and how should they be proposed and implemented? Because it appears that the current restructuring trend is in the direction of piecemeal, ad hoc pronouncements and determinations that have the potential to result in differential applications and outcomes, a number of other questions that take into account historical precedent and consistency with America's guiding principles must also be considered. For example, how would this patchwork of changes comport with traditional notions of fair-play and equal justice for all? Are there lessons from America's his-

tory of wartime treatment of citizens and noncitizens that may be instructive in the current circumstances? If the U.S. justice system framework is dramatically overhauled solely to address concerns arising from the September 11 attacks, what message does this send at home and abroad? In short, the overarching question is this: Can America, a nation rooted in democracy, liberty, and justice, remain true to its commitment to equal justice under the law while simultaneously taking a leadership role in eradicating terrorism throughout the world? As this book will explain, America's strong democratic tradition, which historically manifests itself more fervently during times of crisis, not only will endure but will facilitate a balancing of interests that simultaneously protects national security while preserving fundamental principles that define America as a country committed to due process and equal justice.

A comprehensive exploration of this critical question first requires an understanding of the key concepts that define the current challenges confronting America. Because horrific acts of terrorism precipitated America's post September 11 responses, a proper introduction to the definition of terrorism is where the analysis shall begin.

Defining Terrorism: Its Aim and Infrastructure

Suffice to say that the definitions of terrorism run the gamut from highly refined and legalistic to clichéd and meaningless rhetoric. For example, international law scholar and terrorism expert M. Cherif Bassiouni observes that terrorism is defined as "a strategy of violence designed to instill terror in a segment of society in order to achieve a power outcome, propagandize a course, or inflict harm for vengeful political purposes."² According to this definition of terrorism, the psychology of inspiring fear is the main objective, which is accomplished when societal conditions are such that terrorist acts are perceived as perpetually imminent yet unpredictable and the citizenry as a whole feels vulnerable to attack. Bassiouni further explains that, while this strategy of psychological intimidation may be utilized by state actors against their own populations or against the population of another country, it may also be co-opted by insurgent, revolutionary, or ideologically motivated factions within the state. Regardless of motivation, however, all of the groups rely

upon violence as a means to psychologically paralyze the population with fear.

Examining the different impact and outcomes of state versus nonstate sponsorship, Bassiouni theorizes that state-supported forms of terrorism have the potential to be coordinated, widespread, and easily susceptible to human rights violations. In contrast, nonstate-sponsored terrorist activity may be haphazard and sporadic in nature, although just as deadly.

Nonetheless, as Bassiouni explains:

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in its common usage, the term “international terrorism” has come to exclude the activities of state actors and even insurgent and revolutionary groups. Instead it is applied to small, ideologically motivated groups, and whose strategies of terror-violence are designed to propagate a political message, destabilize a regime, inflict social harm as political vengeance, and elicit over-reactive state responses likely to create a political crisis.³

Another remarkably lengthy academic definition of terrorism, which attempts to encompass all aspects of terrorist motivations, rationales, and goals, explains that

[t]errorism is an anxiety inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby—in contrast to assassination—the direct targets of the violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or target of attention, depending upon whether intimidation, coercion, or propaganda are primarily sought.⁴

On the governmental front, the U.S. Department of State, in its annual Patterns of Global Terrorism report, defines terrorism as

“premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”⁵ The definition further explains that the term *noncombatant* includes civilians and military personnel who, at the time of the incident, are unarmed and not on duty. Not to be outdone, a separate U.S. governmental organization, the Department of Defense (DOD), defines terrorism as “the calculated use of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological.”

The FBI acknowledges that there is no single, universally accepted definition of terrorism and adopts the definition set forth in the Code of Federal Regulations, which regards terrorism as “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in the furtherance of political or social objectives.” The FBI’s definitional scheme categorizes terrorism as either domestic or international, depending upon the origin, base, and objectives of the terrorists.

A provision in the U.S. Code addressing immigration and nationality concerns classifies terrorist activity as

any activity which is unlawful under the laws of the place where it is committed . . . and which involves any of the following:

- (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any—
 - (a) biological agent, chemical agent, or nuclear weapon or device, or

- (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

Finally, the USA Patriot Act defines “domestic terrorism” as activities that

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- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.

On an international level, the first attempt to gain consensus on a globally acceptable definition of terrorism dates back to 1937, when the League of Nations drafted a convention depicting terrorism as “[a]ll criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.” The convention was never ratified, and today, despite numerous efforts, there is still no internationally accepted definition of terrorism.

Indeed, as recently as February 2002, the international community struggled once again (and failed) to achieve consensus on the elusive notion of terrorism. United Nations diplomats and legal advisors at the General Assembly’s Ad Hoc Committee on Terrorism meeting attempted to achieve this critical consensus as a springboard to a comprehensive treaty designed to compel all 189 UN member-states to root out and punish terrorists in their midst. As in the past, a stalemate erupted over defining terrorism strictly according to what terrorists do as opposed to what goal they are trying to accomplish. Rizwan Khan, a spokeswoman for the Pakistani UN mission, observed:

If someone's subjugating your civilians, if you're just fighting for your rights and they shoot someone in your family, you're going to have someone who's going to say, "OK, I'm going to do the same." . . . The UN must analyze the root cause and draw a line between freedom fighters, who are fighting for their piece of land, and terrorists, who are trying to impose their will, their way of thinking, by force.

Khan added that "[c]ountries like Israel or India freely label anyone who resists as a 'terrorist' in an effort to win the battle for international opinion."⁶

Others researching the subject of terrorism have agreed with Khan's observations and further contend that terrorism cannot be defined without due consideration to the political perspective of the definer. That is, the definition is purely subjective and usually reflective of a particular political goal. For instance, countries such as Syria, Libya, and Iran have promoted an international definition of terrorism that would categorize groups they sponsor as "freedom fighters," thereby giving such groups virtually unlimited permission to carry out their goals by any means necessary.

Still others in the definitional quest describe terrorism specifically as it relates to the context of war. For example, in 1992 terrorism expert Alex Schmid proposed a concise legal definition of terrorism to the United Nations Crime Branch, using the following simple equation: Act of Terrorism = Peacetime Equivalent of War Crime.⁷ Similarly, contemporary novelist and military historian Caleb Carr implicated the notion of warfare when describing terrorism as the "contemporary name given to, and the modern permutation of, warfare deliberately waged against civilians with the purpose of destroying their will to support either leaders or policies that the agents of such violence find objectionable."⁸

What is patently clear from this assortment of definitional exercises is that there is no general consensus as to what constitutes terrorism. It is possible that, prior to September 11, the failure to reach accord did not generate significant hue and cry because such attempts were aimed at fostering global consensus during times of relative peace. Consequently, the lack of compromise was of little concern, and nations addressed terrorist activities using definitions that suited their own political, economic, and national security

goals. For example, while Israel and the United States perceive Palestinians as terrorists, others view them as freedom fighters resisting the occupation of their homeland. Similarly, while India threatened war against Pakistan for its failure to root out terrorism, many in Pakistan regarded the “terrorists” attempting to liberate Kashmir as “freedom fighters.” And, in what now seems a tragically ironic twist, the Reagan administration encouraged and financially supported the mujahaddin guerillas in their efforts to end Soviet occupation of Afghanistan. Indeed, President Reagan referred to Osama bin Laden and his cohorts as “the moral equivalent of our founding fathers.” Even the United States has been characterized as a terrorist state for its military incursions into countries whose governmental policies threaten U.S. interests.

Despite such widely varying perspectives, the United States declared war on terrorism in the wake of September 11, and the corresponding threat to extend that war beyond Afghanistan and Iraq demonstrates now, more than ever, that a global consensus on the definition of terrorism is crucial to maintaining international support for the goal of rooting out terrorism worldwide. Yet, the naysayers persist. Perhaps weary from repeated stalemates in their attempts to define terrorism, or skeptical that any definition can be inclusive enough, critics still question the need to formalize the term at all. In support of this contention, they point out that criminal acts typically associated with terrorism, such as kidnapping, airplane hijacking, and bombing, are already outlawed on an international scale, thus obviating the need for a general definition of terrorism.

Whatever the final decision on the need for a global definition of terrorism, when striving for consensus, two general themes, either stated or implied, seem to permeate most characterizations of terrorist activity. First, most definitions encompass the idea of intentionally using violence against innocent victims as a means of conveying a message. Second, in the wake of such shocking and indiscriminate violence, terrorist perpetrators often utilize the threat of more unjustified mayhem as a means to psychologically paralyze individuals, causing them to act in ways that recognize and cater to the omnipresent danger. Yet, even using general themes as a reference point sometimes yields unsatisfactory results. For, as history reveals, yesterday’s terrorists are today’s statesmen

and vice versa. Jerry Addams of Ireland's Sinn Fein and Nelson Mandela of South Africa are glaring examples of the futility of applying immutable definitions to mutable political, social, and economic realities.

The Motivations and Impact of Terrorism

Despite failing to reach agreement on a blanket definition of terrorism, scholars have not shied away from explaining "why" terrorists behave as they do, perhaps hoping to eventually arrive at a concrete definition of "who" a terrorist is. Unfortunately, attempts to delineate psychological motivations for terrorist activity has produced similarly disparate and inconclusive results. In broad terms, however, psychological factors such as hatred, revulsion, and revenge "characterize precisely the feelings and motivations of many terrorists."⁹ In effect, terrorists fail to consider that their goals or objectives might be ill-conceived and obsessively characterize opponents as the epitome of evil, subject to immediate and forceful vanquishment. Such polarized "either-or" conceptions result in a striking ability to dehumanize victims of terrorist violence, which ultimately enables terrorists to perpetrate deadly activities without remorse.

Still, it is not uncommon for terrorist groups to offer strategic and seemingly logical explanations for their behavior, believing "for good reason, that any attempt to explain their motivations in psychological terms diminishes the validity of their ideas, their actions and their beings."¹⁰ Indeed, many scholars have also eschewed the notion that terrorism is the outcome of psychological choices and, instead, portray such actions as the result of logical processes that can be examined and explained. Martha Crenshaw, in an article entitled "The Logic of Terrorism: Terrorist Behavior as a Product of Strategic Choice," posits that, when viewed analytically, "terrorism is assumed to display a collective rationality." What this means is that "the group possesses collective preferences or values and selects terrorism as a course of action from a range of perceived alternatives."¹¹

Not surprisingly, according to Crenshaw, terrorist violence is often the last resort for groups failing to achieve their goals through other nonviolent or less violent methods. To illustrate, Crenshaw

explains that, in the ongoing Middle East conflict, terrorist violence followed the failure of conventional methods of warfare in the Palestinian-Israeli struggle. As a result, Crenshaw concludes, terrorism may reflect the outcome of a cost-benefit analysis where the costs, although high, are perceived to be outweighed by the benefits.¹² Crenshaw further opines that, because terrorist activity is a strategic conception, “based on ideas of how best to take advantage of the possibilities of a given situation,” such strategies must also define governmental responses to terrorist activities. She cautions, however, that emphasis on the strategic reasoning capabilities of terrorists must be juxtaposed against the typical stereotype of terrorists as irrational fanatics. Otherwise, we risk underestimating the dangerous capabilities of extremist groups and, perhaps more importantly, miseducate and misinform the public about the “complexities of terrorist motivations and behaviors.”¹³

Although it is difficult to precisely determine what motivated the September 11 attacks, it is obvious that the various reasons posited have both strategic and psychological components. The purported justifications include a widespread belief that the United States has “colonized” the Arab world to protect U.S. access to oil; alleged U.S. support of authoritarian regimes in the Middle East; and the perception that the United States is actively assisting in the oppression of Palestinians by supporting Israel. Examining these rationales, while the strategic idea behind the attacks may have been an effort to create a large-scale Islamic fundamentalist revolution to rid the Muslim world of corrupt Western influences, the psychological factors of hatred, revulsion, and thirst for revenge were not far below the seemingly logical surface. Indeed, they were horrifyingly revealed by the indiscriminate and deadly nature of the attacks, which specifically targeted innocent victims on such a scale that tens of thousands of people could have perished.

Further evidence of a terrorist psychology or mentality can be gleaned from the fact that young men joining these militant groups are often destitute individuals in the Arab world searching for a *raison d’être*. Driven by a psychological need for meaning and recognition in life, they become easy pawns for the radical, politicized religious organizations that embrace terrorism as a means to impose their will. Such is the case with al Qaeda, a network of

Islamist terrorist organizations whose main goal is to rid the Middle East of Western (and particularly U.S.) influence. By implementing a long-term strategy of attacking the United States at home and abroad, al Qaeda and its supporters are hopeful that the benefits will outweigh any costs associated with their activities. Stated differently, these highly organized and sophisticated mercenaries are using a strategy designed to instill fear in their victims and to rally their angry supporters, while simultaneously gambling that governmental responses will not be so punitive as to completely obliterate the organization and its aims. It is a deadly cat and mouse game writ large on the international landscape.

In addition to the psychological and strategic impact of terrorism, such pervasive, continuing, and unpredictable violence (or the threat of such violence) also inflicts a severe economic wound on its victims. Although terrorists rarely have as their ultimate goal the devastation of a nation's economic infrastructure, one of the inevitable consequences of large-scale terrorist violence is economic downturn and a corresponding reassessment of economic resource allocation. In the aftermath of the September 11 attacks, the United States has endured a dramatic economic upheaval in both the business and consumer markets. Widespread economic uncertainty has resulted in a declining investment market, reduced overall spending, and massive layoffs. Moreover, to fight the escalating war on terrorism, the government has radically refocused its mission to support the counterterrorism effort, which, in turn, requires equally dramatic budgetary revamping. To cite a few examples, in February 2002 Attorney General John Ashcroft requested an additional \$2 billion to help the Department of Justice (DOJ) fight the terrorism battle. On the legislative front, Congress approved a \$15 billion emergency assistance package to help the ailing airline industry recover from the 9/11 attacks. The bailout package included immediate cash payments to compensate for the shutdown of the airlines after the attacks and loan guarantees of \$10 billion. But arguably the most devastated sector of the economy is the insurance industry, which is expected to pay out record claims to those who lost loved ones and property as a result of the attacks. Analysts predict that these claims could reach a crippling \$50 billion. A draft report by NATO's Economics and Security Committee entitled *The Economic Consequences*

of 11 September and the Economic Dimension of Anti-terrorism anticipated that

many of the losses associated with the [September 11] attacks are essentially “one-off” costs that will not endure over the long-term. There are, however, several important exceptions. Insurance [premiums], particularly against terrorist attacks, have probably risen permanently [and] . . . the costs of increased security no doubt will continue to weigh on national economies for the foreseeable future and will disproportionately hit certain sectors like airlines and insurance.¹⁴

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Considering the substantial and unprecedented loss of life and property on September 11, the continuing threat of terrorist violence at home and abroad, the omnipresent fear that more deadly attacks are in the offing, and the ongoing economic turmoil confronting the United States, it is not entirely inconceivable that the government would be hard-pressed to respond to the gruesome attacks in a manner that tests its resolve and commitment as a nation to civil liberties and principles of equal justice. America’s determination to uphold such principles has been tested during tumultuous times throughout its history, and, sadly, it has not always met such challenges in ways that demonstrate unwavering dedication to its core beliefs. Indeed, there are many who advocate that in times of war the government *must* be given a veritable *carte blanche* to protect its citizens at home and abroad. While this is not an entirely untenable position, the primary question that this book seeks to address is whether such latitude should be ceded to the government without also retaining some checks-and-balances authority to protect against fear-driven legislation and policy initiatives that sharply conflict with fundamental principles of equal justice. Or, stated differently, can America respond appropriately to the challenge of global terrorism while steadfastly remaining within the constitutional boundaries that have defined it as a democratic nation for well over two centuries? To begin this analysis, it is essential to define what is meant by “justice” and, more importantly, “equal justice.” That is, what precisely is expected when citizens demand that institutions and people behave in a just manner and that our legal system dispense justice fairly and equally?

The Equal Justice Paradigm

The term *justice* is ironically similar to the term *terrorism* in that it has also eluded a clearly defined, universally accepted meaning. Perhaps this similarity arises from the fact that, like *terrorism*, *justice* is a value-laden term, implicating one's beliefs, biases, and self-interest. Indeed, the meaning of justice has been debated by philosophers, legal scholars, and religious scholars from the medieval period to modern times. In Greek mythology, for example, the concept of justice is traditionally symbolized by Themis, the goddess of divine justice, who is usually depicted blindfolded, carrying the scales of justice and a sword. According to some mythology sources, Themis was the personification of justice and bore responsibility for maintaining order and keeping the moral law of gods and men.

The word *justice* itself originates from the Greek word *dike*, which, loosely interpreted, means that everything stays in its assigned place or plays its designated role according to nature.¹⁵ Of course, this basic conception of justice suggests nothing about the "right" way to behave, and it is only in later definitions that the moral or rightness/wrongness components of justice begin to emerge. For example, St. Thomas Aquinas acknowledged that justice means "doing right" when he said "justice is a habit whereby a man renders to each one his due by a constant and perpetual will."¹⁶ Other philosophers have similarly defined justice in terms of how one ought or ought not behave toward one's fellow citizens, thereby suggesting that justice is dependent upon a mutual network of behaviors where everyone acts in accord with certain standards. For instance, noted philosopher David Hume characterized justice as the mediator between people's essential selfishness and generosity. Similarly, political theorist William Galston described justice as

more than voluntary agreement, [but] . . . less than perfect community. It allows us to retain our separate existences and our self-regard; it does not ask us to share the pleasures, pains and sentiments of others. Justice is intelligent self-regard, modified, by the requirements of rational consistency.¹⁷

The overarching ideal of enhancing justice by maintaining order and rational consistency were present at America's inception, for

“not only were liberty, property and the pursuit of happiness deeply linked in the thoughts of the Framers . . . [but] they also believed in the principle that all people had a right to equal justice and to equality of rights.”¹⁸ President Abraham Lincoln in his Gettysburg Address confirmed this vision of the new nation when he spoke of a nation “conceived in liberty and dedicated to the proposition that all men are created equal.” Lincoln envisioned these as founding principles and considered them interdependent concepts in that achieving equality required freedom and, in turn, freedom could not be maintained without equality.

Later, the U.S. Supreme Court, in its role as ultimate arbiter of the Constitution, endorsed the fundamental principle of equal justice under the law in several cases decided early in America’s history, and reiterated throughout turbulent times, as the young nation struggled with slavery and civil rights issues. Indeed, many believe that the phrase “Equal Justice Under the Law” inscribed on the architrave above the U.S. Supreme Court building was paraphrased from a number of cases in which the Court made reference to “equal and impartial justice under the law.”¹⁹ Several decades after that inscription, in one of the key school desegregation cases, the Court eloquently explained the meaning and impact of equal justice under the law.

In *Cooper v. Aaron*, the Court rejected an attempt by public school authorities in the state of Arkansas to “postpone” school desegregation plans due to racial tensions experienced during the process. Explaining the rationale for its opinion, the Court first observed that the “federal judiciary is supreme in the exposition of the law of the Constitution.” Then, illuminating one of the basic features of our system, the Court declared that “[t]he Constitution created a government dedicated to equal justice under law . . . [and] the Fourteenth Amendment embodied and emphasized that ideal.” Finally, the Court ordered the school board to comply with the desegregation order because “command[s] of the Constitution are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.”²⁰

In common parlance, the notion of equal justice probably connotes ideas of fairness and impartiality in a variety of settings. That is, like people will be treated in a like manner, whether it be a ques-

tion of resource allocation or meting out punishment to a convicted criminal defendant. Traditionally, however, concerns regarding the definition and application of equal justice principles have arisen most often in the criminal justice context. This special category of justice is often referred to as “corrective justice” and is largely concerned with restoring balance to society by administering punishment to those who have created a societal imbalance through the commission of criminal acts. Of course, underlying this idea of societal balance versus imbalance are shades of the basic conception of justice, namely, maintaining order by assuring that everything is in its proper place. Corrective justice can be further subdivided into the categories of substantive and procedural justice. Substantive justice involves the concept of just deserts or how a society determines fair punishment for a criminal defendant following an adjudication of guilt. In her book *Ethics in Crime and Justice*, author Jocelyn Pollock further subdivides substantive justice into retributive and utilitarian justice. Retributive justice restores balance to society by ensuring that the criminal suffers in proportion to the pain or loss the victim was forced to endure. Accordingly, moral limits act as a restraint on retributive justice in the sense that

1. We must punish only to the extent that the loss of liberty would be agreeable were one not to know whether one were to be the criminal, the victim, or a member of the general public, and
2. The loss of liberty must be justified as the minimal loss consistent with the maintenance of the same liberty among others.²¹

Thus, the goal of retributive justice is to reinstate balance and order under circumstances of temporary imbalance. According to Pollock, this means that “the moral limit of punishment is reached when what is done to the criminal equals the extent of his or her forfeiture, as determined by the crime.”²²

Utilitarian justice, on the other hand, administers punishment to offenders primarily to deter recidivism. This formulation of substantive justice is distinguishable from retributive justice in that as long as the criminal is likely to reoffend, then punishment is justified under a utilitarian model without regard to what might be con-

sidered proportional under a retribution model. To illustrate this distinction, Pollock observes, “[i]f a criminal is sure to commit more crime, the utilitarian could justify holding him in prison as a means of incapacitation, but to hold him past the time ‘equal’ to his crime would be seen as injustice under a retributive system.”²³

As discussed earlier, the second subcategory of corrective justice is procedural justice, which concerns the processes utilized to ascertain who is deserving of punishment and how that punishment will be administered. In the United States, constitutionally grounded principles of due process establish the basic parameters for procedural justice. More specifically, the due process of law principle is set forth broadly in the Fifth Amendment of the Constitution and made applicable to the states through the Fourteenth Amendment. According to Leonard Levy in his book *Original Intent and the Framers’ Constitution*:

The Framers understood that without fair and regularized procedures to protect the criminally accused, liberty could not exist. They knew that from time immemorial, the tyrant’s first step was to use the criminal law to crush his opposition. Vicious and ad hoc procedures had always been used to victimize nonconformists and minorities of differing religious, racial or political persuasions. The Fifth Amendment was part and parcel of the procedures that were so crucial, in the minds of the Framers, to the survival of the most treasured rights.²⁴

The Fifth Amendment was thus an explicit acknowledgment by America’s founding fathers that just procedures for identifying, prosecuting, and punishing offenders were indispensable to a free society. This recognition also reflected a central concern that justice, particularly in the enforcement of criminal laws, be administered fairly, impartially, and equally. It is therefore no overstatement to say that these principles have long been the underpinning of the U.S. criminal justice system and are critical to protecting individual freedoms. Indeed, the conception and application of due process and equal justice principles are so instrumental to the operation of the U.S. criminal justice system that the Supreme Court has extended these protections to citizens and noncitizens alike in a series of cases determining that noncitizens, even those who are

present in the United States unlawfully, are protected by the due process of law guarantees in the Fifth and Fourteenth Amendments.²⁵

To summarize, notions of due process and equal justice under the law were intentionally interwoven into the U.S. Constitution at the nation's founding. Subsequent interpretation and application of these basic principles leave little doubt that they serve as critical barriers between arbitrary and capricious governmental conduct directed against those who, for whatever reason, find themselves disfavored by the government. In fact, history has demonstrated that variance from these principles, even in times of national crisis, inevitably leads to disastrous results. Consider the case of Fred Korematsu.²⁶

In 1942 Korematsu, an American of Japanese descent, was convicted for remaining in a designated "military area" in violation of Civil Exclusion Order No. 34, which directed that all persons of Japanese ancestry be excluded from that area unless detained in a designated "Assembly Center."²⁷ The practical effect of this order was to condemn many families to "living in horse stalls under unsanitary conditions, often by open sewers. Others occupied hastily constructed barracks. Toilet and bathing facilities were communal and devoid of privacy. Barbed wire fences and armed guard towers with guns facing toward the inmates surrounded these compounds. They were, in fact, prisons."²⁸

Upon conviction, Korematsu instituted a legal challenge claiming that military detention of civilian citizens of Japanese ancestry pursuant to Order 34 was unconstitutional. The case wound its way through the courts, finally reaching the U.S. Supreme Court. In reviewing Korematsu's case, the Court began by acknowledging that legal restrictions curtailing the rights of a single racial group are immediately suspect and are therefore subject to the most rigid scrutiny. With respect to the relevant military orders issued shortly after the commencement of the war with Japan, the Court concluded that "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to public safety" can justify exclusion from an area or constant confinement.²⁹ Yet, the Court explained that exclusion of a specific group of people from certain areas during the war had a "definite and close relationship" to the prevention of espionage and sabotage. Furthermore, addressing the

issue of “possible” racial prejudice as it pertained to the forced detention of citizens of Japanese ancestry, the Court observed:

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.³⁰

Several members of the Court sharply dissented from the majority opinion, and their dissenting voices warrant careful consideration because they speak specifically to the necessity of adhering to enduring constitutional principles, especially in time of war. Justice Murphy, in dissent, described the exclusion of persons of Japanese ancestry as exceeding “the very brink of constitutional power” and falling into the “ugly abyss of racism,” concluding:

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.³¹

Similarly, Justice Jackson, in a particularly strident dissent, warned of the possibility for further abuse if the Court sanctioned such a blatant constitutional violation:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doc-

trine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.³²

And, indeed, the passage of time revealed that the compelling words of the Korematsu dissenters were not merely hyperbole and misplaced sympathy. In 1983 Korematsu filed a writ of *coram nobis*³³ to overturn his conviction after discovering new evidence that the government apparently suppressed in his earlier trial. The evidence strongly indicated that the government intentionally misled the court concerning its claim of "military necessity," which, during the first Korematsu case, was offered as the sole justification for exclusion and internment of Japanese American citizens.³⁴ In the later Korematsu opinion, the court took judicial notice of a recent report from the Commission on Wartime Relocation and Internment of Civilians, which found that, rather than military necessity, the "broad historical causes which shaped these [exclusion and detention] decisions were race prejudice, war hysteria and a failure of political leadership." Thus, upon reviewing the case, the district court determined that, while it did not have the authority to overturn the original Korematsu opinion, it could correct errors of fact and effectively vacate Korematsu's conviction. Opining about any lingering significance of the earlier Korematsu decision, the court stated:

Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.³⁵

In this modern “war on terrorism,” as America continues to formulate legal, political, and judicial responses to the September 11 terrorist attacks, it must be ever mindful of the errors and consequences of the past, when military necessity and national security concerns were offered as scant justification for setting aside foundational principles in favor of capitulating to unfounded fears and petty prejudices. The looming shadow of the Korematsu case stands as a beacon, perpetually warning that reactions to terrorism must be prudently measured and not predicated upon ad hoc legal principles and policy initiatives driven by hatred and fear.

The goal of this book is to meaningfully analyze America’s current political, legal, and judicial responses to the terrorist attacks of September 11 by critically evaluating how those responses comport with historical precedent and America’s long-standing commitment to principles of equal justice. In some respects, the book’s overall objective might render it controversial in light of the current national tide of patriotism. In fact, Attorney General Ashcroft essentially warned Americans that the current war on terrorism will not suffer dissenters gladly when he declared before Congress that those who challenge his wisdom only aid terrorists and give ammunition to America’s enemies. Certainly he must have forgotten that more than two centuries ago popular dissent challenging a repressive English monarchy inspired the revolution that created America, a nation committed to democracy, where toleration of critical and dissenting voices is interwoven into the very fabric of its Constitution. In light of this history, we certainly do not believe that reasoned analysis and critique of America’s past and present responses to terrorism equal a lack of patriotism, much less treasonous aiding of any real or imagined enemies. Indeed, the academy has often been at the forefront of furthering global understanding of complex issues that arise in times of controversy. Thus, the insights in this book are offered as a springboard to foster discussion and debate, and we hope it is received in that spirit.

This chapter introduced two of the key concepts that will be explored throughout the book: terrorism and equal justice. Chapter 2 will take a retrospective approach, examining how America has effectively responded to the challenges of terrorist violence in the past without significantly altering its political, legislative, or judicial framework. Next, chapter 3 will assess the various terrorist threats

confronting America, ranging from traditional threats, such as bombings, to nuclear, biological, and chemical threats, to the twenty-first-century potential for cyberterrorism. Chapter 4 will begin the book's in-depth analysis of America's legislative, executive, and judicial responses to the 9/11 attacks by dissecting the USA Patriot Act, a lengthy and constitutionally questionable piece of legislation hurriedly enacted by Congress little more than a month after the attacks. Following this analysis, chapter 5 will explore a broad range of other legislative, executive, and judicial responses to the attacks, including the Joint Congressional Resolution Authorizing the Use of Force, legislation creating a new Department of Homeland Security, and the president's military order. Chapter 6 will examine a wide range of court proceedings and decisions arising out of the events of 9/11 and will assess the impact of these judicial measures on our justice system as a whole. Finally, in chapter 7 the book will conclude with a comprehensive review of current trends in America's legal responses to the terrorism threat and will call on America to adhere to fundamental principles of fairness and equal justice under the law as it continues to formulate responses to the emerging terrorist threat.