

## A BETRAYAL OF RATIONAL ARGUMENT

Jeremy Rabkin<sup>1</sup>

The Spring/Summer 2015 issue of the *National Security Law Journal* carried a very long article by William Bradford called *Trahison des Professeurs: The Critical Law of Armed Conflict Academy as an Islamist Fifth Column*. The issue appeared in print at the end of July. I did not learn of this article until somewhat later.

Then a colleague at another law school wrote to me, as former advisor to the journal, protesting that the article was an “embarrassment.” Other scholars soon forwarded their own angry complaints about the article to Dean Butler and former Dean Polsby.

I commend our deans for saying that it is up to the student editors to decide how they will respond. But I offer this brief response to explain why I think they ought to repudiate the article. The article *is* an “embarrassment” for a scholarly journal.

The article argues that critics of U.S. military policy at major American law schools have offered false accounts of the law of armed conflict for the purpose of assisting Islamist military campaigns. From this premise, the article reasons that such scholars are “combatants” in a psychological warfare operation on behalf of our enemies, but “combatants” who have forfeited prisoner of war protections because they have not worn the “distinctive insignia” which the law of armed conflict requires of lawful combatants. It then concludes that these scholars:

*... can be targeted at any time and place and captured and detained until the termination of hostilities. As unlawful combatants ... propagandists are subject to coercive interrogation, trial and imprisonment. Further, the infrastructure used to create and disseminate [such] propaganda – law school facilities, scholars’ home offices and media outlets where they give interviews – are also lawful targets given the causal connection between the content disseminated and Islamist crimes incited. Shocking and extreme as this option might seem, [these] scholars and the law schools that employ them are – at least in theory – targetable so long as attacks are proportional, distinguish noncombatants from combatants, employ non-prohibited weapons and contribute to the defeat of Islamism.*

In the Foreword to this issue of the journal, last year’s Editor-in-Chief does acknowledge that this new issue “will not be without controversy” and may be “discomforting at times.” The editor then offers the “hope” that “the diverse ideas you read here – even if you disagree – will prompt you to think and respond.” That doesn’t remotely address the problem.

---

<sup>1</sup> Professor of Law, George Mason University School of Law

When an article proposes to arrest law professors and bomb law schools and nearby TV studios, it's not engaging in "controversy," but slipping into an alternate universe. It's not "discomforting." It is bonkers. The journal could not reasonably have expected readers to "respond" – unless to ask, "Are you out of your minds?"

It may not be necessary to say anything more. Perhaps it is worth saying a bit more, however, to clarify the lines which this article has crossed. First and foremost, a journal that aspires to offer "scholarship from a range of views" (as the editor's Forward says) must respect some bounds of civil discourse. A law journal should also show respect for constitutional limitations, when it opens its pages to policy advocacy.

This article hurtles past these boundaries with scarcely a word of acknowledgment. The affront starts with the first word of the title – *Trahison* ("treason," as the first footnote earnestly translates, so no one will have to miss out on the hissing intensity of the charge). Treason was one the first crimes set out in medieval common law. It is a charge so freighted and subject to abuse, it is the one crime defined in the U.S. Constitution, precisely to guard against its abuse. The constitutional definition (Art. III, Sec. 3) stipulates that the charge requires either "levying war" or "adhering to enemies, giving them aid and comfort." Like other serious crimes, conviction of treason requires *mens rea* – deliberate intent.

The longest section of the article itemizes misconstructions of the law of armed conflict (in the author's view) propounded by various scholars. These misconstructions are offered as evidence of a "Fifth Column" of legal commentators, working on behalf of our enemies to undermine the morale of the U.S. military and the confidence of the American people. The article urges that professors who offer such improper commentary should be prosecuted for "treason" (while meanwhile held in detention as enemy combatants).

The article cites a range of scholars, whose works purportedly exemplify such treasonous activity. Among those cited are: Gabriella Blum of the Harvard Law School, a former military lawyer for the Israel Defense Force; Ryan Goodman of NYU Law School, now serving as a senior policy adviser at the Department of Defense; Michael Scharf, a professor at Case Western Law School, who served as a legal advisor to the Iraqi government for the trial of Saddam Hussein and before that in the Legal Advisor's office at the State Department; and Michael Walzer of the Institute for Advanced Study in Princeton, whose book on the ethics of war has been assigned at U.S. military academies for decades.

It is outright libel to call such scholars "combatants" in the service of Islamist aggression. The only defense for such accusations is that they are too preposterous for anyone to take seriously. It is the contemporary equivalent of the John Birch Society claiming, in the 1950s, that Secretary of State George Marshall and then President Dwight Eisenhower were Communist agents.

Perhaps there is some law professor out there, somewhere, who secretly does hope to see terrorists prevail in the “war on terror.” We may hope the FBI is monitoring that individual, if he is in communication with actual jihadis. What propels the argument of this article is the claim that there are dozens of legal scholars seeking to assist Islamist war plans – at one point, the article says there are at least forty such scholars working for this cause. That is moving from claims about treason to claims about conspiracy. But conspiracy, like treason, is not just an emotive word but a criminal charge and it requires evidence of common purpose or a common plan of action.

The article does not supply evidence to support its conspiracy claim. Instead, it offers fifty pages analyzing the “etiology” of a “Fifth Column Attack on American Political Will.” Of some two dozen topics discussed there, almost all of them – such political attitudes as “cosmopolitanism,” “skepticism of executive power,” “human rights absolutism” and “anti-militarism” (to cite the subheads in this section) – have no direct connection to support for Islamist victory. So despite the sensational use of the term “Fifth Column,” the analysis does nothing to demonstrate a common, coordinated effort to achieve a particular criminal result.

Finally, the whole article is premised on the notion that the United States faces an “existential” threat from an Islamist program to conquer the world. The article concludes:

*Western civilization has been ‘seized, encompassed, and ambushed’ [quoting a verse from the Qur’an] by a Fifth Column and will be vanquished, subsumed within the Caliphate and ruled by Shari’a if a trahison des professeurs goes unchecked.*

Reputable legal scholars acknowledge that government may lawfully curtail free speech and seize private papers in a moment of extreme crisis. Certainly, constitutional history provides memorable wartime precedents for such measures. But western civilization is not going to be “vanquished” in the next two years or two decades. We are not, right now, facing an emergency situation.

Yes, American military personnel are still engaged in combat operations in the Middle East. Perhaps American military efforts would be more effective if less restrained. Perhaps the military would be less constrained – or more fully supported – if there were less criticism from legal scholars about combat practices of the U.S. military.

Still, everyone must acknowledge that defeating a guerrilla insurgency is no easy challenge. The Soviet Union waged a failing struggle against Afghan rebels throughout the 1980s. Surely, that failure was not caused by hostile commentary from Soviet law professors. Perhaps the Red Army was somewhat discouraged by hostile comment originating in other countries. But U.S. combat methods would also be exposed to foreign criticism, even if we somehow could silence domestic critics. So the article urges drastic abridgement of free speech by American scholars for extremely doubtful advantage in overseas efforts that will likely continue for many years, in any case.

The article tries to work around such obvious objections by arguing as if we were already defending our way of life in the last ditch: it starts and ends with references to the medieval warriors who stopped 8<sup>th</sup> Century Muslim invaders from conquering France. Framing the challenge in this way implies that we no longer have time to worry about constitutional principles, because it's already past the point where we can think about anything except imperative demands of survival. So the article does not offer an analysis of trade-offs we may face in a long-term effort. Instead, it makes a shrieking demand to stop thinking and strike back at our enemies wherever we can find them – starting with the nearest law school, where they may be lurking on the faculty!

Putting these arguments together, the article deploys the classic elements of popular mobilization, as practiced by totalitarian regimes: designating critics as traitors, spreading dark warnings of lurking conspiracies, barking about the urgent need to silence defeatist talk because the nation is besieged by relentless enemies, already at our gates. This is not advocacy or analysis. It doesn't assess means against ends, costs against benefits, fundamental commitments against necessary exceptions. Instead, it offers frenzied rhetoric – with 800 footnotes (many of which are confused or hard to follow).

There is not much danger that this article will incite mobs or vigilantes to violent attacks. The Internet already offers much more incendiary offerings for people who want to be stoked into hysteria. But the article has even less prospect of stimulating serious discussion of genuine policy challenges. Serious scholars don't spend time debating with authors who sound demented.

The main harm from this article will fall on the *National Security Law Journal*. A reader must invest considerable time to plow through a long article in a journal of this kind. To make that investment, readers must have some trust in the judgment of editors. This article advocates policies so beyond the bounds of plausible action, so beyond recognized constitutional limits, so unrelated to evidence-based argument, that readers could reasonably conclude the editors of this journal don't deserve their trust.

So I hope the editors will acknowledge that a mistake has been made. That's the first step toward reassuring readers that they will be much more careful in the future. It would also be worthwhile to establish a more formal review process, involving a named roster of reputable advisors. Saying sorry is not enough. The editors need to win back the confidence of readers.