For more than six years now, the U.S. has held hundreds of nonresident aliens who are suspected terrorists at its military base in Guantanamo Bay, Cuba. In addition, the U.S. holds thousands of detainees in Afghanistan and Iraq, many of whom are held as suspected members of al Qaeda, and many of whom have been held for years. The detention of suspected terrorists, however, is not limited to nonresident aliens. In the recent en banc fourth circuit case of \textit{al-Marri v. Pucciarelli}, the court ruled that the U.S. can detain both resident aliens and citizens for years if they are found, after being given process falling short of criminal process, to be members of al Qaeda.

The important thing to note about these detainees is that almost none of them have been convicted of crimes and sentenced accordingly. The U.S. says it plans to use military commissions to try about 80 of those held in Guantanamo, but to date only two of those who have been detained as suspected terrorists have been convicted and sentenced. The rest are being held in long-term preventive detention (LTPD), aimed at preventing them from resuming terrorist activities. This may not be the only reason the U.S. holds some of them. The government may believe that some still possess valuable information, and it surely wants to ensure that those it is planning to try by military commission will be available for trial. But fear that they would resume terrorist activities is the reason given most often for LTPD of suspected terrorists.

Defenders of this practice argue that al Qaeda is a new kind of enemy, and that the war on terror is a new kind of war, making LTPD of suspected terrorists vital to national security. But they also argue that LTPD for suspected terrorists is functionally, and morally, no different than LTPD for prisoners of war (POWs). POWs belonging to the armed forces of a legitimate state are legal enemy combatants. They cannot be punished for their use of force (assuming they have not violated the laws of war). Nevertheless, they can be subjected to LTPD, to keep them from rejoining the fight, until the “cessation of active hostilities.” Those who fight for al Qaeda do not have the same privilege to use force; they are therefore called by some “illegal enemy combatants.” But unless they are tried and convicted of war crimes, their detention, too, is meant to be preventive rather than punitive. If POWs can be held in LTPD, the argument goes, then so can those illegal enemy combatants who fight for al Qaeda.

Many people object to LTPD for suspected terrorists. Some argue pragmatically that it is hard to tell terrorists from innocent civilians—terrorists don’t wear uniforms. Others argue that the war on terror is not a real war, and that terrorists are just criminals who should be treated as such. But the analogy between suspected terrorists and POWs has not been effectively challenged. That is my target here. I argue that the analogy is generally not sound, and that as a result, we do not have to resolve the difficult question of whether the war on terror is or is not a real war.

My thesis is that the assimilation of suspected terrorists into the category of combatants is morally illegitimate. It violates a basic moral commitment in liberal societies: the commitment to respecting the liberty of autonomous individuals. This commitment requires states to respect the principle that those who can be held criminally accountable for their choices, as normal autonomous agents, can be subjected to long-term detention only if they have committed a crime for which long-term detention is a fitting punishment. Because traditional enemy combatants are legally privileged to use force, they cannot be held criminally accountable for doing so, and thus they fall outside this restriction. So-called illegal enemy combatants, however, generally can be held criminally accountable for their use of force, and thus this restriction applies to them. As long as they can be held accountable—a question that depends in large part on the legal practices of their home country—LTPD is morally inappropriate.
Abandoning the commitment to respecting the liberty of autonomous individuals crosses a significant moral line. It departs from a position which aims to respect each individual, adopting instead one which sacrifices the rights of some for the welfare of others. At the end of the day, this kind of collectivist policy may be morally justifiable if the threat of terrorism is extreme enough and the alternatives to LTPD of suspected terrorists would prove inadequate to protect national security. But the threshold for justifying LTPD of suspected terrorists is high. The category of “illegal enemy combatant” hides that fact, and for that reason should not be used. Adopting a policy of LTPD of suspected terrorists is a step to be taken only with full awareness of the moral gravity of doing so.

With the Bush administration about to pass into history, and with President-elect Barack Obama promising to close the Guantanamo detention center, the debate over LTPD may appear to be of diminishing significance. But pressure to engage in LTPD will not end with the closing of Guantanamo—it will continue as long as the threat of terrorism continues. The immediate question, then, is: Should the U.S. engage in LTPD in the war on terror going forward, even assuming that the procedures used are much better than those used in Guantanamo? This paper argues that, once we recognize the differences between POWs and suspected terrorists, a positive answer to that question is harder to defend than most proponents of LTPD have been willing to admit.

Models of Detention that Respect Autonomy

Respect for the liberty of autonomous individuals is the defining norm of liberal societies. By “autonomy,” I mean only the normal ability to use practical reason to frame and pursue a conception of a good life. Of course, liberty cannot be absolute; each of us must respect limits on our liberty so that others can enjoy their liberty in peace. But detention is not just a limit on liberty; it is its essential negation. There are only three ways that it can be imposed that respect the rights of individuals: punitive detention, the length of which is proportional to the severity of the crime committed;
short-term preventive detention (STPD), which does not demand too much of an individual; and LTPD of individuals whose autonomy is compromised in one of two ways: either they lack the ability to govern themselves as normal autonomous agents, or they cannot, for extrinsic reasons, be held accountable as normal autonomous agents.

**Abandoning the commitment to respecting the liberty of autonomous individuals crosses a significant moral line.**

In the years immediately prior to the war on terror, it is at least arguable that all forms of detention in the U.S. respected the liberty rights of autonomous individuals. (Going back further in time, the detention of enemy aliens or U.S. citizens of Japanese ancestry during World War II clearly did not respect these liberty rights.) This claim may seem an unrealistic idealization. But though the ideal may have been under strain, U.S. policy had not, in any clear way, violated it. It is only LTPD in the war on terror that clearly crosses a moral line. To demonstrate the uniquely problematic nature of LTPD of suspected terrorists, I will briefly consider the rights-respecting forms of detention to which I alluded above, and then return to the difference between LTPD of POWs and of suspected terrorists.

1. **Punitive Detention**

   The paradigmatic model for detention that respects autonomy is punitive detention. It is paradigmatic because it is the one model that justifies the long-term detention of fully autonomous adults. The justification, on a standard retributivist account, is that if one has chosen to break the law, then one can (and, on the strong version of retributivism, one should) be punished to a degree that is proportional to the severity of one’s crime. In short, if one is punitively detained, one suffers a punishment that one brought on oneself by one’s own autonomous choice.

   This model comes under some strain insofar as the sentences criminals receive are not proportional to the severity of their crimes. In particular, repeat offenders are often given longer sentences than first-time offenders for the same crime—a “recidivist premium.” In practice, recidivist premiums seem to reflect the belief that repeat offenders are particularly likely to commit crimes in the future, and thus should be locked up for long periods of time in order to prevent them from doing so. This rationale indicates that the U.S. is practicing LTPD, in a more or less disguised way, in its domestic criminal justice system.

   It is not clear, however, that recidivist premiums are inconsistent with the retributivist paradigm. Though imposed for consequentialist reasons, susceptibility to LTPD can be understood as an element of a punishment: a waiver of the right to benefit from the normal presumption that one will be a law-abiding person. As long as that penalty has been publicly stated in such a way that potential criminals could reasonably be expected to know that certain crimes would be penalized with the loss of that presumption, then it is up to each autonomous individual to choose whether to commit those crimes and risk incurring that penalty.

   This is not to deny that some recidivist premiums are unduly harsh. My point is only that such laws are not clear counter-examples to the claim that, except for LTPD in the war on terror, U.S. detention policy in recent decades has respected the connection between liberty and autonomy.

   Of course, there is always a risk that someone convicted of a crime is actually innocent. But the standard of “proof beyond a reasonable doubt” is meant to minimize such errors as much as practically possible.

   **Dangerousness itself is not a justification for long-term preventive detention; it must be combined with compromised autonomy.**

In practice, this standard is often not taken seriously. As a matter of official policy, however, the standard protects the liberty of innocents as much as possible without making it impossible to detain and thereby punish the guilty.

2. **Short-Term Preventive Detention for the Sake of Others**

   Autonomous individuals can justifiably be detained for the welfare of others, even if there is a reasonable doubt that they have committed a crime, if the deprivation of their liberty is relatively short and therefore relatively minor. This idea can be modeled on the difference between jury service and slavery: It is one thing to demand that a person make some short-term sacrifices for others, and another to demand that she serve as a mere tool for the welfare of others. The former demand, but not the latter, is consistent with a respect for the liberty of autonomous individuals.

   The practice of detaining some criminal defendants prior to trial fits within this category of justified STPD. Under federal law, a defendant can be subject to pretrial detention “[i]f, after a hearing . . . , the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required [at trial] and the safety of any other person...”
Dangerousness itself is not a justification for LTPD; it released, even if he remains dangerous. Thus, if someone is no longer mentally ill, he must be only because the person’s autonomy is impaired. respect for autonomy, in that the detention is licensed the normal ability to control their impulses. served their sentences if the case is made that they lack sexual predators, can be detained even after they have tion. And certain convicted criminals, most famously ers can be involuntarily committed to a mental institu- show themselves to be a danger to themselves or oth- guardian. Those individuals who are mentally ill and care of, but also kept out of trouble, by a parent or guardian. Those individuals who are mentally ill and show themselves to be a danger to themselves or others can be involuntarily committed to a mental institu- And certain convicted criminals, most famously sexual predators, can be detained even after they have served their sentences if the case is made that they lack the normal ability to control their impulses.

Detentions in cases like these are consistent with respect for autonomy, in that the detention is licensed only because the person’s autonomy is impaired. Thus, if someone is no longer mentally ill, he must be released, even if he remains dangerous. Dangerousness itself is not a justification for LTPD; it must be combined with compromised autonomy.

Detention of POWs and Suspected Terrorists
LTPD of POWs is justifiable as an extension of the pre- preceding category. While legal enemy combatants are presumably competent, autonomous adults, they cannot be held accountable as autonomous individuals for their use of force. They cannot be held accountable for the straightforward reason that they are legally privi- leged, or allowed, to use force against members of an enemy’s armed forces or against other legitimate mili- tary targets. This privilege explains not only why they cannot be punished for their use of force prior to cap- ture, but also why they could not, if released while hostilities were ongoing, be held accountable for any future use of force. And this lack of accountability explains why POWs can be subjected to LTPD.

What if it turned out that there were some way for POWs to recover their capacity to be treated as account- able, autonomous agents? This is no mere abstract pos- sibility: In fact, there is a way for POWs to forfeit their privilege to use force and make themselves accountable for their future use of force. The Third Geneva Convention, on the treatment of POWs, allows for the release of POWs on parole. If they “give parole”—that is, give their word that, if released, they will not again partake in hostilities against the country that is detain- ing them—that changes their status: If they are captured again, having violated their word, they are subject to criminal penalties for having done so.

International law allows countries to offer POWs this choice, but do countries have an obligation to do so? I have claimed that the practice of LTPD should respect the liberty of autonomous agents, even in times of war. A society would fail in this duty if it simply chose not to hold POWs accountable for future acts, and then detained them as unaccountable agents, when it could hold them accountable and release them. If, however, this is taken to mean that countries like the U.S. are morally obliged to release POWs if they simply give their word that they will not take up arms again, my claim may appear to lead to an absurdity.

The response to this objection is that it has not been, and is not likely to be, possible to hold POWs who give parole accountable for the choice once again to use force against the U.S. And without accountability, there is no moral obligation to release POWs on their word.

The impossibility here has two grounds. First, many countries, the U.S. included, do not let their soldiers give parole. The Geneva Conventions only allow a soldier to give parole and change his status if his home country will respect the decision to do so. Second, even if a country did allow its soldiers to give parole, it would not be reasonable to expect the enemy during wartime to enforce this duty. While the U.S. could threaten to punish POWs whom it released on parole if it recaptured them while they were again using force against the U.S., in reality, detainees would effectively be released on their own honor. They could be held accountable in one sense: it would be just to punish them if they were caught, tried, and convicted. But they are unaccountable in another sense: they are very unlikely ever to be caught, tried, and convicted.

Note that this response treats accountability, like autonomy, as a threshold notion. For one to be treated as autonomous, one’s capacity to use practical reason to frame and pursue a conception of a good life must reach a certain minimal threshold. Below that, one is considered to have diminished autonomous capacity and one can be subjected to LTPD for the sake of one- self and others. Likewise, someone is accountable for his actions only if (a) he can justly be punished if tried

Suspected terrorists are not privileged to use force and can be held accountable under the criminal law.
and convicted of crimes, and (b) the prospect that if he commits a crime he will be caught, tried, and convicted for having done so reaches some minimal threshold level.

Now, what if the U.S. could trust that an enemy would enforce the duty of parolees to stay out of the fight? In that case, I think it would be obligatory to give POWs the option of giving parole and being released back to their home country. Under that supposition, they could be held accountable for any failure to respect their duty, and the proper stance toward them would be to give them their liberty. The reason this seems like such an unrealistic scenario is not that an autonomous person’s claims for liberty are lost during times of war; it is that the condition for holding paroled POWs accountable if they breach their duty—a certain kind of trust between enemies—has not existed and is unlikely ever to exist.

Turning now to suspected terrorists, we can point to two significant differences between their situation and that of POWs. First, suspected terrorists are not privileged to use force and can be held accountable under the criminal law. Even if they are fighting for a state (as members of the Taliban arguably were doing after 9/11), their methods violate the law of war. Thus they can and should be tried for war crimes.

Second, even if a suspected terrorist, for some reason, cannot be successfully prosecuted for war crimes—an issue that might arise, for example, if introducing certain critical evidence would disclose intelligence information which cannot safely be disclosed—the prospects of prosecuting them for future use of force are often different from the prospects of prosecuting POWs released on parole. The presumption is that paroled POWs would go to a country that would not hold them accountable for fighting again. But that presumption would not necessarily apply to suspected terrorists. If a suspected terrorist were released into the U.S., then he would be subject to the normal criminal penalties for his future actions. His situation would be no different from that of any defendant the state is unable to convict of a crime. The problem arises only with regard to suspected terrorists who would be released to other countries.

If suspected terrorists would be released into societies that support their terrorist activities, or that are unable or unwilling to police them, they could not be held accountable. In such cases, the analogy with POWs would hold. Then, the relevant question for determining the appropriateness of LTPD would be whether the suspects were indeed terrorists intending to commit hostile acts or were innocent civilians who had been mistakenly apprehended. Given sufficient evidence that they had been involved in terrorist activities, and that they seem to retain those intentions, no moral line would be crossed in holding them in LTPD.

Ethics of Global Development: Agency, Capability, and Deliberative Democracy

David A. Crocker

Poverty, inequality, violence, environmental degradation, and tyranny continue to afflict the world. Ethics of Global Development offers a moral reflection on the ends and means of local, national, and global efforts to overcome these five scourges.

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—Branko Milanovic, the World Bank and the Carnegie Endowment for International Peace

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But a simple look at the home countries of the Guantanamo detainees shows that, at least for many of them, this justification is not available. In many of these countries (such as Australia, France, Great Britain, and Sweden), the criminal law is available, and the suspected terrorists can be held accountable as autonomous individuals not only for what they have done, but, if released, for what they might choose to do. Then again, in many other countries on the list (such as Iran, Pakistan, Saudi Arabia, and Yemen), we cannot be as confident that the criminal law and police force would hold terrorists accountable. Arguably, detainees who came from such countries and who could not successfully be prosecuted for terrorist acts already committed could justifiably be held in LTPD on the same grounds that POWs can be subject to LTPD: (1) dangerousness and (2) compromised accountability. But those who can be prosecuted for crimes already committed, or who can be released to countries that would hold them accountable for future terrorist activities, cannot justifiably be treated like POWs.

Objection and Reply
There is one primary objection to the claim that LTPD, in the kinds of cases I have just mentioned, crosses a moral line and abandons a commitment to the defining value of liberal society. It is permissible to detain people who pose unjust threats to others if doing so would negate the threat. Therefore, the objection goes, LTPD is justifiable as long as there is sufficient reason to believe that a particular person poses an unjust threat to others and will continue to do so for a long time to come.

The question is, how can one have sufficient reason to believe that one person is a threat to others? While there are external indicators of intentions that suffice for short-term interventions and deprivations of liberty, the state cannot legitimately assume that what an agent intends at one point in time is what he will intend at another substantially different point in time. Indeed, the presumption in a liberal society has to be that an autonomous agent is free to choose what he will do, including whether to continue to follow an old intention.

What can justifiably be done, then, with a person who seems to harbor an intention to inflict serious harm on others? Within the liberal paradigm, he can be detained for a short period of time, perhaps a period of months. This is both because the state can assume that his intentions will be stable over such a period and because short-term detentions even of innocent people are justifiable for the sake of others. But as the scale of time stretches from months to years, the short-term justification ceases to apply, as does the assumption that his intention still is what it once was. If the state acquires, in the short-term time frame, evidence of a continued or renewed intention to inflict serious harm on others, then the period of detention can be extended. If, however, the state obtains no new evidence of a renewed intention to harm others, then the state can no longer say, with a high degree of certainty, that this person intends to inflict such harm. At that point, as long as it can hold him accountable for his actions, the state has no ground for treating him differently from any other autonomous person. To respect him as an autonomous person, it must release him.

This is quite different from the presumption at work in the current program of LTPD. The presumption currently seems to be that anyone who was once detained as a suspected terrorist can be detained until it is very clear that he is not (either because he never was or because he no longer is) a threat to others. This presumption errs on the side of security, and in doing so, it disrespects the autonomy of the individual. If there is no ongoing basis for presuming that an individual harbors an intention to harm others, and if he can be held accountable for inflicting such harm, the state crosses a moral line by subjecting him to LTPD.

Such a presumption may be acceptable, as we have seen, in the context of a recidivist premium, which can be understood as a waiver of the presumption of law-abidingness. But without a criminal conviction—and there are many inchoate crimes, like conspiracy to commit terrorism, that a suspected terrorist can be charged with even if he has not performed any terrorist acts—there is no just basis for a punishment at all, and thus no basis for that kind of waiver. Thus, if a person has not been convicted, and can be held accountable, he should be released and treated like any other accountable, autonomous agent.

I am not denying that the state can justifiably impose some restrictions on a person who is more likely than most to pose an unjust threat to others. For example, it might be justifiable to require those who have stalked or otherwise harmed others to keep away from their former victims. But this leaves a person mostly at liberty to pursue a normal life. It is quite another thing to subject someone to the much more profound loss of liberty that is LTPD. As evidence of an intention to harm slips into the past, and as the detention grows from short-term to long-term, the state, if it is to respect autonomy, must release accountable, autonomous individuals from detention.

Conclusion
It might be true that the U.S. faces a threat of such magnitude that it can justify detaining suspected terrorists as long as it has reasonable ground to worry that they might, if released, seek to engage in terrorist activities. But when we, as citizens, think about how
our government acts, we should be aware that LTPD of suspected terrorists is not merely an extension of a well-justified practice of detaining POWs until the cessation of hostilities. It is crossing a line; it is compromising the liberal commitment to respecting the liberty of autonomous individuals.