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Who Are We Fighting? Conceptions of the Enemy in the War onTerror

Lawrence Friedman

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Who Are We Fighting? Conceptions of the Enemy in the War on Terror

LAWRENCE FRIEDMAN*

A host of arguments can be constructed in support of the view that the terrorism suspects detained at Guantanamo—and future detainees who qualify as alien enemy combatants—should be tried for their alleged crimes before military commissions rather than in civilian courts in the United States. First, there is the danger posed by holding their trials in civilian courts—the security risk that intelligence sources and methods might be revealed. Second, because of restrictions in civilian courts on the use of evidence obtained through questionable methods of interrogation, there is the possibility that "clean cases" cannot be presented and that the charges against the defendants will have to be dismissed or the defendants will be acquitted. Third, there is the argument that, because the suspects are noncitizens they are not, as aliens deemed enemy combatants, entitled to trials in federal court. Finally, and relatedly, there is the assertion that these individuals, because of what they are alleged to have done or who they are, simply do not deserve trials with all of the protections the federal criminal justice system affords defendants. In other words, these individuals should be considered in a separate category for purposes of justice, a world apart from ordinary criminals and others suitable for trial in the federal courts.

It is this last position that I would like to explore in this essay, to try to get at what this argument means and to sketch its implications. If terrorism

* Professor of Law, New England School of Law. My thanks to Jordan Baumer, Victor Hansen, and Carla Spivack for their thoughtful comments and suggestions on early versions of this essay; and to Elizabeth Sullivan for that and more.

suspects are not like criminal defendants, then who are they like?[1] For guidance, we can turn to the implicit definition to which the United States Government has subscribed in legislation and in policy decisions spanning successive Presidential administrations. Alternatively, we can set aside that characterization to try and determine, as lawyers do, what distinguishes these men from ordinary criminals in the American mind. I attempt to do so here, I hasten to add, not to defend them as anything other than villains—for if the allegations against them are true, they surely are villains—but to explore whether treating terrorism suspects differently from other criminal defendants ultimately raises questions about the value of consistency to the rule of law and the extent to which we should tolerate deviations in the face of the kind of threat to national security that terrorism poses.

For an alternative perspective on how to define terrorism suspects, I look to Ward Just's remarkable post-September 11 novel, *Forgetfulness*.[2] The book tells the story of an American, Thomas Railles, a figurative painter of some renown. It takes place a few years after September 11, when Thomas is living in France with his French wife, Florette. One late fall afternoon, they are entertaining some of Thomas's old friends. Florette decides to go for a walk on the mountain trails a stone's throw from the house. After taking a fall and fracturing her ankle, she is discovered by a group of men who carry her part of the way to safety but then decide to abandon her. Before doing so, their leader cuts her throat.

These men prove to be Moroccan terrorists. One of Thomas's friends, Bernhard, has connections to American intelligence services, and he learns that the men have been captured and linked to Florette's death. He informs Thomas, who attends their interrogation by Antoine, a French intelligence operative. Antoine gives Thomas permission to ask their leader, a man named Yussef, questions. And so Thomas has the opportunity to confront precisely our question: just who is it we are fighting in this war, and are they different from ordinary criminals because of their goals or their capacity for evil?

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The individuals with whom the United States and its allies currently are at war defy easy definition, much less understanding. But we can get some

1. At this writing, at least, an inquiry into how terrorism suspects should be defined is not an idle pursuit. *See* Charlie Savage, *Obama Team is Divided on Anti-Terror Tactics*, N.Y. TIMES, Mar. 29, 2010, at A1 (discussing Obama administration attempts to define terrorism suspects for purposes of determining, among other things, who among them should be tried in civilian courts).

2. WARD JUST, FORGETFULNESS (2006).

sense of them, or at least what our elected leaders and government officials believe them to be, through the laws enacted and policies adopted to deal with them. The argument that the terrorism suspects detained at Guantanamo are undeserving of the ordinary protections of American criminal procedure is, after all, not a new one. The Bush administration soon after September 11 proposed trying some of the individuals detained in Guantanamo before military tribunals and on the basis of secret evidence—evidence which would not be made available to the accused or, in some instances, his counsel.[3] Officials representing the Bush administration suggested its position on secret evidence lay in the critical need to protect sensitive and secret information from disclosure.[4]

This reasoning does not withstand close scrutiny given the proven ability of the federal courts to manage such information in the context of criminal trials.[5] There are, nonetheless, several other possible rationales for the Bush administration's preference for secret evidence. First, there is the familiar contention that the legal status of alien enemy combatants is different from ordinary and domestic criminals.[6] Of course, they are not citizens and the acts with which they are accused may be violations of both the criminal law and the laws of war. But, as a practical matter, the legal status of the defendant is immaterial to the ability of a court or tribunal to protect sensitive and secret information. In other words, nothing about the status of the accused explains why that fact is necessarily meaningful in determining whether an individual is amenable to being tried in the civilian system. There is the possibility that, in the event of an acquittal, the defendant will have learned something about our intelligence capabilities, but federal court judges have ample authority to control the presentation of

3. This position was advanced by the Bush administration before the United States Supreme Court's decisions in *Hamdan* and *Boumediene*; together, these decisions can be read to hold that the President does not have the exclusive power to design and implement a system of military tribunals for the terrorism suspects detained at Guantanamo. *See* Boumediene v. Bush, 593 U.S. 723, 790 (2008) (alien enemy combatants detained at Guantanamo not immune from habeas corpus review by the courts of the basis for their detentions); Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (President cannot unilaterally establish system of military tribunals to try alien enemy combatants).

4. *See, e.g.*, U.S. DEP'T OF DEF., BACKGROUND BRIEFING ON MILITARY COMM'NS (2003), *available at* http://www.globalsecurity.org/security/library/news/2003/07/sec-030703-dod02.htm (stating the President's principal objective was to "set up a body of rules that will allow for us to protect information to achieve additional intelligence gathering purposes that may lead to the capture of more terrorists").

5. *See* VICTOR M. HANSEN & LAWRENCE FRIEDMAN, THE CASE FOR CONGRESS: SEPARATION OF POWERS AND THE WAR ON TERROR 68-82 (2009) (discussing the ways secret information can be protected in judicial proceedings); *see also Boumediene*, 553 U.S. at 796 (noting that "protecting sources and methods of intelligence gathering" are within a District Court's "expertise and competence").

6. *See, e.g.*, Victor Hansen, *The Usefulness of a Negative Example: What We Can Learn About Evidence Rules from the Government's Most Recent Efforts to Construct a Military Commissions Process*, 35 WM. MITCHELL L. REV. 1480, 1500-01 (2009).

evidence, which can be published in forms that render its future utility questionable.[7] At bottom, the issue is an evidentiary matter, one that presents practical problems unrelated to the identity of the accused.

Second, there is the possibility that, if terrorism detainees are afforded the process due ordinary criminals, including access to all the evidence the government seeks to use against them, then it would be difficult to obtain convictions.[8] The additional process that the presentation of sensitive evidence might entail could well impede a speedy trial—the panoply of procedural protections criminal defendants enjoy in our federal court system generally do not promote expediency.[9] But expediency would only be relevant, from the government's perspective, if these individuals posed some ongoing danger to national security.[10] In the case of the suspects detained at Guantanamo, this practical concern is blunted, as there is no doubt that the United States Government has complete control over the suspects pending trial and Congress has the power to authorize some form of post-trial detention should it prove necessary.[11] Again, the problem is a practical one and not beyond the capacity or authority of our political leaders to solve.

The third possible rationale for the Bush administration's preference for secret evidence applies as well to the preference for military commissions over civilian trials: these are alien enemy combatants who have sworn support to a terrorist cause. The actions of the September 11 terrorists and the reality of subsequent attempts to inflict harm on Americans on U.S. soil may have provided sufficient reason in the minds of Bush administration officials—and now in the minds of their Obama administration

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7. *See* Classified Information Procedures Act, 18 U.S.C. App. 3 § 6(d) (2006) ("If at the close of an in camera hearing . . . the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal."). S*ee also id*. § 3 (permitting the court to issue an order protecting against disclosure of classified information disclosed by the United States to any defendant in any criminal case); *id* § 4 (court may withhold certain information from defendants or limit by summarization).

8. *See, e.g.*, John Yoo, Opinion, *The KSM Trial Will Be an Intelligence Bonanza for al Qaeda*, WALL ST. J., Nov. 15, 2009 (discussing the potential threats presented by decision to prosecute suspected terrorists in federal court).

9. *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 18-20 (2006) (discussing the many rights afforded to criminal defendants).

10. *See* Hansen, *supra* note 6, at 1499.

11. *See, e.g.*, Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903 (2009) (discussing a framework for preventive detention within the criminal justice system); *see also* Letter from Ronald Weich, Asst. Att'y Gen., to Patrick Leahy, Chairman of the S. Judiciary Comm. (Mar. 22, 2010), *available at* http://judiciary.senate.gov/resources/documents/111Documents.cfm Chairman (last modified Apr. 7, 2010) (discussing several grounds for continued detention of terrorism suspects acquitted on United States soil, including immigration statutes, the Authorization to Use Military Force and federal law barring the release of Guantanamo Bay detainees into the United States).

counterparts—to regard terrorism suspects as undeserving of the protections we afford criminal defendants because of the scale of terrorism's aims. And the enormity of their alleged crimes is indeed staggering; in light of what happened on September 11, to give terrorist suspects the ordinary protections available to criminal defendants in federal court would be to dignify those actions as worthy of more than mere contempt.

This view is based upon a moral assessment of the terrorism suspect's alleged actions. But it remains that neither the community nor its representatives may make a special moral claim on these individuals in respect to their actions until they have been determined to be guilty of committing the acts with which they are charged.[12] And among the greatest engines developed for the determination of guilt is the American criminal justice system, including all of the protections afforded defendants.[13] For if a jury can find that a person afforded counsel, access to the evidence against him, and the opportunity to present witnesses and question those whom prosecutors present is guilty beyond a reasonable doubt, we may take some comfort that its judgment ultimately is fair and one upon which we—and the world—may rely.

And then there is the argument that the terrorism suspects do not deserve criminal procedure protections, not just because of what they are alleged to have done, but simply because of who they are. Legislation passed by Congress since September 11, as well as the policy positions of two Presidential administrations, effectively portrays the nation's enemies as individuals who may be defined by a single-minded desire to do harm to Americans. The Detainee Treatment Act[14] and early iterations of the authorization for military commissions[15] implicitly suggest that the nation's terrorist enemies are decidedly unfit for the treatment we reserve for our fellows, particularly the procedural protections that would be provided them in the civilian justice system.

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12. *See* Robert Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 489, n.10 (1995) (book review) (observing that a victim has no special moral claim with regard to a particular alleged perpetrator until that alleged perpetrator "is determined to be the agent of the criminal act").

13. Which is not to say it has ever been thus. *See* LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 436-37 (3d ed. 2005) (discussing the "many faces" of the criminal justice system).

14. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1) (2005) (denying federal courts jurisdiction to review by habeas corpus any "application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba").

15. Military Commissions Act, Pub. L. No. 109-366, § 949m(a), 120 Stat. 2600 (2006) (finding of guilt may be premised upon vote of "two-thirds majority of the members of the commission present at the time the vote is taken"); *Id.* § 5(a) (eliminating ability of defendants to "invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories").

* * *

The view of alleged terrorists as inherently undeserving of criminal procedure protections is perhaps most pronounced in respect to the issue of interrogation and just how far the government should proceed with harsh interrogation techniques that border on, or amount to, torture. For if the principles of humane treatment do not apply in the context of interrogating terrorism suspects, why should they apply in the determination of justice? There is a scene near the end of Ward Just's *Forgetfulness* in which Thomas Railles finds himself at a dinner party in New York where the "conversation turned to the uses of torture and peremptory detention of persons suspected of terrorism,"[16] and one woman says, "Whatever it takes."[17] To which Thomas replies:

> Where does it end? The [woman] said, It doesn't matter where it ends. What matters is that it stop. And if you have a better solution, please tell me what it is. Her eyes filled with tears for a moment. Thomas suspected that her husband had had offices in the twin towers. That was not true. But she had been nearby on the morning of September 11 and had seen the bodies tumbling from the heights of the buildings and she still had nightmares, terrible nightmares, and for that reason demanded action, the more severe the better. She said, There were many victims of nine-eleven and not only those who died. We deserve satisfaction, too.[18]

Here is the first argument for categorizing terrorism suspects separately from ordinary criminals: many Americans have been hurt by their activities, and those activities must be stopped. Torture is fine, because terrorism—that is, the actions of terrorists and the consequences of such actions—must be stopped. It is fine to stop those actions by any means necessary, moreover, because satisfaction must be had.

But the woman is not through; she knows that Thomas has met the man—the Moroccan terrorist—who is likely responsible for killing his wife, Florette.[19] The woman continues:

> You of all people should understand . . . , Thomas.

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16. JUST, *supra* note 2, at 233-34.
17. *Id*.
18. *Id*.
19. *Id*. at 234.

Thomas said he understood, but he didn't, quite.
You've seen them face to face, haven't you?
Thomas said he had.
They don't deserve to live, she said.[20]

And here is the second argument for categorizing terrorism suspects separately from ordinary criminals, one that animates both the advocacy of harsh interrogation techniques and the preference for trials before military tribunals: because of what they are capable of doing, these individuals do not deserve not to be tortured, they do not deserve even to live.

Civilian trials deny these arguments. Such trials are premised upon the value that attaches to a fair determination of guilt, and fairness dictates that we ascertain what it is defendants are alleged to have done, if anything, before we condemn them. Here the procedural protections that attend a criminal trial in civilian court present more than just practical impediments to swift justice. The expressive value that attaches to a criminal trial has a particular meaning. It says something about the worth of the victim or victims and of the defendant, too. The mechanisms of the trial signal that the accused is a fellow human being who is entitled to at least the respect necessary for us to determine whether he is, in fact, responsible for the acts we truly believe he committed.[21] This expressive value is in tension with the assertion that, because of who the terrorism suspects are, they do not deserve to live. If we know *already* that they do not deserve to live, as the woman speaking to Thomas suggests, then why would they deserve the dignity of a criminal trial and all of its accompanying protections for the defendant?

Perhaps the woman is suggesting that if these terrorism suspects are indeed found to be guilty by a jury or other decision maker they do not deserve to live. But if a human being has so little worth—or if we are so sure of his culpability—that he may be tortured for information, then what would be the point of attempting to hold him accountable in a proceeding the criminal justice system considers to be fair? After all, a fair trial depends upon the defendant being treated a particular way before and during the trial—as a person whom we should presume innocent.[22] How

20. *Id.*

21. As Henry M. Hart, Jr. put it: "If what is in issue is the community's solemn condemnation of the accused as a defaulter in his obligations to the community, then . . . the fact of default should be proved with scrupulous care." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 411 (1958).

22. "At trial," the U.S. Supreme Court has reminded us, "the [criminal] defendant is presumed innocent and may demand that the government prove its case beyond a reasonable doubt." Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2320 (2009).

could a trial, after torturing the defendant for evidence that could be used against him, not be, among other things, a waste of effort and resources?

In *Forgetfulness*, the woman's view of such matters as interrogation and determinations of guilt depends, it seems, upon a conception in her mind of just who a terrorist is—namely, a person who is contemptible simply because he is alleged to be capable of committing the heinous acts we associate with terrorism. He is, therefore, undeserving of the respect accorded defendants by the procedures of the criminal justice system, which is to say that he is someone categorically apart from ordinary criminal defendants. When the woman states that terrorism suspects do not deserve to live, Thomas does not reply.[23] She then asks: "What did they look like?"[24] And Thomas responds without hesitation: "Most ordinary."[25]

This is not an entirely surprising characterization. Earlier in the novel, when the French interrogator, Antoine, allows Thomas to ask the group's leader, Yussef, some questions, Thomas sees the Moroccan as nothing more than "a man in a chair, hands shackled."[26] And when he looks at Yussef with his painter's eye, Thomas notes that he is "not handsome, not even very interesting."[27] Who is this uninteresting-looking man? Thomas's friend Bernhard—the one with connections to American intelligence—observes that when the Moroccans were captured, they had "all the toys of the modern businessman."[28] Indeed, Bernhard suggests that the Moroccan leader is just that—a businessman, "a freelancer. They all are. Basque, Al Qaeda, Tamil, Chechen, Polisario. . . . [W]hoever pays."[29] And the man they call Yussef describes himself in similar terms. Thomas asks him questions and tells him something about his wife, Florette, specifically who she was, what she meant to him.[30] Surprisingly, Yussef responds to Thomas.[31] He tells Thomas what happened that fall afternoon on the mountain.[32] He says: "We had business of our own. She interfered with our business. We were on a timetable. Then the snow began and it became impossible for us to go on with her. . . . We did not ask for her to be there."[33]

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23. JUST, *supra* note 2, at 234.
24. *Id*.
25. *Id*.
26. *Id*. at 152.
27. *Id*. at 179.
28. JUST, *supra* note 2, at 138.
29. *Id*.
30. *Id*. at 173-74.
31. *Id*. at 180.
32. *Id*. at 181.
33. Just, *supra* note 2, at 181.

Is it wrong to characterize terrorists as "businessmen"? Does it trivialize their actions and the consequences of those actions? White collar criminals are businessmen. Participants in organized crime are businessmen, of a sort. We treat all of them as ordinary criminals. Indeed, we treat domestic terrorists—whose aims we should regard as no less evil than the aims of alien enemy combatants—as ordinary criminals.[34] And the condemnation of each of these various defendants follows in particular cases from a determination by a jury that they were guilty of achieving—or attempting to achieve—evil ends.

An alternative, of course, is to classify terrorism suspects as enemy soldiers. Our government has often labeled them as such.[35] But these men should not be regarded as soldiers in any traditional sense of the term. Even those among them who may pledge their allegiance to the same cause do not represent a state that poses an existential threat to the United States. The fact of their alienage accordingly does not really distinguish them from other criminal defendants; in the end the actions in which they are alleged to be engaged are no more morally reprehensible than those of domestic terrorists or even, depending on the circumstances, of organized crime.

Despite the outcry over the possibility of trying terrorism suspects in federal court, since September 11 several hundred terrorism suspects have been moved through the civilian criminal justice system.[36] Research by lawyers at The Center on Law and Security at New York University School of Law has revealed something about these defendants—who they are and the crimes with which they have been charged (and more often than not of which they have been convicted).[37] The majority of suspects prosecuted in civilian courts since September 11 are not affiliated with a known terrorist organization; affiliation with the Revolutionary Armed Forces of Colombia ranks second, al Qaeda third.[38] Defendants are charged under terrorism statutes as well as with violent crimes, weapons violations, racketeering, commercial fraud, criminal conspiracy, and drug crimes[39]—that is, with the kinds of charges that compose the grist of the federal prosecutor's weekly

34. The most common citizenship of terrorists in the United States is American. CTR. ON LAW AND SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2009 20 (Jeff Grossman ed., 2010).

35. *See* Heidi Kitrosser, *Reclaiming Skepticism: Lessons from Guantanamo*, 35 WM. MITCHELL L. REV. 5067, 5070 (2009) (discussing position that Guantanamo detainees should be considered unlawful enemy combatants).

36. TERRORIST TRIAL REPORT CARD, *supra* note 34, at 1.

37. *Id*. at 5.

38. *Id*. at 20.

39. *Id*. at 9.

criminal docket.[40] In light of these data, it seems Thomas Railles's assessment that Yussef looked "most ordinary" has some basis in reality.

* * *

In an early scene in Just's novel, Thomas is at a café with Florette.[41] The owner, Bardeche, is a friend.[42] There is a disturbance: a small group of Americans, led by a large, blind man, is causing trouble; they are taunting Bardeche.[43] Thomas intervenes and the blind man, Jock, goes sprawling.[44] Thomas says to one of the man's companions, "I'm sorry about your friend. Was he a policeman?"[45] The friend replies: "Cop? No, he wasn't a cop. Jock sold insurance. Except in New York City we're all cops now. You wouldn't understand that."[46]

It is true: in a sense, all Americans were deputized after September 11. We go to airports—indeed, any public place—and are encouraged to report suspicious behavior. We are all policemen. But policemen are not authorized to make ultimate determinations of guilt and innocence. We do not subscribe to a governmental system in which policemen, in addition to investigating criminal acts and arresting suspects, prosecute and judge those suspects. This is elementary. The framers feared such aggrandized power and created a governmental structure of interlocking and competing competencies: the legislature enacts the criminal laws that the executive enforces while the judiciary manages determinations of guilt and innocence.[47] And so we have trials in which those determinations are contested by lawyers and resolved by judges and juries.

Though it may get complicated in its operation, the criminal justice system represents the rule of law because it imposes a particular order on the determination of guilt or innocence. In the criminal context, the separation of powers framework serves to prevent arbitrary and vengeful

40. *See, e.g.*, OFFICE OF THE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, FY 2009 PERFORMANCE & ACCOUNTABILITY REPORT II-6 to II-32 (2009), *available at* http://www.justice.gov/ag/annualreports/pr2009/TableofContents.htm (detailing the strategic goals within the U.S. Department of Justice, including targeting white-collar crime, violent crimes, and drug trafficking offenses).

41. JUST, *supra* note 2, at 19.

42. *Id*.

43. *Id*. at 19-20.

44. *Id*. at 22.

45. *Id*.

46. JUST, *supra* note 2, at 22.

47. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012-1017 (2007) (discussing the historical foundation of separation of powers in the criminal context).

judgments. Its virtue is its commitment to the even-handed administration of justice. The procedural protections granted to criminal defendants, all of which work to ensure the trial's fairness and the reliability of judgments, are critical components of this commitment.

In this light, we ought not create an exception to how we determine the guilt or innocence of terrorism suspects—at least, not until we can principally distinguish them from the mobsters, murderers, and domestic terrorists who have been and will be tried in the federal courts. Until we can distinguish them, moreover, we must reckon with the implications of treating terrorism suspects differently from ordinary criminals. Such differential treatment calls attention to them in a way that may benefit their efforts to publicize their mission and accomplishments.[48] It may turn these criminals into recruitment tools. As General David Petraeus, who commanded the multi-national force in Iraq, has remarked, the closure of Guantanamo will help the American military's counterinsurgency efforts in the Middle East by eliminating an important recruiting symbol for jihadists.[49]

In addition, unjustified differential treatment of terrorism suspects may undermine the virtue of the even-handed administration of justice in other contexts. It suggests that the rule of law, which values consistency and predictability, and eschews arbitrary and ad hoc decision-making, may be cast aside in certain circumstances. At the same time, it tells us nothing about when we must create such an exception. Is it when we are particularly outraged and, as the woman with whom Thomas Railles has dinner suggests, we need satisfaction? Likely an exception would be warranted in an emergency situation, one in which some determination of culpability must be made and it simply is not possible to allow the criminal process to run its course.[50] Whatever that situation looks like, it is not one in which individuals have been securely detained at an offshore American military base for more than half a decade.

None of this is meant to suggest that our outrage and anger at terrorist acts is not entirely justified or, more importantly, that we should not, in our outrage and anger, seek justice by holding accountable those we believe

48. As Harold Hongju Koh has asked, "Why should those in the Middle East whom we are trying to persuade accept the justice meted out by secret terror courts?" Harold Hongju Koh, *Repairing Our Human Rights Reputation*, 31 W. NEW ENG. L. REV. 11, 17 (2009).

49. *See* Greg Bluestein, *Petraeus Supports Closure of Guantanamo Bay Prison*, GUARDIAN, May 29, 2009, *available at* http://www.guardian.co.uk/world/feedarticle/8532168 (reporting General Petraeus as stating that "closing Guantanamo and ensuring detainees are dealt with by an appropriate judicial system would bolster the nation's war effort in Afghanistan and Iraq").

50. *See* HANSEN & FRIEDMAN, *supra* note 5, at 37-39 (discussing when exigent circumstances may arise in the national security context).

responsible. But the way we do that with individuals who act through violence, the way we honor our commitment to fair determinations of guilt and innocence, is to channel outrage and anger into a process—one that is, to be sure, cumbersome and tiring, sometimes frustrating, and that much of the time leads to the result we predicted. When we have a judgment upon which we can rely, however, our outrage and anger at particular individuals becomes justified. At that point, our emotions have been articulated through the voice of the community's representatives—the jury has determined these defendants are, given the proof of their plans and actions, deserving of our worst punishments.

* * *

By the end of *Forgetfulness*, Thomas Railles has relocated to Maine.[51] He is not at peace with Florette's death, not exactly. But he is no longer in despair over his loss.[52] "Wait it out," he thinks.[53] "Wait for the light that arrives ages later, light even from a dead star."[54] Eventually, he knows, the light will come: the ends of justice will be served and our patience rewarded.

51. JUST, *supra* note 2, at 254.
52. *See generally id.*
53. *Id*. at 258.
54. *Id.*