Preface

Bioterrorism

Interview with Matthew Meselson, Professor of Molecular and Cellular Biology, Harvard University

Interview with Anthony Lake, Distinguished Professor in the Practice of Diplomacy, Georgetown University

Interview with Colonel "Dutch" Thomas, Military Support Liaison Officer, and Marc Wolfson, Public Affairs Officer, Federal Emergency Management Agency

Interview with Peter Lejeune, Senior Associate, Security Management International, Inc.

Interview with Joshua Lederberg, Professor Emeritus, Rockefeller University

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An Application of Refugee Law to Child Soldiers

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The Transformation of Governance Paradigms and Modalities: Insights into the Marketization of the Public Service Response to Globalization

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The Internet Economy: Access, Taxes, and Market Structure. By Alan Wiseman

The Third Force: The Rise of Transnational Civil Society. Edited by Ann M. Florini

Politics and Science: Assuring the Integrity and Productivity of Research. By David Guston
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Throughout its history, America has faced new and evolving challenges to its national security. Biological attacks, distinct from chemical and nuclear attacks, are one of these challenges. The threat of a biological attack has raised the specter of bioterrorism and prompted many questions about America’s readiness for such a crisis. These questions are often difficult to answer because of the complex intersection between science and policy.

Our feature article, “Bioterrorism Preparation and Response Legislation—The Struggle to Protect States’ Sovereignty While Preserving National Security” by Victoria Sutton, asks how different levels of government should interact to address bioterrorist threats to US national security. To answer this question, Sutton examines the Constitution and The Federalist Papers to assess how the Founding Fathers would have approached the unique challenges presented by the threat of a biological attack.

Bioterrorism is discussed further in five interviews with experts ranging from the fields of science to international law. First, we spoke to Matthew Meselson, a professor of molecular and cellular biology at Harvard, who has proposed a new international law regarding biological weapons. Next, we spoke to Anthony Lake, the former National Security Adviser to President Clinton, and Colonel Fenton “Dutch” Thomas and Marc Wolfson, both from the Federal Emergency Management Agency (FEMA), about US policy and response in the event of a biological attack. Finally, we talked with Peter Lejeune, a Senior Associate at Security Management International, Inc. and an expert in the field of terrorism, and Joshua Lederberg, a Nobel Prize winner and professor emeritus at Rockefeller University.

The next article, “An Application of Refugee Law to Child Soldiers” by Wendy Perlmutter, looks at the problem of using children to fight wars, a practice that is increasing around the world. Perlmutter discusses whether refugee law can be applied to former child soldiers who committed brutal acts while engaged in war.

The third article, “The Transformation of Governance Paradigms and Modalities: Insights into the Marketization of the Public Service in Response to Globalization” by Nand C. Bardouille, offers a critical look at public management in the age of globalization. The article explores the struggle many governments face trying to serve the public interest while modernizing public management practices. Finally, we present five reviews of books recently published in the policy community, covering topics from privacy in the Internet age to the rise of transnational civil societies.

As The Georgetown Public Policy Review completes its sixth year of publication, we would like to acknowledge the invaluable support of our readers and the Georgetown community. This support is what makes The Review possible. As always, we encourage and welcome any comments and contributions.

Anne Gable
Editor-in-Chief
At the heart of the issue of bioterrorism is the balance between state and federal powers for public health regulation. Although the provision of national security falls squarely into the powers of the federal government, the use of these powers has been almost exclusively in the international arena for intelligence gathering for defense and for military responses on other shores. Thus, bioterrorism has given rise to a new conflict with federalism where national security, the province of the federal government, becomes a matter of public health, an area traditionally regulated by the states. This conflict suggests that federalism should give way to the constitutionally delegated powers of the United States to preserve national security, even though it would mean the regulation of state public health systems in order to achieve that goal. This paper seeks to define the kind of legislation that achieves the goals of federalism and the goals of national security through examination of the Federalist Papers, the US Constitution, statutes, and case law.

"The means of security can only be regulated by the means and danger of attack. They will, in fact, be determined by these rules and by no others."
James Madison, Federalist Paper No. 41

Introduction

The security of the United States has been a source of national pride and controversy since the founding of the nation. As a nation, we have enjoyed the protection and peace of mind that comes with having the most powerful military in the world. Today, not one citizen of the United States can remember a war being fought on American soil. However, the threat of biological attack—distinct from chemical and nuclear attacks—has raised new concerns about our national security.1 The coordination of traditional emergency response mechanisms within the Constitutional framework are those which are clearly defined and practiced. However, the coordination of peacetime preparations for bioterrorist action is not so clearly defined and remains a vulnerable position for the United States. Where emergency response to natural disasters dictates clear intergovernmental relationships and practiced response operations, a bioterrorism event would be an ongoing disaster with casualties increasing exponentially during the response. In contrast, the casualties in a natural disaster are most likely to have peaked before the response and be in a sharp decline or at zero when the response begins. Preparation and surveillance are most critical to a threat of bioterrorism, and the only way to fulfill the
Constitutional mandates is for the federal government to provide adequate national security.

The question is now whether our governmental, administrative, and legal infrastructure is designed to meet the critical need for our national security system to adequately prepare for and defend against such an attack.2 At the heart of the issue of bioterrorism is the balance between state and federal powers for public health regulation. Although the provision of national security falls squarely into the powers of the federal government, the use of these powers has been almost exclusively in the international arena for intelligence gathering for defense and for military responses on other shores. Never before has the threat to national security originated so pervasively from within the United States’ borders. Part of the threat stems from the ability to develop biological agents in a relatively small space; part from commonly used equipment that can easily be converted to use for the production of biological agents; and part because the surveillance to prevent such an attack is certainly as important—if not more critical—than the response to such a threat. Because of the characteristics unique to a biological threat, our legal foundations of federalism—the division between federal and state powers—are directly challenged.

While it seems that no citizen would object to protection by the federal government, it is equally important to note that erosion of state powers can be threatening to the stability of state sovereignty, particularly in times of peace. The federal government cannot impose on that sovereignty, except where interstate commerce is affected—the constitutional basis for federal environmental laws as well as the Food, Drug and Cosmetic Act. Other areas such as public health and safety are clearly powers of the states, originating such states’ actions as quarantine laws. The Tenth Amendment assures us that states can protect the public health of their citizens as they see fit. The Doctrine of Preemption provides that the federal government can regulate where the government has so completely taken over the field that there is no room for state law, and state law is thereby preempted. But the US Supreme Court has held that preemption cannot apply where Congress has no authority to regulate in the first place.3

Power between state and federal governments can be shared. Where there are conflicts, if that power is not reserved to the states, then the federal government may preempt the issue. Some scholars suggest that the Supremacy Clause of the Constitution is the source of that power; others suggest it is the Necessary and Proper Clause.4

Another approach to federal control involves a cooperative federalism model that establishes national standards based on the authority of federal legislation. States may choose to assume administration of the programs, such as some of the environmental statutes (i.e., the Clean Water Act, the Clean Air Act, and the Safe Drinking Water Act). Again, Congress is limited to regulating that which they have authority to regulate, and such environmental laws are based on Congress’ authority to regulate commerce between the states. However, the demarcation between federal and state powers has been clear in some areas. The regulation of public health has traditionally been a police power of the states, arising from the regulation of contagion and disease during colonial times. Quarantine laws have historically fallen under state powers, as have other areas of public health law; the regulation of national security has been exclusively given to the Congress through the Constitution.

Thus, bioterrorism has given rise to a new conflict with federalism where national security, the province of the federal government, becomes a matter of public health, an area traditionally regulated by the states. This conflict suggests that federalism should give way to the
Bioterrorism Preparation and Response Legislation

constitutionally delegated powers of the United States to preserve national security, even though it would mean the regulation of state public health systems in order to achieve that goal. The systematic communication, surveillance, and reporting functions essential to preparation for and response to a bioterrorism event require federal coordination. However, any expansion of the federal government into the area of public health must be sufficiently narrow to avoid the erosion of the states' constitutionally preserved sovereignty.

The modern interpretation of federalism suggests that there is a shift from the New Deal era of federal regulation to recognizing powers reserved to the states, particularly in the area of public health. The suggestion that national public health goals must be implemented through state political processes rather than Congressional legislation is troublesome because the essence of our defense against bioterrorism will be federal coordination of planning, preparedness, and response. States are constitutionally prohibited from regulating such activities. Traditional cooperative federalism with the necessary flexibility for states' self-governance does not lend itself to a precise system designed to operate uniformly with sensitivity and rapid response.

It is established that states have the police powers to quarantine, balanced by the protection of Constitutional due process through the Fourteenth Amendment. In the 1824 landmark case, *Gibbons v. Ogden* (22 US 1), the Supreme Court interpreted state police powers to be reserved to the states through the Tenth Amendment. States have regulated public health through quarantine, sanitation laws, control of water and air pollution, vaccination, and the regulation of medical professionals. However, it is clearly established that the federal government does not have police powers to do so in public health regulation, except in narrower circumstances where "in cases of rebellion or invasion the public safety may require it." It is also very clear that in times of emergency and foreign invasion the federal government has the Constitutional authority to declare a state of emergency and respond to both invasions and domestic disasters. James Madison, the fourth President of the United States, described the shared powers of the state and federal governments to mean that the federal government is best to govern during "times of war" and state government is best in "times of peace." However, the threat of bioterrorism is uniquely incapable of fitting neatly within these established Constitutional boundaries. When preparing for war, the federal government continually trains and recruits military troops and conducts international surveillance and intelligence gathering operations in preparation for defense. However, the preparation for action against bioterrorism requires a system of surveillance and preparation which will by necessity involve the state, county, and city governments as logical points in the matrix of national communication, surveillance, and preparedness.

There is a vital need to create a mandatory system for epidemiological information, critical to the detection of biological attacks, on a nationwide basis. The battlefield is not traditional: it may be the winds, the mass transit systems, or a crowded gathering. State boundaries become meaningless where the attack media, a disease agent, can travel from any one point on the globe to another in under 36 hours. Whether the federal government adequately addresses the constant and unique threat of bioterrorism within the constraints of the US Constitution involves a narrow set of circumstances. In order to effectively address national security concerns, it is necessary to decide whether a public health model exists or whether other areas of law, such as federal environmental law, may be used to design an effective
preparation and response system to bioterrorism. An analysis of *The Federalist Papers* raises the question as to whether James Madison, Alexander Hamilton, and John Jay, authors of *The Federalist Papers*, may have contemplated the kind of national security issues raised by the threat of domestic bioterrorism.  

**In Times of War and Peace**

The authority and power of the United States is clearly a federal power in times of "war and danger" as interpreted by James Madison:

> "The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security... The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States."  

Herein, Madison suggested that the more adequate our national defense, the less frequently the question of power over state governments would arise. In the matter of bioterrorism, our national defense from the foreign perspective is indeed formidable; however, domestically, the "scenes of danger" do not diminish proportionately with the strength of our national defense envisioned by Madison.

Contemplated are "scenes of danger" that "might favor the "ascendancy" of the federal government over the states." The "scenes of danger" are those arising from releases of biologic agents, capable of widespread infection in a matter of hours. The "adequacy" of the national defense may have little or no effect on these kinds of attacks. The kinds of attacks contemplated by Madison were likely those by countries having inferior weapons and troops. In a visionary statement concerning national security, Madison suggested that with the rise of new means of inducing danger and attack on our national security, regulation must necessarily adapt and be shaped to respond to whatever new threat evolves. Madison further wrote that this rule is determining and must be considered supreme relative to any other rules: "The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others." Here, the characteristics of the weaponry and attack are the controlling standard, not the "means of security." The "means of security" suggest federal or state powers to provide such security as dictated by the "means and the danger of attack."

Referring to the threat of disease, one court has held that "drastic measures for the elimination of disease are not affected by constitutional provisions, either of the state or national government." The case of a bioterrorism event involves "drastic measures" called upon in an emergency situation, which clearly finds power in the federal government in times of emergency. This case, however, would not give authority to the federal government where the elimination of a disease was not at issue. Surveillance, reporting, and preparation for any response to a bioterrorism attack must necessarily come long before elimination of disease becomes necessary.  

In the same writing concerning national security, Madison further suggested that threats can come from within the boundaries of the United States as well as foreign concerns: "In America, the miseries springing from her internal jealousies, contentions, and wars would form a part only of her lot." It was not unforeseeable that internal strife and political rebellions of various degrees would continue to plague the nation.

This relationship of the power vested in the federal government is directly proportional to the exigency which the United States faces, evidenced in Madison's discourse on the powers which should be held by the federal government. Here,
again, Madison wrote that it is the exigency that controls the proportional amount of federal power required. In the last sentence of his paper, Madison asserted that this question is the same as that of the continued existence of the Union itself, forcing the unequivocal conclusion that the federal government thereby possesses power to avert destruction of its "continued existence." The dangers discussed in Federalist No. 44, considered with the exigencies in Federalist No. 41, indicate that the ascendency of the federal government may be favored where the exigency demands such a response, and the existence of the Union is thus dependent upon such action. Thus, a limited ascendency of the federal government is not only required, but demanded by the constitutional context of national security. However, in times of peace, when the threat exists but does not rise to the level of an exigency, the federal government cannot act where the state has sovereign power. While we are certain that a bioterrorism threat exists, the exigency required by the Constitution to invoke federal powers means there must be an imminent threat to national security. 

Alexander Hamilton described a scenario that has historically justified the maintenance of a military during times of peace, as well as supported the draft and other national defense preparations. Therein, Hamilton raised the specter of the consequences of a nation that does not have the ability to be prepared for national defense describing "a nation incapacitated by its Constitution to prepare for defense before it was actually invaded." The Founders cautioned against the strictest construction of the Constitution, which would leave the nation "to prepare for defense before it was actually invaded." This warning is clearly analogous to the preparations and surveillance systems necessary to avoid becoming incapacitated by the convention of the strictest construction of state powers in public health and safety. 

The Founders also wrote that: "As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for as the legal warrant to the government to begin its levies of men for the protection of the State. We must receive the blow before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger and meet the gathering storm must be abstained from, as contrary to the genuine maxims of a free government." This reference to the "distant danger" and the "gathering storm" is an appropriate analogy to the threat of bioterrorism. The caution that avoiding "[A]ll that kind of policy..." suggests an aggressive national security policy should be implemented to address such anticipated dangers. This discussion indicates where the Federalists might stand on a national approach to a bioterrorism threat during peacetime—the raising of a "bioterrorism militia" would clearly be in order.
WHERE THE FEDERAL GOVERNMENT CAN BE MORE EFFECTIVE THAN STATE GOVERNMENTS

"The protection and preservation of the public health is among the most important duties of state government."29 However, Madison observed that "...State legislatures will be unlikely to attach themselves sufficiently to national objects...."30

"If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State government, the people ought not to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State government could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things be advantageously administered."31

The Founders anticipated the need for the nation to have flexibility to shift long-held powers of the states to the federal government, but only where the people have the highest "confidence" in the federal government, i.e., to respond to the threat of bioterrorism. But is there a legal mechanism to shift the long held powers of public safety from the states to the federal government in the case of bioterrorism? If each state elected to enact a uniform surveillance system which interfaces neatly with that of each and all of the other states, would this be sufficient to address the needs of a national security response and preclude the need for more invasive uses of federal powers into the area of public health? The specter of a national security threat led by 50 leaders with 50 different sets of priorities is not only foolish, but also a failure of the role of the federal government in the "continued existence" of the nation.32

Public safety in times of rebellion

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."33 This quote refers to the Constitutional provision for protection against being confined.34 It specifically identifies a time of public safety as appropriate for the suspension of the writ of habeas corpus, perhaps providing the Constitutional authority to invoke quarantine when the timing is such that public safety is at risk. However, the state has police powers for quarantine, its use contingent upon the public safety. In general, "probable cause" that the subject is infectious is all that is required by a state to quarantine.35

Therefore, the federal government does have the Constitutional power to quarantine, but only on a much more limited and narrow precept than do the states. The quarantine power of the federal government is an untried power in this context. The limited use of this power, coupled with the Constitutional due process requirements of individual hearings for each individual, makes its practical application in an emergency practically useless to address the exposure of thousands or more to a bioterrorism agent.36

The ability of states to muster state militias was a contentious issue when the Articles of Confederation were discussed during the construction of the Constitution. AlexanderHamilton addressed the issue of separate state militias and cautioned against the separate possession of military forces: "The framers of the existing [Articles of] Confederation, fully aware of the dangers to the Union from the separate possession of military forces by the States, have in express terms prohibited them from having either ships or troops, unless with the consent of Congress."37 The use of military forces is an important component of a well-planned defense in preparation for a bioterrorism event. The possibility of 50 different militias in a national response without one overall leader again presents a threat to national security and a failure of the federal government to
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protect the “continued existence” of the nation.38

"For the common defense or general welfare"39

The interpretation of the General Welfare Clause has been incontestably limited to the authority of Congress to tax since the time of The Federalist Papers. The interpretation given to the Clause was essentially narrowed to one of use as a “general phrase” followed by qualifications of the general meaning, thereby narrowly applying the Clause to the ability for Congress to levy taxes.40 This limitation precludes the use of the General Welfare Clause as a basis for Congress to legislate on the basis of broad purposes of the general welfare of the nation.

In spite of such sweeping mandates to act for the general welfare, such as: “The prevention of disease or disability and the promotion of health, within reasonable resource constraints, provides the preeminent justification for the government to act for the welfare of society,” the General Welfare Clause bestows no power on Congress to act other than to tax in order to carry out these broad mandates.41

A CONTEMPORARY TENTH AMENDMENT ANALYSIS42

The original powers used by the states during the colonial era were police powers that included the regulation of health, safety, and welfare, later reserved to the states through the Constitution. During that time, states had the exclusive authority for the regulation of public health.43 However, in 1870, the Surgeon General of the Public Health Service, General John Maynard Woodworth, made an effort to establish quarantine as a federal responsibility. The resulting backlash of states’ rights objections argued that the matter of quarantine was better left to the states, as was the historical pattern. General Woodworth argued that the regulations were inconsistent from state to state and the spread of disease was not relevant to states’ borders. After the 1877 outbreak of yellow fever, General Woodworth worked for a national quarantine system, which resulted in the Quarantine Act of 1878.44 The Act stipulated that federal quarantine regulations must not conflict with or impair those of state and municipal authorities and was to be administered by the precursor agency of the Public Health Service.45 The use of a federal quarantine system would be an integral part of a national security plan against the threat of bioterrorism.

The test for Tenth Amendment distinctions between federal powers and state powers is articulated in Hodel v. Virginia Surface Mining Reclamation Ass’n (452 US 264 [1981]). First, the challenged statute must regulate “states as states;” second, the statute must involve matters that are strictly “attributes of state sovereignty;” and third, the state’s compliance with the federal statute would impair the state’s ability to “structure integral operations in areas of traditional functions.” Garcia v. San Antonio Metropolitan Transit Authority (469 US 528 [1985]) qualified the “states as states” criteria as “one of process rather than one of result,” and overruled National League of Cities v. Ussery (426 US 833 [1976]) where the standard of “traditional governmental functions” failed to articulate a clear principle as to what it means. In Garcia, the dissent of Justices O’Connor, Powell, and Rehnquist saw this decision as ignoring the Tenth Amendment restraints on the Commerce Clause and leaving little to restrain Congress from passing legislation encroaching on state activities.46 Instead of Tenth Amendment restraints, the majority in Garcia expected that the “built-in restraints that our system provides through state participation in federal governmental action” and the “political process” will “ensure[s] that laws that unduly burden the states will not be promulgated.”47

The most recent teaching from the US Supreme Court on the protections of the
Tenth Amendment was articulated in *New York v. United States* (505 US 144 [1992]). In *New York*, the Court sought to confine Congress’ authority to “commandeer” states in the regulation of the disposal of radioactive wastes. Rather, the states were to be given a choice among regulating, being preempted by federal legislation, or attaching conditions under the spending power of Congress to encourage states to regulate. This further limited Congressional reaches into state legislative choices, thereby introducing Tenth Amendment protections not recognized previously in the *Garcia* decision.

The most recent case to address state health and safety regulation in this line of cases is *Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Devel. Comm’n* (461 US 190 [1983]) wherein the court sought to avoid preemption of state public health and safety laws by preempting state law only where it conflicts with federal law. The subject of health and safety here was nuclear safety, and the courts have consistently found that nuclear power and nuclear safety is an area where the federal government has clearly preempted state law. However, the dissent suggests that where safety of the state’s citizens are at issue, the state should have the sovereign power to prohibit the construction of a nuclear power facility. Again, the recognition of the power of states to protect its citizens is affirmed and the role of states in the federalist system gains establishment in case law.

The construction of federal legislation concerning a mandatory role for the states in what must be a precisely executed system of surveillance and response to any threat of bioterrorism, does not fit within the Tenth Amendment protection standard articulated by Justice O’Connor in *New York*. Here, the requirement that states be given the option to regulate or be preempted may work for the facts of *New York*, but in a system where coordination and uniformity are essential to a surveillance and response system, there is no room for options such as these.

**Police Powers, the Commerce Clause, the Supremacy Clause, and Preemption**

The police power “[a]ims directly to secure and promote the public welfare by subjecting to restraint or compulsion the members of the community. It is the power by which the government abridges the freedom of action or the free use of property of the individual in order that the welfare may not be jeopardized.”

Since the Constitution does not expressly grant Congress the power to enact legislation for national public health, there exists an assumption that Congress does not have the power to do so—rather the states have that power. The Constitutional Convention considered numerous resolutions to give Congress such power, but all were rejected.

The Court extended the reach of the Commerce Clause in *Hoke v. United States* (227 US 308 [1913])—wherein the Mann Act was found to be constitutional—just short of granting police powers, to that of regulations having the “quality of police regulations.” The Court limited Congress’ police powers because the Commerce Clause gave the federal government power to regulate “among the states” and “that Congress, as incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.”

According to James Tobey, a scholar from the 1920s, the “Government is, in fact, organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty.” The use of police power by the federal government is a basis on which a federal approach to the threat of bioterrorism might be established.

A bioterrorism event would affect interstate commerce. Spreading rapidly
from state to state, it could bring death to those involved in commerce, inhibiting business trade and commerce. However, the relatively recent litigation of congressional power to legislate in traditional areas of state power in *United States v. Lopez* suggests that reliance on the Commerce Clause for federal bioterrorism legislation might exceed the shrinking reach of Congress' Commerce Clause powers. More recently, the US Supreme Court again limited the reach of the standard for affecting commerce in the review of the migratory bird rule, by striking down a regulation which extended federal power beyond Constitutional limits into an area of state police powers. Bioterrorism regulation based upon the Doctrine of Preemption could be proposed as a basis. The Doctrine states that state law is deemed preempted by federal constitutional or statutory law either by express provision, by a conflict between federal and state law, or by implication where "Congress so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." In public health law, Congress has not preempted the field as it has in the area of nuclear power. Furthermore, the trend in federalism suggests a trend toward more power for states—not less.

"No state shall enter into any treaty, alliance, or Confederation" Madison discussed the prohibitions against alliances between the states from the Articles of Confederation to the US Constitution. He explained that "for reasons which need no explanation, [the prohibition against states entering into treaties...] is copied into the new Constitution [from the Articles]." Although alliances and treaties may serve nationally important goals, they are strictly prohibited without the authority of Congress. Any formal alliances between states for purposes of bioterrorism preparation and response would be therefore strictly prohibited by the Constitution, without Congressional approval.

An informal alliance of state epidemiologists have filled the void where the federal government is unable, under current public health law, to provide a national uniform system of reporting diseases. These diseases include those biological agents that are commonly known to be among those used for bioterrorism. Without this alliance, our coordination of state reporting would be so useless as to be non-existent. This alliance has articulated uniform standards for identifying and reporting a list of selected diseases in order to maintain a national surveillance system. The Centers for Disease Control (CDC) has adopted these standards and provides them as guidance. However, this system has reached its maximum coordination and standard-setting powers as a volunteer organization. Without federal governmental powers, or a Congressionally authorized states' compact, the system is doomed to collapse in times of emergency.

Establishing a network of state epidemiologists for the constitutionally narrow purpose of preparation and response to bioterrorism as part of federal legislation would institutionalize a successful working model. The result would be a coordinated national response to the threat of bioterrorism, otherwise impossible where 50 independent sovereigns are protecting their individual state interests, as they must, rather than the national interest.

The Supreme Court has established that a state's police powers are not absolute and could not be exercised outside a state's territory or in contravention of the federal Constitution. The Court specified that police powers authorize the state to legislate "all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States, [including] health laws of every description." There-
fore, while the state epidemiologists’ alliance may act to create uniformity and compliance, it has no power to require any other state to do anything. It is conceivable that should one or more states choose to avoid reporting a disease cluster, the state epidemiologists—as well as the CDC—have no power to mandate their compliance, even for the health of the nation, or in the name of national security under the current regime of public health laws and case law.

**Conclusion and Recommendations**

The enactment of federal legislation on the basis of the Commerce Clause, extending the character of those regulations to the “quality of police regulations,” is an available federal approach to national security. In a reading of *The Federalist Papers* in the context of the new threat of bioterrorism, it is evident that the Constitution was intended to permit any shift of powers from the state to the federal government when the people’s confidence shifted to the federal government. With the threat of bioterrorism, people are likely to expect federal preparedness for a national security threat, which ultimately involves extensive peacetime activities. Conversely, they may be unaware that the long-held powers of the states’ governments, which have so ably protected the public since colonial times, may well prove to be an impediment to the effective role of the federal government, "or in other words, whether the Union itself shall be preserved.”

Legislation tailored to meet the narrow purpose of national defense against the threat of bioterrorism is an essential responsibility of our federal government. Recognition of the importance of constructing and approving such legislation prior to a bioterrorism disaster requires that Congress face the constitutional challenge of taking national leadership in our national defense and begin the political debate surrounding such legislation sooner than later. There will be no opportunity to have the deliberative debate of state and national powers that are raised in this article. This debate about the proper construction of legislation is essential to protect our system of federalism should a bioterrorism threat become a reality.

**Notes**

1 Bioterrorism may be defined as an overt release of a biological agent which is calculated to expose populations, resulting in immediate or delayed mortality or morbidity.


3 The Supreme Court has found that federal environmental laws may preempt state law, but only so long as the federal government has authority to regulate under the Commerce Clause, *New York v. United States*, 505 U.S. 144, 167-168 (1992).

4 See Stephen Gardbaum, “The Nature of Preemption,” 79 Cornell L. Rev. 767 (1994), “the most common and consequential error is the belief that Congress’s power of preemption is closely and essentially connected to the Supremacy Clause” rather than the necessary and proper clause.”


6 U.S. Const. Art. I, Sec. 10, Cl. 3, “No state shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

7 The Federalist No. 84, 511 (Alexander Hamilton)(Clifford Rossiter ed. 1961).


10 The "germ theory" was not among the new knowledge sweeping in during the Enlightenment era; however, the use of biological warfare should not have been unknown to the Founders. As early as 1385, the practice of catapulting the corpses of plague victims and the carcasses of diseased animals into cities under attack was in use. [Quoting Robert O'Connell, Of Arms and Men: A History of War, Weapons, and Aggression 171 (1989), in Ward Churchill, A Little Matter of Genocide — Holocaust and Denial in the Americas 1492 to the Present 151-152 (1997).]

Clearly, at least a crude notion of how epidemiology works was known at that time. In 1663, Captain John Oldham, a diplomat for Massachusetts Colony, was believed to have deliberately infected the Narragansett Indians by gifting them with contaminated blankets. [Quoting Robert O'Connell, Of Arms and Men: A History of War, Weapons, and Aggression 171 (1989), in Ward Churchill, A Little Matter of Genocide — Holocaust and Denial in the Americas 1492 to the Present 151-152 (1997).] In 1763, the Founding Fathers must have certainly known about Lord Jeffrey Amherst's attempt at genocide when he ordered smallpox-infected blankets to be passed out to the Ottawa and Lenni Lanape Indians in order to accomplish his own quoted goal to "exterminate this execrable race." [See John Duffy, Epidemics in Colonial America (1953); E. Wagner Stearn and Allen E. Stearn, The Effects of Smallpox on the Destiny of the Amerindian (1945), footnoted in Ward Churchill, A Little Matter of Genocide — Holocaust and Denial in the Americas 1492 to the Present 153 (1997).] Whether the Founders contemplated the use of contagion as a possible threat to other than the American Indians is not clear.

11 The Federalist No. 45.
30 The Federalist No. 46, 298 (James Madison) (Clifford Rossiter ed. 1961).
31 The Federalist No. 44, 288.
32 The Federalist No. 84, 511.
33 The Federalist No. 44, 288.
34 U.S. Const. § 9, cl. 2.
35 Ex parte Martin, 188 P.2d 287 (Cal. App. 1948).
36 U.S. Const. Amend. V.
37 The Federalist No. 25, 164.
38 The Federalist No. 44, 288.
39 U.S. Const. Art. I, Sec. 8, Cl. 1, "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States ... ."
40 The Federalist No. 41, 262-263. "It has been urged and echoed that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare... . Nothing is more natural nor common than first to use a general phrase, and then to explain or qualify the general meaning and can have no other effect than to confound or mislead, is an absurdity... ."
42 U.S. Const., Amend X., "...Powers not delegated to the US by the constitution; nor prohibited by it to the States, are reserved to the States respectively, or to the people."
44 20 Stat. 37 (1878).
46 The dissent wrote, "With the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."
50 The Mann Act prohibits the transportation of females across state lines for immoral purposes.
51 Police powers include those regulating safety, health, and welfare.
52 227 U.S. 308 (1913).
59 See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). Congress could decide to preempt the field but it should not be in an area of safety. Even in the area of nuclear power, the courts have held that Congress has preempted the field in nuclear power, but not in the area of nuclear safety where the concerns of the states' citizens are at issue.
Bioterrorism Preparation and Response Legislation

60 Art. of Confed., and U.S. Const. Art. I, Sec. 10.
61 The Federalist No. 44, 281.
62 Interview with Joe G. Moore, Jr., former Director, Water Commission, Department of Interior, 1968-1970 (April 3, 1998). The Delaware River Basin Commission was proposed for the goal of cooperative use and protection of water resources in the 1960s, but opposition in Congress eventually led to its demise.
63 Low Level Radioactive Waste Policy Act, 42 U.S.C. § 2021 et seq. The Southern Compact for the disposal of nuclear waste is intended to allocate the burden of nuclear waste equally among the seven southern state members of the compact was authorized by Congress.
64 Centers for Disease Control, Case Definitions for Public Health Surveillance, MMWR 1997; 46 (No. RR-10): [p. 57].
66 Jacobson, 197 U.S. at 25.
67 227 U.S. 308 (1913).
68 The Federalist No. 44, 288.

References
Cushman, Robert. 1919. The national police power under the commerce clause of the Constitution. Minn. L. Rev. 3: 289, 290.
Ex parte Martin (188 p2d 287 [Cal. App. 1948]).
Fidelity Fed. Sav. And Loan Assn. v. De la Cuesta (458 US 141 [1982]).
Garcia v. San Antonio Metropolitan Transit Authority (469 US 528 [1985]).
Gibbons v. Ogden (22 US 1 [(1824)].
Hodel v. Virginia Surface Mining Reclamation Ass’n (452 US 264 [1981]).
Hodgson v. United States (227 US 308 [1913]).
Hoke v United States (227 US 308 [1913]).
In re Caselli, 204 P. 354, 364 (1922).
Jacobson v. Massachusetts (197 US 11 [1905]).
Jones v. Rath Packing Co. (430 US 519, 526 [1977]).
Maryland v. Louisiana (451 US 725 [1981]).
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Feature Interviews

Bioterrorism is a difficult issue as an interview topic. In public policy we often discuss issues like school choice, gun control, welfare reform, and tax cuts; in short, issues that have an obvious conservative and liberal perspective. There are difficult policy questions surrounding bioterrorism even though they are not as obvious as those surrounding other issues; questions arise regarding our civil liberties and basic freedoms. Issues like bioterrorism go beyond Washington, DC to involve experts from the fields of science and international law. Interview Editor Siobhan Murphy and Executive Editor Christina Werth talked to scientists Joshua Lederberg, a Nobel Prize winner, and Matthew Meselson, a Harvard geneticist, about government involvement in finding vaccines and keeping track of who uses these dangerous pathogens. They interviewed Colonel "Dutch" Thomas and Marc Wolfson at FEMA to discuss the civilian-military interface and how the military works with other government agencies to deal with a possible attack on US soil. They also spoke to Peter Lejune, an expert in the field of terrorism, and Anthony Lake, former National Security Advisor to President Clinton, about what makes bioterrorism different from other terrorist actions. We hope this set of interviews will cause you to stop and think, not in terms of left vs. right or liberal vs. conservative, but about issues and practical and effective solutions.

Interview with Matthew Meselson, Professor of Molecular and Cellular Biology, Harvard University

How real and immediate do you think the threat of bioterrorism is? Is the threat more from state-supported terrorist groups or from cult or anti-government groups within the US?

First of all, if we’re talking about any individual American, the threat is negligible. If we’re talking about anywhere in the world where it might happen, then I think it is a serious issue. It is not appropriate for individual Americans, with all of the other things that we have to be concerned about, to worry about bioterrorism, which has never happened in the country in any serious manner. One case that is sometimes mentioned is the deliberate contamination of salad bars in Oregon, in which nobody died. Compare that with the number of Americans that are accidentally shot every year, or shot in massacres, or who die in other disasters. Of course, our main source of suffering and illness is nature itself; we are all vulnerable to disease. In the big scheme of things, even though in the media there are waves of concern about this and waves of concern about something else, in the big picture this is not something for ordinary Americans to get excited about.

After all, there is a discipline at Georgetown and all other universities called History. And when one looks at history we’re talking about something that, when compared to other hazards, has been minuscule. So you have to start with that. To completely close one’s eyes to history is to let one’s self in for serious miscalculations.

There is another lesson from history: not just that ordinary individuals should
not be particularly concerned about this, but that if it hasn’t happened, there must be reasons. We have shootings and wars and all kinds of violence all the time, but not this. The basic technology has been available in the open literature for more than half a century. So why not? Why hasn’t it happened? Whatever those reasons are, that’s where we should put our efforts, to reinforcing those, because they’ve worked. Whatever they are, they’ve worked. Is it a norm? Is it because it is difficult for evil-minded people to get hold of these things? Is it because it doesn’t satisfy their particular political needs? Is it because military organizations have not spun off experts and materials and knowledge that could fall into private hands? Is it because countries themselves, even those who have developed biological weapons, as we had once, have never seriously contemplated using those things in their war plans? Is it because bureaucracies have built them up but not with determined support from leadership? I don’t know.

There is very little scholarship here. Very few people are seriously trying to get hold of original documents from archives and making scholarly studies of these issues. Finding out what was going on inside the Soviet Union and what was really in the minds of American leaders that are now dead is very hard to do. The really important issues have to do with why hasn’t it happened and how can we keep it that way? If it should happen anywhere in the world, that is a threat to us because when you have a norm, a standard of behavior almost universally observed, if it gets broken anywhere, then there is a hazard that it could spread. We’re not worried about keeping it just from happening on our soil, but anywhere. So with that background, what can be done to reinforce those barriers?

What can be done to deter these acts?

Not just deterrence. Our vocabulary has become so impoverished when we discuss security issues, mainly since nuclear weapons were introduced. Nuclear weapons are so absolute that we introduced the word deterrence; it wasn’t used much before nuclear weapons.

There are a lot of things that don’t happen because people are not inclined to do them, not because they are deterred. Deterrence means someone wants to do something, but the cost to them is made high enough so they won’t do it because of the pain and suffering they would incur. That is not necessarily why people don’t do it. Why don’t you lie all the time? Is it because you are deterred? The language is impoverished here, so as soon as we start with the term deterrence we are denying ourselves other tools for dealing with this very special problem.

I don’t think deterrence is the right way to start. I think one has to take a broader view. We look at all the technologies that our species has ever developed: metallurgy, internal combustion, nucleonics, computers, you name it. Every one of them has been exploited for peaceful purposes. But in addition, with no exception, every one of them has been vigorously exploited for hostile purposes. This is putting the problem in the big picture, not the little picture. We have coming now a huge new technology, biotechnology. If we take this broad historical view, that it has happened with every other technology, how could it not happen with this one? This is one of the biggest questions that our species has to face in the present century. Are we going to be able to change the typical pattern and not use this particular technology for hostile pur-
poses, like we have done with all the others?

Why would it be different? You could argue it wouldn’t be that different. People might make some biological weapons, use them in wars; wars are bad enough anyway, it won’t make that much difference. Or maybe it would kill a lot more people, but still civilization would survive; most important our humanity would survive. After all, we’ve gone through times when there were horrible amounts of violence, and humanity has survived somehow.

Or is biology different? There we come to a very important question. Other weapons offer ways of destroying people physically. Biotechnology is fundamentally different because yes, it can kill people, but it can do something very different, it can change them. It will be a number of decades before it becomes clearly apparent, that biotechnology will give us the ability to manipulate cognition, the brain, development, our form, our shape, and the way our bodies work. We will be able to manipulate all of the fundamental life processes, in ourselves, in animals, and plants. You can see this happening at a quick rate of change in my field: molecular biology, molecular genetics. Every few months, something is discovered that no one would have dreamt could have been done before. And this will continue. The real question is far deeper than the hype artists in the press are feeding us in order to sell more papers.

Our species has suddenly arrived at a unique point in the history of living creatures—the point at which it can change itself; that has never happened before. And it is a fantastic change and it will deepen and deepen as the decades pass. That is why we should want to make sure biotechnology is used only for humane purposes; otherwise, we are in very deep trouble because we will lose our sheet anchor, we will lose what it is to be human. If you can change it readily, and if you do it for hostile purposes, what is left after a few hundred years? That is where I am very concerned. That approach deals with the more immediate issues of averting damage or danger to a city or to a country or to an individual. But there is very little effort there. That’s the sad part.

Could you talk a little bit about your proposal of an international convention on criminalizing biological weapons and how that fits into what you are talking about here, the idea of societal norms? Or is it more on the side of deterrence?

It isn’t. It is on the side of norms of behavior. In religious doctrine and ethics, the concept of a norm of behavior has been developed deeply. It is something that politicians should pay more attention to. This idea of a convention that would criminalize biological weapons is only one tool, and I’m sure it is not the total answer.

There is a body of international law going back several hundred years, and it first applied to piracy. It’s based on the thought that there are certain crimes that are a threat to everybody. No matter where a perpetrator of a crime appears, no matter where he is found, the courts of that country ought to have jurisdiction over that crime. That is different from someone committing embezzlement in Peru and coming to the US, when there is no special extradition treaty between the US and Peru. Well, he’s a free man. He isn’t an American citizen; he didn’t commit embezzlement in the US; he didn’t steal from a US corporation abroad. If someone hauls him in front of a US court, his lawyer would say, "It is irrelevant what my client might have done in Peru. This court has no jurisdiction over deeds.
committed by non-US citizens outside of the US if it did not harm US interests abroad." But not if he is a pirate because even if he is a pirate from Peru and he captures a Spanish ship and he happens to come to New York, our courts have jurisdiction over piracy no matter who does it.

There are seven treaties now in force, and the US is a party to every one of them: airline hijacking, airline sabotage, crimes of maritime navigation, harming of diplomats on official duties, theft of nuclear material, torture, and hostage taking. (You may remember the Achille Lauro, the treaty happened after the event which is often what happens. People don't get concerned with something until it happens.) Those are all in force. There is a new one but it is not in force yet because not enough countries have signed on to it yet and that is on terrorist bombing.

My colleague Prof. Julian Robinson of the University of Sussex in England essentially took a bunch of scotch tape and scissors and took pieces of all these treaties and changed the words to fit biological and chemical weapons. We followed basically the format of treaties that arc accepted and to which the US has subscribed and created a draft to make it an international crime.

What does that mean? Let's say you are the head of state, and you're wondering if you should start a biological weapons program and you ask your advisor. He will say, "You can do that, you are the boss here, but if you do that you better not travel because you don't want to find yourself in a foreign jail, and this is now subject to international jurisdiction. Furthermore, if this government should change and you are no longer head of state, the new government might put you in jail." Another thing his advisor probably wouldn't tell him is what happens when his son or daughter one day asks, "Dad, I read that you have been indicted as an international criminal. That's not true Dad, is it?" There is some dissuasion going on there; maybe there your word deterrence starts to apply.

What kind of response and support are you getting for your proposal?

So far as I know, everyone who has read it thinks it is a good idea. But it is different when a few university professors think it is a good idea than when a head of state, or better yet, a few heads of state say, 'This is the most important thing on our agenda. We are going to propose this in the UN and we are going to get it done.' That is where we are right now. Our problem is that the world is full of people who are interested in this problem, but they are too busy with other stuff. We are not very much aquatinted with world leaders; I teach genetics. So far none of my students has ended up being the President of France. Nevertheless, we are trying through contacts to reach leaders in several countries that are liked in the world. We are hoping, especially after I am on sabbatical, to kick into high gear and get this done.

Let's talk a little bit about research, and that aspect of the issue. As a scientist, what do you think the government's role is in supporting this kind of research? What is the government's role in monitoring scientists to ensure that any work being done is for a good use of these biological agents instead of hostile uses?

There is no money in most vaccines, so the private sector is reluctant to do it. There are a few vaccines where there is a profit, but leaving those out, vaccines in our country, as far as I can see, are going to have to have a lot of govern-
ment support. Only those vaccines with a large commercial market, like a vaccine for the common cold or AIDS, have a big profit potential. Let's take smallpox. We really should have a supply of the vaccine. We have some but it is not a lot; we should have more. A better vaccine or even the old vaccine is not that hard to make, and the government, I think wisely, has contracted with a company here in Cambridge to first develop the vaccine because it will be a new kind of smallpox vaccine, then produce a fairly large quantity of smallpox vaccine, and then it will be stored away. I think that is worth doing.

Could you do this for every disease, for every variant of every disease? No, you would go broke and we don't know how to make acceptable vaccines for most diseases. So it is not a general answer. There is another factor, and that is for most infections, the vaccination has to be before you are exposed because it takes a while for the immunity to build up. You certainly cannot vaccinate all Americans against all diseases. But having certain vaccines just in case, I think that is a good idea.

A broader spectrum approach is if we understood enough about viruses so that we could develop broad range therapies. In other words, only if you are already sick, then you would do something medically about it. Prophylaxis also has the problem that everyone says, "Well maybe I was exposed." How do you qualify, where do you draw the line? At the border between Cambridge and Somerville, or farther west between Somerville and Medford, or farther still between Medford and the New Hampshire stateline? Some people are even going to worry if they are living in Maine and something were to happen in Boston. How do you deal with this kind of public concern? It is much better to have something for after you know someone has been infected, and that gets you to therapeutics instead of vaccines.

We don't have a cure for any virus disease and we've had more than 50 years of intensive research against virus diseases generously supported by the government. So more money isn't the answer. We still can't cure AIDS. There is not a single virus disease that we can cure. We can prevent some with vaccines. But cure it? No. So there is certainly a great need for research. But nobody should think that it is going to happen tomorrow, and nobody should think that it is something we haven't been doing and that raising the budget will fix it. We have been doing it, hammer and tongs. Look at the AIDS effort.

We've talked about prevention and preparation, and the media sensationalizing the issue. How do you draw the line between preparing the public for a possible biological attack and not creating a panic? How can we keep groups from creating hoaxes to stir a panic in the population?

There really has not been a problem with creating a panic. We have had more than 200 anthrax hoaxes. It's incredible. Now I don't think you can get an inch in a newspaper with one. In fact it may be the cry wolf problem. I'm not sure how to answer that type of question. I'm a biologist; I don't know too much about how to shape public opinion. But it does seem to me, just on the basis of the facts, that our public has been pretty sensible when they have reliable information.

How would you look at international cooperation both on a national level to fight biological terrorism and on your level, the researchers' level?
What can international cooperation do for the problem? Does this type of cooperation exist?

The best type of cooperation is the normal openness that is in the scientific community. That should be encouraged by supporting the travel of young scientists especially and older ones too so they can go to one another’s countries and get to know one another and know what each are doing. There are many biologists in the former Soviet Union, I am told, who didn’t even know there was a treaty that prohibits biological weapons. Openness, travel, the web, TV, all these things help. There is no way you are going to be able to have a police type of surveillance of activities. The main approach is to encourage openness, except where there is legitimate secrecy, for example monetary, military, and police, but to be open in other areas. For example, proprietary information that is commercial information can be shared with our government. They have a very good record. The FDA does not tell other companies how to make products that have secret methods. When it is military stuff, share it with an ally. When it is police stuff, share it with police organizations in other countries, in your own country, with Interpol. If you only have one organization, only one unit, I would be afraid that it could become so ingrown, so isolated from everybody and everything else, that it could go off in its own direction. The first step is to look everywhere and encourage openness. A further step is to break down isolation even in secret work.

Regulations are more difficult. Especially if you are talking about laboratory practices of science. Scientists are skeptical about politicians. They tend to be an independent-minded lot of people, especially the ones in universities and research institutions. You can license certain things. If you want a pathogen, you used to just be able to order it, now you have to be approved. There is a certain form you have to fill out and the Center for Disease Control gets involved. It is a step that isn’t too burdensome; whether it will really make a difference, I don’t know. I don’t think we should export pathogenic strains without knowledge of how they will be used. On the other hand, they can be isolated from nature and from sick people.

We are dealing with a problem where you really need to have good behavior based on the fact that people want to behave well. That, as my friend Joshua Lederberg said to me the other day, "The main protection we have here is the norm." If that were really to change, if the picture you imply by talking about deterrence were to really be accurate, and all types of people are itching to do this, then you would never stop it.

If you had the ear of President Bush, what would you suggest on this issue?

There needs to be more attention to the long-term issue about how to keep our species from going down this road.

There is right now in Geneva negotiations to provide for the Biological Weapons Convention, the same kind of system of declarations and onsite inspections and activities that we have running for the Chemical Weapons Convention, which really was the initiative of George H. W. Bush.

Now what I would say to George W. Bush is, "Your dad did something of great wisdom, and we will see this more clearly as we learn more and more how to manipulate people with chemicals." The first President Bush was the key leader in bringing in the Chemical Weapons Convention. It was when he was Vice President that he pushed this for-
ward when most of the rest of the government was skeptical, even hostile. I would say to George W., "What your dad did in the area of chemical weapons, you should now do in the area of biological weapons. And that is, in Geneva to instruct your delegates to get an agreement where we have a new international organization to which countries would make declarations on certain matters and which would have inspectors that would do checks."

And we would also have an element of international cooperation. You’ve already got the model; it is up there in The Hague, it is the Organization for the Prohibition of Chemical Weapons. It’s a good model. Instead, what is happening so far is that the US is not taking a leadership role. It had not done enough under the Clinton administration, and we are going to lose this thing. And that is too bad. It has to happen at a high level. Most of the middle level people are not going to be able to do that. They do not have the authority; many of them do not have the broad vision either. That is what I would do. I would tell him, go talk to your dad.

Matthew Meselson teaches and conducts research in the Department of Molecular and Cellular Biology at Harvard University. Professor Meselson is a member of the US National Academy of Sciences, the Royal Society, the Académie des Sciences, and the Russian Academy of Sciences and has been awarded honorary degrees from Columbia University, the University of Chicago, Yale, and Princeton. He has served as a consultant on chemical and biological weapons (CBW) arms control and defense to various US government agencies and is a member of the Committee on International Security and Arms Control of the US National Academy of Sciences. He is co-director of the Harvard Sussex Program on CBW Armament and Arms Limitation and co-editor of its quarterly journal, The CBW Conventions Bulletin.
Interview with Anthony Lake, Distinguished Professor in the Practice of Diplomacy, Georgetown University

It's interesting that in your book, Six Nightmares, and in a recent issue of Foreign Affairs, bioterrorism is referred to as a nightmare. How much of a real threat is bioterrorism? Or do you think it will remain in the realm of nightmare, and not reality?

It's much harder to develop a biological weapon than a chemical weapon and much, much harder than using computers for terrorist action. So, if you're calculating probabilities, then bioterrorism, probably even more than some forms of nuclear terrorism, is relatively unlikely. I do not walk around everyday worrying that people are dumping microbes in the ventilation ducts of the building I'm in. If we allow ourselves to become scared of this, then in a way, the terrorists have won. If we alter our behavior too much beyond prudent or preventative and preparatory efforts, then the terrorists have won. I don't think the chances are at all high that this will happen; in fact, I think they're very very low. However, the fact is that the Aum Shirinkiyo was trying to develop biological weapons and probably used sarin because the Japanese police were closing in on them. (I believe they lost a scientist in the process of trying to develop biological weapons.) We should lament any death, anywhere, but that would be low on the list of lamentations. So while it's very unlikely, it is possible, and in fact we have entered the age in which there have been active efforts to try to develop biological weapons.

Secondly, even if the chances of a biological agent being used are very small, the consequences of such an action could be extremely large. Therefore, we should be doing everything we can both to prevent such an action and to prepare for its consequences.

On prevention, there are a number of issues. One is, how do you find a terrorist before he or she can act? That means an emphasis on our intelligence [collection], which is important. But terrorists are getting, in many ways, harder to catch, because they tend to act less and less as part of highly organized, disciplined organizations with a clear political goal and more out of a motivation simply to kill for revenge. That makes them harder to deter. But every dollar spent on anti-terrorism and our intelligence energies is well-spent.

The second issue is whether we can help prevent it by, for example, censoring the Internet so potential terrorists have less access to the recipes you can find, mostly for chemical weapons. Or to put new constraints on the scientists and censor scientific explorations, genetic modifications, etc. I don't believe such efforts are right, either in principle or as a practical matter.

Since there is such a fine line between research and weapons, how would you limit scientific explorations?

My answer is, you both shouldn't and can't do either. On chemical and biological weapons you can tighten up on whom dangerous materials can be sent to or the ease with which you can purchase the stuff. So you can't just order over the Internet and have botulism delivered to you. But we need to be very careful even with that, because again, if we allow our fears of
terrorism to appreciably diminish our civil liberties, including freedom of speech, even electronic, then the terrorists have won. Censoring the Internet, as the Chinese are already learning, is probably impossible. Secondly, in fact, you may well be able to catch terrorists by tracing who is hitting on the sites. A third way of preventing it is to undertake a massive effort to change how our ventilation systems work, and I think that is not feasible.

In terms of preparing, the government has begun a program of training people in communities around the country, and they’re increasing the number of their programs. That program is a praise-worthy start, but it’s got a lot of problems in it, and it needs further development.

Another issue that comes up, both with preparation and in dealing with an actual event of biological terrorism, is local vs. federal authority. Where should responsibility lie?

That’s a very important issue. Much of the training is about how to coordinate local, state, and federal efforts. You need all three, and you need to coordinate them. I recommended to President [Clinton] to issue the presidential decision memorandum that established the current structure for how you organize this at the federal level. In retrospect, I think it was wrong, in that at each of the levels—local, state, and federal—you have a fair number of organizations that have very different functions and therefore different bureaucratic interests. At the federal level, the most notable would be the FBI and FEMA.

Imagine, for a moment, that we were at the site of a catastrophic event. The interest of the FBI is the crime scene. So you don’t want to change things. The interest of FEMA is to deal with the victims and to get people out of there right away, consistent with decontamination. This is more likely in a chemical weapons attack. (In a biological attack, you often wouldn’t know it had happened for a couple of days, which makes it more dangerous.) On the ground, as we’re currently structured, the FBI plays the lead role. I went to an exercise in which the FEMA people were inordinately, I thought, taking direction from the FBI people, when it’s not automatically clear, at any particular incident, whether the FBI’s crime scene interest is greater than FEMA’s victim interest or vice versa. I think you need an impartial bureaucratic arbiter who can take over a crime scene and can proactively coordinate the federal, state, and local activities. I think there’s only one institution in our government that can do that, and that’s the White House. So I think, sooner or later, I hope sooner, the White House will develop, as FEMA has, a cadre of people who are able to immediately go to a scene like this and know what they are doing and take over and work on it.

There is also much to be done in getting ready in regards to vaccinations. Efforts are, I suppose quite properly, concentrated on the military. My friends in the government tell me that one area where we need more money is developing and producing the vaccines for the civilian population as well.

There are several laws the US has regarding biological terrorism. Can domestic legislation that criminalizes the use of biological weapons and development effectively deter a biological terrorist event? And is there a difference in how the laws affect domestic groups versus foreign?

I think you are asking the question in black and white terms. Will it deter or won’t it deter? Certainly, they cannot perfectly deter it, because again, what I call existential terrorists simply want to lash out at a society they hate. They may well be in a state of mind which makes them undeterrable. But [the laws] can help. You’re always dealing in probabilities and
percentages, and I think, almost by definition, they can help. The question is, how much are you giving up in terms of civil liberties compared to the deterrent effect? So far, I don't think we've gone over a reasonable line.

The other issue to deal with is international; it is very important that we make more progress internationally in finding ways to harmonize the various laws governing all this. We want to encourage other nations to get tough on terrorists. At the same time, most other nations' criminal justice systems have less protection of individual liberties than we do. So it is a lot easier to call for more harmonization than to actually do it. Finally, there is the issue of whether you want to make it an international crime, as we have with hijacking, to possess or use biological weapons.

That leads to my next question about making it an international crime. If that happens, criminalizing the possession and use of biological agents, what would happen once the terrorist individual or group is apprehended? Where would they be prosecuted? Would it go to the international court or would it stay in the US?

Good question. It has to be worked out. A start would be to try to work it out, rather than saying in advance that it's too complicated or the difficulties are too obvious, so let's think about something else.

* Latin: "force of the county," referring to an armed group given police authority. The Posse Comitatus Act forbids using the Army or Air Force as domestic police.

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Could you give us some background on the relationship between FEMA and the Department of Defense (DoD)?

Fenton Thomas: FEMA is the lead federal agency for natural disaster response. In the Federal Response Plan we find the 12 emergency support functions. Each of these support functions has a lead federal agency. This agency, DoD, is a supporting agency for all 12 Emergency Support Functions and all 27 federal signatories to the Federal Response Plan. We are the biggest of the agencies and the most expensive. We are probably the most capable, with a broader range of capabilities, skills, equipment, manpower, and deliberate planning. My role here is to be the DoD point of contact for FEMA. I have Master Sergeant Marshall who is the assistant military liaison. There is also a National Guard Liaison Officer. The three of us represent the four hundred-pound gorilla that supports the Federal Response Plan.

How does preparing for a bioterrorist attack differ from preparing for a natural disaster?

Marc Wolfson: The Federal Response Plan gives us the framework within which we are going to operate. That is not going to change, but some of the assets and resources that we are going to be calling upon through that channel are going to be different. And in fact, the DoD has some specific resources that we would have to call upon in a [bioterrorist] incident like this to deal with the consequences.

FT: From my point of view as an individual, this is not DoD policy, the hardest of the terrorist options to define and respond to is bioterrorism. Who is to say the West Nile virus in New York was not a test run to see if the virus could be spread effectively, or to test the response of the medical system of New York City and the federal level agencies? (By the way let's talk federal, state, local, as the national response entity. I'm trying to refine myself and not say this is the national level when in fact all levels of government make up the national response.) I personally think it was a natural outbreak. We have been able to inoculate, immunize, and we have actually managed to mitigate. When was the last time you heard of an outbreak of smallpox? It has virtually been eradicated from the planet. There was one suspected case last year.

MW: Some of the earliest incidences of bioterrorism were in the Middle Ages when the bodies of victims of the Plague would be put in the catapults and flung over the walls of a city.
FT: Or they would pollute the wells in the face of an advancing army. So what I am trying to get to is that our culture has become convinced and reassured that medical science in America is capable of giving us a healthy life. I grew up on a ranch in the Midwest where anthrax and hoof and mouth disease (we didn’t call it foot and mouth, but hoof and mouth) and Black Plague and other hazards to livestock were something we had to deal with and vaccinate against, and now we have a healthy food source from cattle, sheep, and pigs. The caution is not to look at everything that appears to be a bioterrorist attack as in fact bioterrorism because we may be looking at a natural outbreak; therein lies the conundrum.

Have you come up with any sort of criteria to determine what is a natural outbreak and what might be something more sinister?

FT: Metropolitan Council of Governments has an initiative to develop a bioterrorism plan that links the military hospitals with an interactive database. Patient symptoms are entered into the database and there is a statistical means of determining an anomaly. The runny noses and upper respiratory infections could be an indicator. I am allergic right now because it is pollen season, and if I were to go to a physician over at the clinic in the Pentagon, he would enter my symptoms in the database to see if there was a spike. That is a tripwire. They are trying to bring that system into the 19 hospitals that make up the Metropolitan Hospital Association. Then eventually that would develop into a national system. And that brings together Presidential Decision Directive Number 63 dealing with cyberterrorism. If you really want to fool Americans, then the cyberterrorist takes out the tripwire at the same time they deploy the biopathogen; they’ve now exacerbated the mass casualty scenario.

There are all kinds of scenarios; it is hard to pin it down. The last time we had an epidemic other than AIDS or STDs was in 1918 with the flu epidemic. That was the last time I know that there was an identified epidemic where massive numbers of people died. That was actually dealt with by self-quarantine; people went home and stayed home until the epidemic ran its course.

The other thing we have to watch out for is targeting the medical structure of the nation. We don’t have a whole lot of doctors, emergency room nurses, technicians, and laboratories for the mass-casualty scenario. It scares me sometimes, in the line of work I am in. Because of this kind of awareness, we think through these things. We understand the infrastructure that makes our quality of life what it is. [The infrastructure] is not all that robust when you have a mass-casualty, major disaster at a catastrophic level. The saving grace, in my opinion, is the durability of the American people. I think we are a lot tougher and more robust and more capable of coping than some of our erst-while foes think we are.

In what sense?

FT: I was in a meeting about eight or nine months ago where a very high level individual was speculating about how the DoD might cope with panic in the streets if there was a detonation of a weapon of mass destruction. Being the soft voiced, retiring person that I am, I challenged him to cite an example of the Western world in the modern era when there has been panic in the streets of any Western city. I don’t recall that individual has spoken to me since. There was the Blitz in July, August, and September of 1940 in the portion of England that could be reached by the Luftwaffe,
but particularly London after Hitler changed the focus of the target list from the Royal Air Force to the city. The London fire brigade worked itself into exhaustion and wore out its equipment. A large number of residents of London moved into the Tube; some thousands never came out until virtually the end of the war, but there was no panic in the streets. You could say the same thing about Berlin, Hamburg, Koln, and Dresden. They endured without panic.

MW: Even during the Gulf War, when they issued gas masks to the Israelis, you didn’t have people screaming in the streets.

FT: That’s true. They said okay and took their gas masks. They learned how to put them on themselves and their children. They coped. The Northridge earthquake, the Murrah Building, and Loma Prieta earthquake are recent events here in the United States. You have the televised images from the 19th of April when the second device was announced in the building and people ran down the street, but within minutes the people of Oklahoma City were back dealing with the wounded, the injured, the traumatized. I don’t think Americans will panic in the streets. There may be a momentary flash, but they won’t run around in circles and scream and shout. I don’t think there will be panic in the streets because that is not our nature.

There is the possibility of large media outlets sensationalizing the idea of a biological attack and perhaps creating a panic or paranoia in American society. In the planning for a biological attack, what do you see as the possibilities with the media and how can you control for that?

FT: Do you know of James Lee Witt? Have you ever seen him on television? One of the most reassuring faces to the victims of disaster during the time he was director here was when he was sitting in this chair with those big red letters [FEMA] over his shoulder. In a very calm and reasoned voice, he spoke to the nation about what the Federal Emergency Management Agency is doing to cope with the trauma at that moment. He presented a very clear and reassuring message. Sensationalist press will always be sensationalist press by First Amendment right. But out of the major exercise that took place in May came a decision about the Public Affairs Directorate in FEMA; they would have "the story." They would tell the story from the consequence management side of the Nunn-Lugar-Dominici legislation in one clear and well-reasoned voice to create balance to the sensationalist press. (And here I am diverging from the policy that was established to what I think is going to happen.)

The majority of Americans want facts. They can watch Bart Simpson in the sensationalist press anytime they want to. But when they are afraid or want reassurance or need the information about their family, loved ones, and their property, they want the voice of authority not dictating, but informing with clearly stated facts.

MW: One of the other things that came out of the exercise is a decision that on medical issues the chief spokesperson for the federal government will be the Surgeon General. Again, someone like Director Witt, someone who is the medical authority is the person who is going to be speaking to the public about what we know and what we are doing about it from a medical standpoint.
How do FEMA and the FBI work together on these issues? How do you balance what the FBI needs to do in terms of finding the perpetrators, and what FEMA needs to do in terms of disaster relief and consequence management?

FT: When there is a designated national security event we create a liaison. We have a FEMA representative in the Strategic Information Operations Center in the Hoover Building and there is a FBI representative here as part of the Emergency Support Team of FEMA. That would work during a designated terrorist act. The FBI and the Department of Justice have their role, which is law enforcement. They’re even in mitigation through their intelligence role. Based on the Federal Response Plan, which is an all hazards response plan, whatever caused the trauma or the mass-casualty incident, the Federal Response Plan can handle it, and that is in close coordination with the FBI or other law enforcement agencies. The biggest difference is by Presidential direction, the FBI handles a bioterrorist-type event as a federal crime. The FBI is going to be operating as a federal agency relatively unilaterally. The local and state law enforcement agencies assist. FEMA does not relinquish its relationship with the governors of the states, the Incident Command Centers, or the Incident Commander in the local response agency, be it the local fire chief, police chief, or the municipal emergency commander. They are the ultimate requestor that gets what FEMA can bring to the fray.

We interviewed Tony Lake, the former National Security Advisor, who suggested an overarching coordinating entity (perhaps in the White House) that does not have a vested interest like FEMA or the FBI. Do you think that is necessary?

FT: I don’t think it is necessary. Tell me that we won the war on drugs by having a drug czar. Tell me what that fixes. You have two cabinet level officials, one is the Attorney General of the United States, and the other is the Director of the Federal Emergency Management Agency. working together in the event of a terrorist act of catastrophic dimensions, and the President, who has the responsibility of Commander-in-Chief and the head of the State, will be running things. So as policy oversight as to who should be running things, it should rest with the Vice President. This Vice President, particularly because of his background in the Congress and as a Cabinet official, knows the issues. Throwing 19 million dollars into a new White House level or executive branch office as Ms. Tilly Fowler (R-FL) (for whom I have a great deal of admiration and respect) has suggested is unnecessary. House Resolution 4210 is a great attempt to bring together some cohesion out of this whole mess that was stirred up out of Nunn-Lugar and Nunn-Lugar-Domenici. Congress was right in what they were trying to do when they passed that legislation. The response has not exactly been what they had anticipated, in my opinion.

I don’t think a new office is necessary when you have competent people in the existing agencies. Use the existing structures, without adding something new requiring additional funding, to resource the existing agencies, to expand their staffs, or their capabilities. That would be more efficient. More is not always better; use what works instead.

Another area we are interested in is the civilian-military interface. Do you foresee any problems with the military getting involved in a crisis
on US soil, any possibility of violation of civil liberties or posse comitatus?

CT: Under the existing guidelines, as are practiced every time the President signs a disaster declaration, the Department of Defense engages. *Posse comitatus* was passed back in 1878 in the aftermath of the Civil War because the federal troops still occupying the eleven states of the Confederacy were abusing civil rights. There is no need to suspend *posse comitatus* if there is a biological event. The National Guard, a forward-deployed first military responder on state active duty under the authority of the governor, is exempt from *posse comitatus*. However, as a matter of policy, they do not effect arrest. They support the duly commissioned sworn law enforcement officers present. A platoon of National Guard Military Policemen can be put on the street and they, in fact, have powers of arrest in most of the sovereign states. However, they will wait for that deputy sheriff down at the end of the block to make the arrest. They might detain someone, they might escort someone to support law enforcement, or, as they do here in the District [of Columbia], they might support by pulling in some of the clerical occupational specialties to do desk work, but they do not go out and effect arrest. Not only that, in the intelligence arena it is prohibited for the military to gather, maintain, or disseminate intelligence on US citizens, and that is ironclad. We’ve been able, as the Coast Guard has, to accomplish the mission without ever having extraordinary powers. The Founding Fathers got it right when they wrote the Constitution. There are people like me and Marc, who are dead-set against extraordinary powers going to the military in order to accomplish the domestic support mission.

MW: One of the keys that the Colonel mentioned earlier is that we are there to support the Governor and support state and local authority. So if the order to quarantine an area comes down, then it is the local civilian authority that is going to make that decision. They may need assistance, but it won’t be a military operation.

FT: A challenge for you. Go back to Georgetown to the law school and have them point out to you in federal law, in federal code, where the US government has the statutory right to declare martial law. I would be interested to know; I have not been able to find it. I don’t think it exists. I hear about twice a year in conversations, “There will be a declaration of martial law.” The answer is no. Name one other time in US history when martial law has been declared.

So the Governors will maintain control throughout the process?

FT: The Governors have the control and bear the responsibility to the citizens of that state.

Is this control and responsibility for both the clean-up after an event and helping the victims as well as finding the perpetrators?

MW: No, that is where the divergence is. Finding [the perpetrators] is a federal law enforcement matter.

How likely do you think a biological event is?

MW: That is for the intelligence analysts at the FBI and the CIA, who are tracking these groups on a regular basis, to determine. There are groups out there who potentially have the means to do this, but right now there is no imminent threat. We are not at a threat level
where we are anticipating an imminent attack.

FT: It is a sliding scale. The better prepared we are, the less likely it is that a terrorist group or person will carry an attack off effectively because they cannot obtain their goal. The answer to your question is really, how prepared are we to cope? That is one of the key questions. You will hear people say it is inevitable, that it is just a matter of when and where. I'm not so sure.

Do you think that having a good response plan could act as a sort of deterrent to terrorist groups, knowing that this plan is in place, thinking that their attack might not have much impact?

FT: There is no magic about the Federal Response Plan. It came out in April 1992 and was first tested when Hurricane Andrew did urban renewal in Dade County, Florida, and then Omar did Guam, and Iniki did Kauai. It was a really good test, and the lessons learned out of those events are still valid today. Every time we do a Hurricane Floyd type of an event, the procedures that are embodied in the Federal Response Plan are refined just that much more. In this new area of bioterrorism, the way we can deter is to show that this plan applies and that the National Disaster Medical System (NDMS) applies. The more robust and prepared the first responders are, the better our advanced life support ambulances are, and the better the police are at identifying the symptoms, the less likely we are as the military support to [confuse things and] contribute more casualties to the event. Then what is the value [of the attack to the terrorist]? If there is no value then there is no value in committing the act. That is deterrence.

Does FEMA share ideas for preparation with other countries and work with officials from countries to avoid an event like this from happening?

MW: First of all, you have to understand that FEMA does not have an international charter; the agency in its mission was created specifically to deal with disasters, preparation, etc., within the United States and the US territories. Now, that said, we have had numerous meetings and visitors from other countries that have seen what the agency has done over the years in disaster response. They've come to pick our brains on how we do what we do here in the United States and to try to learn from that.

FT: One of the most frequent requests the military support office here at FEMA gets is to address the visitors from other nations; the Japanese were in here Friday as a follow-on to the Kobe-Osaka event. This agency is the standard that developing nations look to in order to know how to deal with a disaster. When Venezuela had the landslides, they came here to learn about FEMA. There is a whole book of memoranda of understanding between FEMA and other nations that Dr. Claire Blong and his staff put together. We do not respond for other nations, but they come here to learn our methodology, to learn how we do it. The military influence is important because in so many other nations, as in Argentina, for example, they task their Ministry of Defense, to be the responding agency, i.e., FEMA. That is the antithesis of how we do it here. The military is not the lead agency for anything. But they want to hear how we do it. So I stand in front of them with my 24 briefing slides and explain how we do it.
MW: One of the things that really has changed that is the Internet. Every one of the federal agencies including FEMA has a website that can be accessed 24 hours a day from anywhere in the world. We track the statistics on what kind of hits we get, and about 10 percent of our hits are coming from other countries. People interested in seeing it can download the Federal Response Plan and study it. Then they want to come here to discuss it in person. It really has changed how we do business in our ability to communicate all over the world.

FT: FEMA is there to serve as a standard. I'm very proud of my assignment here; I'm very proud of this agency. It does some tremendously good work. It represents the national system. But [the national system] encompasses not only this agency, but also the relationships with other agencies that are signatories of the Federal Response Plan; and that is a nuance that is hard to catch.

MW: The key is FEMA does not have all the resources, the people, the skills, or equipment to deal with a disaster like bioterrorism, but we provide the framework. We are a management agency; we can manage and coordinate. We then turn to Defense or Health and Human Services to get what is needed at the state level to help them deal with the disaster.

FT: There is a thing called the Request for Federal Assistance. It is one of the most powerful documents in disaster response that you can imagine. It carries money with it. But it also tasks the agency receiving the request for assistance to go forth and do.

Do you think the current level and allocation of funding is sufficient?

FT: A misperception is that FEMA is sitting upon a kettle of gold coins, and it is a matter of putting in your request, your grant proposal, to get some of that pot of gold. FEMA's money comes when the President declares a major disaster, and that opens the Disaster Relief Fund. And even then it is tightly controlled; it does not flow freely or openly. As far as that 19 million that I was talking about from House Resolution 4210, and the current House Resolution 525 on spending, that money is not allocated. It would be about the right amount to better staff this agency and to do the exercises and studies necessary to cope with [bioterrorism]. It doesn't take a great landslide of money; it takes proper investing. There is the use for more money but it wouldn't take a lot.

MW: I agree. FEMA's role is to support the states and local officials in the management arena down to the first responders level in their planning and their training to prepare for whatever disaster they might face. There have been a number of different initiatives in this area that would provide training assistance to states and locals; we've had programs in Justice and Defense, so [training to state and locals] needs to be a little more tightly focused. We need to make sure there is no redundancy there and that we are delivering the best quality product.

If there is one request you could put forward to the new administration as to what needs to be done first to improve our preparedness in the area of bioterrorism, what would that be?

FT: Put Mr. Joe Allbaugh in as Director of the Federal Emergency Management Agency. And he is.
MW: That was a great first step for all of us—the fact that Mr. Allbaugh has a very close working relationship with the President. The fact that the two are very comfortable with each other is very, very important to all of us because in a time of crisis when the President needs to turn to somebody to lead this charge for him, it needs to be someone that he trusts. And Mr. Allbaugh is that person. All of us can help make Director Allbaugh smart on the issues and provide him background, but we could never replace the relationship he has with the President.

FT: Or have that level of trust. A lot of times we miss that. We put cathode ray tubes between reality, the Internet, and us. I like the relationship [DoD] established with Public Affairs. We trust each other. And that didn’t come by accident, that came by trial, by test. The confidence factor goes up, a proven commodity. The Hurricane Liaison Team is on a first name basis with the staff in the Hurricane Forecast Center. There is trust. No matter how big the agency, no matter how much money, when it comes down to it, it comes down to people, and that is the basis of my answer. If you don’t have trust and confidence, then a guy like me can’t get on that phone and move millions of dollars worth of equipment with the paperwork to follow. It is easy to understand bureaucracy when you look at the people who man it.

Colonel "Dutch" Thomas has served in the US Army for over 32 years. He is a Field Artillery Officer currently assigned as Military Support Liaison Officer to the Federal Emergency Management Agency. Colonel Thomas served as a member of the Department of Defense Weapons of Mass Destruction Tiger Team. Colonel Thomas graduated from Tarkio College with a BA in social science and is the recipient of a MS in community development from the University of Missouri.

Marc Wolfson is the Public Affairs Officer (PAO) at the Federal Emergency Management Agency, serving as one of the PAOs cleared to work with the domestic emergency support team for incidents involving weapons of mass destruction. Prior to joining FEMA, Wolfson served for 22 years in the US Coast Guard before retiring from active duty as a commander. Wolfson holds a BS in oceanography from the University of Michigan, an MBA in human resources from National University, and an MS in mass communications from San Diego State University.
Interview with Peter Lejeune,
Senior Associate,
Security Management International, Inc.

How serious do you think the threat of a biological terrorist attack is? Do you feel the threat is more from domestic groups or foreign groups?

I believe the threat is low in possibility, but extremely high in effect. The preparation to respond to such a threat takes a long time—the development of technology, the development of the concept of operations—so it is prudent that we start now. Do I believe it to be imminent? No, but then again, no one thought the bombing of the Murrah Building was imminent.

One difference between the domestic threat and the foreign threat is the form of the attack. For example, the attack of the Bhagwan Shree Rajneesh in Oregon was a pretty basic attack, sprinkling salmonella on salad bars. That type of attack domestically could be possible for some form of revenge, or, as they were trying to do, alter the outcome of a local election. An attack of the sort that you see exercised affecting 100,000 or more people, such as infecting them with smallpox, probably exceed domestic groups’ local capability. At this point it is arguable whether there is the international will, partly because the repercussions would be extreme. But I would hate to go on record as saying that it will never happen and then see it happen. I would say that it is possible, it is doable, and the technology certainly exists. The intent and the capability technically and operationally, including funding and delivery mechanism, probably do not come together in one place at this time. Luckily.

The US laws concerning biological weapons and terrorist attack basically have three purposes: inflict criminal penalties, allow the federal government to seize biological agents or delivery means, and install a regulatory regime to control the transfer of biological agents and possible delivery means. How effective do you think these laws are at deterrence?

Those older laws are not effective enough. You have to look to the new laws. I honestly cannot tell you exactly where they stand today; you would need to talk to someone from the FBI to really get an up to date understanding of the US laws and how effective they are. For example, it was not a criminal act as of a year ago to manufacture and store Ricin, which is a biological toxin agent. Manufacture was okay. But if there was some apparent intent to deliver it—in other words, you had sketched out a plan to attack some individual or group with it—then it became a criminal act. There have been several cases where groups or individuals have possessed materials which could have been used in attacks, but prosecutions are not always easily obtained, which obviously creates significant problems for law enforcement. But I cannot tell you what laws are available or needed today, or what laws will create the sensible criminalization of the various acts without infringing on freedoms so that no one could get a flu shot without being accused of harboring toxins.

To broaden the scope and look at the US versus international laws, how effective do you think the international laws would be? Taking it one step further, if there was a foreign attack on...
US soil, what do you think the probability is that the US would turn someone over to be prosecuted under international law?

You have to break that question down into its components. There is the Chemical Weapons Convention, the CWC; there is also a biological convention that is not fully ratified. You’ve also got the Australia Group, which monitors the acquisition or equipment. The problem, particularly with regard to biological weapons, is that dual use capability makes it so difficult to regulate. For example, the manufacture of bacterial agents to use against gypsy moths is legal; the whole process is legal. In fact you could go to a garden supply store and buy it. The same process could be used to produce an agent harmful to humans, and the production capability can be switched from one “output” to another. So what you are trying to focus on is intent and the quick change-over capability. I think that the FBI definition of a weapon of mass destruction, especially in the case of high explosives, is quite broad. We really need to think through the international laws and treaties and figure out how to implement controls that will have the effect you want without impacting legitimate trade. This area also includes export controls, and at this time many of those controls are quite robust, especially on the nuclear side.

And that is one of the problems: how do you stop the illegal activity without interfering with scientists’ research and peaceful development?

International cooperation is needed. One of the big headaches is the detection of the weapons. They do not have a signature that you can pick up as you could with many other types of weapons, and that is where cooperation is necessary. Cooperation among countries and among shipping companies, airlines, etc.

One area we want to talk about more extensively is the state versus federal issue. You reviewed the Federal Response Plan. What changes do you think should be made?

There have been changes made. The Federal Response Plan is an all hazards plan. There are terrorism annexes to it. Response is divided into crisis and consequence management. I think you are talking more about the consequence management. You also have to divide between the federal and national, which many people take to be one and the same. Then there are states, counties, and local municipalities, and, depending upon the state, the structure of government differs. There is the National Guard, which is a state asset but can be federalized, but that act changes what they can do, and puts them under the same posse committatus limitations as the active military. And then you have two classes of first responder: there is the civilian first responder—fireman, policeman, emergency room worker—and there is the military first responder who might very well be the guardsman—Weapons of Mass Destruction Civil Support Teams (WMD-CST). You’ve got, as you look at the first responders, their training requirements, planning requirements, the concept of operations, their requirements for equipment, and requirements for sustainment services. Some are acquiring equipment without a plan, or without a concept of operations. They buy the gadget, which will end up sitting in an equipment locker never being used because it is the wrong piece of equipment.

But there are advancements in coordination, advancements in equipment, and advancements in getting people ready. These sorts of actions are a major step forward for the first responder confronted with the requirement to respond to homeland security mission, but still unaware of all the requirements of such a mission.
Are the different agencies cooperating together? Are there open defined lines of communication to facilitate these agencies to work together?

A couple of facts: this is a rare example in government where you have a national set of programs that is driven solely by appropriations. This is not a defined mission or set of missions. No one has decided to what extent we should consider agriculture a target, for example, and then provided funding to respond to requirements developed based on the threat. Instead there have been appropriations that have sent millions of dollars to a wide variety of programs, departments, and agencies as well as consortia, institutes, and universities. There is no question that there is a lot of pork in this money flow. There are several consortia and “Centers.” Individually, they are all probably very good, but there is no overarching coordination. And because it is appropriations driven, a lot of the money is misspent, duplicated, or doesn’t go where it is needed. Without that management, it is not focused.

You talked about responsibility and who is in charge. Each of the agencies involved, like the FBI or the Center for Disease Control has a parochial interest. Tony Lake has suggested to have an organization outside all of that as the coordinating organization, perhaps an office created in the White House. Who do you think should be in charge?

Someone or something needs to be in charge. You can start by working backwards, who it should not be. It cannot be the DoJ and FEMA, because with that you get the problem of posse comitatus. There have been three reports that have come out on this subject. The first was “Towards a National Strategy for Combating Terrorism,” by the Gilmore Commission; the Roadmap for National Security: Imperative for Change,” by the Hart-Rudmann Commission, and the third one was “Defending America in the 21st Century,” by the Center for Strategic and International Studies (CSIS). All the reports said: right now it is a mess, there is no strategy, and no one is in charge; and someone should be in charge. Then you get the differing opinions as to who that should be.

Hart-Rudmann wanted to turn Federal Emergency Management Agency (FEMA) into a National Homeland Security Agency, going so far as to putting the Coast Guard, Customs, and Border Patrol under their control. This would be an Executive Branch agency. This suggestion probably caused them to lose credibility, and this caused some of the good points of the report to be lost. Gilmore is the one that is most accepted as being the right one, and that proposes a National Office For Combating Terrorism in the Executive Office of the President. The CSIS report suggested a National Emergency Planning Council in the Office of the Vice President. Now again, whether it should be at the White House or the Vice President’s office or the National Security Agency (NSA) is difficult to say, and there are persuasive arguments for all.

Mr. Lake is undoubtedly right that you have the parochial tensions between the DoJ and FEMA. DoD, it is clear, is always in support. One thing is clear, the current method is not working. I don’t know where it should be. A lot depends on the person they are going to choose as to whether or not it is going to be successful. There was an attempt by Representative Tilly Fowler (R-FL) to create a czar for terrorism, similar to the drug czar, but that proposal was killed. She wanted to mirror the counter drug program.

Is the money being appropriated for this problem sufficient?
Probably, if you get rid of the waste, but that is a very difficult question to answer because a program hasn’t been designed yet that really addresses the problem. You’re asking me, is the money sufficient for what is being done currently, which is support of confusion, and confusion is very expensive. Money to do it right? Possibly there is enough. But there are no clear budgets proposals. There is no clear set of requirements. Unfortunately, the first responders are poor at developing their requirements, for they lack the information. They may disagree with this statement, but it is true because no one has worked out a concept of operations, and without that it is difficult to know how to prepare. Another thing that is not there is quality control, no “consumer report” which carries authority. When someone comes in with a wonderful gadget, how do they know it does what it says? But even if it works in tests, that doesn’t always mean it will work in a real world situation, and the real world requirements of the first responders in an urban environment are not yet fully understood. Everyone is trying to improve the situation, to make the preparation and response better, but the lack of direction makes the task difficult.

As an overall wrap-up, what direction do you think we need to go in order to improve our readiness and response capabilities? What would you do to improve the situation?

Wiser men than I have tried to answer this question, and the Gilmore, CSIS, and Hart-Rudmann reports all address these questions; and the answers should not be oversimplified. When taken in total, the reports probably exceed 1,000 pages, and within those pages are many good ideas. The General Accounting Office (GAO) and other auditors have also written excellent reports. I suggest any serious attempt to reorganize has to look at all of these reports.

I can, however, highlight a few concerns, which I think are important. The threat must be properly quantified. Because we are vulnerable, it does not mean that there is a credible threat. This work must be done, and it must incorporate the entire community from those involved with foreign intelligence, include defense at home and abroad, and then take the work to the local level where the infrastructure is truly understood. When the threat is understood, defenses can be built.

Do not ignore current capabilities. We are lucky to have many capable agencies and certainly thousands of capable men and women dedicated to defending the country. During the Cold War we built a response to nuclear attack, involving many levels of planning and response, not least being the National Guard and local responders. We can do it again with some thinking and re-engineering; do not ignore the “memory” we have built in those services. The National Guard is a great asset in the area of Chemical, Biological, Radiological, and Nuclear (CBRN) defense, and their capabilities go far beyond the WMD-CST teams.

People need to understand the strengths and limitations of the military. The DoD provides a finite capability; the same unit cannot be overseas fighting a war and at home responding to emergencies. The limitations of posse committatus are real, and support means support. This can all be sorted out through increased understanding and worthwhile exercises.

We, as a nation, have some of the greatest scientific and technical capabilities. There are over 100 government labs, and many, especially those within Defense and Energy, are working this problem, but they need guidance and coordination. The requirement must drive the science, not vice versa.

We need doctrine, we need good operational plans, we need leadership.
In conclusion, we need action, not talk. This may seem an odd thing to say in an interview, but I think we need to have less talk about the "worst case scenarios" lest we develop a self-fulfilling prophesy. We need to think the problem through, set goals and requirements, develop a budget, fund the programs, and then move ahead.

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Interview with Joshua Lederberg, Professor Emeritus, Rockefeller University

What do you think of the recently published articles in various journals directed to the new administration, highlighting issues such as biological terrorism as an issue that needs to be addressed?

They want to make sure the new administration is as well prepared as the previous administration. President Clinton took very personal, very well-informed interest in these matters. He put out at least two presidential decision directives. If the new administration is as attentive to these matters as Mr. Clinton was, we’ll be on track.

Do you have any sense of where this administration stands on the issue of biological weapons?

Not yet. There’s no reason to doubt it, but they have a lot of other things on their minds. I would say the reconstruction of the National Security Council that Condoleeza Rice has been establishing makes it less likely that they will be the centerpoint, but on the other hand, other agencies are carrying the ball, such as Force Command, within the Department of Defense (DoD) structure. A lot of things have changed. Whether they will be adequate structures, I don’t know. They will probably be different from what we have.

In your book you mention a 1998 speech by President Clinton that outlines his directives. How well do you think those directives have been carried out? How far along do you think we are in committing to them?

It’s still pretty much in disorder. We don’t know what the national structures are going to be. It’s a very difficult problem because it does involve at minimum law enforcement, which would be Department of Justice, FBI, and crisis anticipation, especially dealing with bioterrorism.

I think it’s something that will still have to be worked out over the next months. There are a lot of issues, including the role of ForceCom. I talked to the Secretary of Defense [Rumsfeld] briefly about it, and he does understand the responsibility of DoD even for civil preparedness, but his whole structure still has to be appointed. We don’t have the assistant secretaries in place yet who will actually be involved. So all that has to be redone.

There is an issue of focusing both on preparedness and response. Which do you think the new administration should focus on more closely?

There are definitional issues. There’s not much we really know about prevention. On the bioterrorism side, what the FBI does with its penetration of groups is important. That still needs to be balanced against civil liberties issues. If they could tap every telephone in the country at liberty
and had the resources to record it, they would probably be ahead a notch or two. But they would be so drowned in data, they couldn’t possibly analyze it. But people sometimes talk in that vein.

There are a lot of aborted efforts at terrorist attack they have managed to [infiltrate]. We’ve had these border crossings, both in Maine and Seattle. It’s incredible that they were able to catch those folks. You would have thought they just got the tip of the iceberg, but it really appears they got the principal culprits on those occasions. If they can keep up that good a record, that’s important prevention. But still, no one believes that can work in every case.

We need to recognize the fact that there will be attacks of varying degrees of sophistication, mostly pretty crude, mostly not likely to be the top of the mark in terms of skill and finesse and technical insight, but even by accident, they could go a lot further than one might expect. Aum Shinrikyo made a real bungle, but it’s hardly a guarantee that malevolent efforts are bound to fail.

I think we need a balanced program. We need to assess what the opportunities are for intervention. Some things are just so obvious. Being prepared to cope with a release of anthrax is pretty high on the list. It’s almost equivalent to temptation, not to be prepared for those kinds of events. After that it gets very difficult, because there is a much wider range of agents than we could possibly have vaccines for. But they are also much more difficult to procure and to handle. At this stage in the development of these capabilities, I don’t think we’re going to leapfrog to the second or third generation without seeing some of the more primitive efforts in the first instance. So that’s what I would focus on, since that’s what we are able to do. But we still don’t have a well-structured program, say of antibiotic stockpile. We still have a very messy situation about what kinds of anthrax vaccines can be redeveloped. It [anthrax vaccine] is really a very old entity that has the advantage of long experience with it. We have every reason to believe it’s perfectly safe. It’s very clumsy to use; it takes at least three shots. It takes several weeks to get full immunity. We certainly ought to be able to do better than that with the new generation. But it will probably cost, by the time we’re done, a couple hundred million dollars before we can beat the far side of it. That’s assuming no major glitches are in our way.

Because biological agents have dual usage, how much involvement do you think the government should have in the R&D process? How much should the government work and be involved in coming up with these vaccines?

If the government doesn’t do it, nobody will. This is not dual use. There is no civilian market for anthrax vaccines. There is no civilian market for plague vaccine. There’s very limited interest in the encephalitic viruses. It does happen, but these are all quite rare diseases under normal circumstances, so making appropriate preparations for them is really only in the context of civil preparedness against biological attack. That’s a government responsibility. Some of it is done within government labs. But in the past years they’ve been decimated; they’re not what they used to be. They need to be re-funded adequately to do their job.

We have heard elsewhere that there is adequate funding, but that the lack of coordination has led to chaos and inefficient use of the available funding. Do you agree?
It's so hard to put your finger on it. Until that money is actually in the pipeline, you can't say there is enough. There are high expectations. Probably a fair amount of it is going to things that aren't too worthwhile. There's an enormous amount of money going into biosensors, which will still take two or three years before it crystallizes into an explicit program. There doesn't begin to be enough to cover the vaccine development. There's enough for the beginning of antibiotic stockpiling, but not for a full-blown program. Even the planning for this is in a pretty primitive stage.

What is the possibility for FDA involvement? Could the FDA have some sort of fast-track approval for the vaccines?

Under current FDA doctrine, you have a catch-22 that nothing, no new vaccine, could be approved unless it had demonstrated clinical efficacy in the context where it would be applied. In other words, you would have to have experiments that would show that it would defend a civilian population against an aerosol attack by bioterrorists. That's not an experiment we have any way of doing. But their hands are tied in terms of existing regulations. They've been through a process that is finally reaching some culmination. They've had hearings, they've had request for comment, and they've had draft proposals that would alter that doctrine. For this specific case, though, we're talking about material for public health emergency that could be validated if they go through all the safety precautions that are required of any other vaccine. They need to demonstrate the vaccine to be efficacious in treating the disease under experimental conditions in animals. Using experimental subjects, it needs to be shown to raise antibodies in humans. So we'd no longer be required to do the impossible, which would be to expose 100 human volunteers to anthrax to see whether the vaccination protected them against inhalation anthrax. Even that wouldn't be a precise alignment in a clinical situation. So it's taking a very, very long time, but it seems to be coming to some fruition, at least where that would be permissible.

No one has argued there should be any other safety standards; if we're going to give something out even in a dire emergency, you'd want to do everything possible to ensure you weren't doing any harm and certainly not more harm than good. But it's been a serious dilemma how to encourage vaccine approval. So proxies for efficacy are a necessary step. That's as fast-track as we need.

Once a vaccine is approved, would the government be able to commandeer labs to produce them, as the government can commandeer ships in the Merchant Marine in terms of war? Can you see this as a possibility, with possibly an agreement the government will make with pharmaceutical companies to use their laboratories to produce these vaccines after a biological attack?

The trouble is, it takes too long to reconvert [the labs]. If you're talking about the anthrax vaccine, you could never use [the lab] for anything else again once you had anthrax in the facility. The FDA would never approve [it], no matter how you scrubbed it, for any other application. So it would be irrevocable. A better track is a government-owned pharma, corporate-operated facility. That's been going around for years, but there's been a lot of resistance to it. The same elements in the pharmaceutical industry that have themselves declined to participate when they've been asked to make bids in the production of vaccines have also been part of the foot-
dragging process in enabling alternative routes. Some smaller companies have been interested in bidding, but none of the big ones even responded to requests for bids.

Is that because of the lack of profit incentive?

There’s not enough [incentive]. Working with the government involves horrendous complications and they do very well, thank you, with their own private efforts. So we have much smaller and much less experienced firms beginning to make bids. There is a procurement that’s been out for smallpox vaccine, for example, which used to be produced for five cents a dose, but under ancient standards. Under contemporary standards, it’s going to be $50 or $100 a dose. That’s what they’ve been coming in with, and there’s been no alternative to it. I don’t know if there’s any way around that. There’s so little experience in this military-civilian interface in the health-related area. Parties are suspicious of one another. Mostly they don’t understand one another, which inflates the costs enormously. But it is starting to happen, so it’s not a hopeless situation.

In terms of response, we’ve talked about the medical effects of a biological attack, but what about the psychological effects?

We had a conference on that six or eight months ago with a lot of wise words on the need for preparedness and how to deal with the social impact of attack. I think the short answer is exercise, exercise, exercise. Have different branches of government able to cooperate. The place where coordination may be most critical is in the information activities. If different branches of government start giving discordant information or don’t respond to what CNN will be putting out by way of provocation, I think they will only fan the flames of panic and disorder. So credibility, reliability, promptness, and consistency are the main words there, but you’re never going to achieve that without exercising who’s going to undertake which responsibilities under these circumstances. There needs to be prior information to the public health authorities of different cities.

In New York City, there’s been an exemplar. Jerry Hauer was the director of emergency management in New York City for many years. Mayor Giuliani provided a lot of support to try and provide this framework. [Hauer] conducted a lot of tabletop exercises, bringing in every branch of government that would be relevant to it. They had bulletins prepared beforehand on various kinds of agents; they had different elements of government prepared to deal with them. We had a commissioner of health who was apprised to it. We had the police department and fire department, both of which played important roles as first responders. [Hauer] had a pretty smoothly working team, but it would take half a dozen exercises before he could get there. Those are the main messages that come out of it. Having people stampeding, trying to get out of the isle of Manhattan after an attack could totally disrupt the public health services they were trying to offer at the same time. The amount of panic could exceed what the direct injury would be. That is very important.

There is another issue: prevention versus paranoia. If we get so worked up about the possibility of an attack, could a hoax wreak as much havoc as an actual attack?

I think we have to worry a lot about the mass media; they tend to glamorize these issues, if I can use a kind word. They may also help make it seem more attractive to would-be perpetrators. I certainly don’t want to be part of that process. And some
degree of temperance on the part of the media is a very important part of prevention. Other people say if you don’t raise the issue, you’ll never get any political response, but I’ve tried to be low-key in how I present it.

The US has an official policy of not granting concessions to terrorists. Do you think the possibility that a bioterrorist attack, which could endanger hundreds of thousands of lives, could warrant a possible change in US policy?

I’m not sure I’m the one to comment on that. A biological attack is much more likely to be one intended to kill the state or to kill as many people as possible out of some element of revenge than it is out of compellence. In some respects, there is very low predictability; a biological threat can be quite open-ended with what the actual consequences are. It’s not what you’re looking for if you want a lever to pry loose some element of policy.

So you think the perpetrators of a biological attack just want to do the act rather than force some sort of policy change?

That’s where terrorism has changed. Terrorism has mostly focused on theater, on demonstrations, and maybe taking hostages. So those are, historically, negotiation scenarios. I don’t know where to begin on how I would model negotiations for something as large but unpredictable an outcome as a biological attack. I think people making a biological attack may be trying to kill and show what they can do, out of revenge or their crazy motives, for example the attacks on the Oklahoma City federal building and the World Trade towers. Those are not negotiating stances.

Related to this is the question of deterrence. We have an international convention, the Biological Weapons Convention, that has not received universal support. There has been a proposal to make creation or possession of biological weapons an international crime. Do you think that would provide enough of a deterrent?

It might add to it. I don’t think it will solve the problem, but I think it is an element of it, and it’s an element of seriousness of purpose, giving some handle for enforcement. If circumstances come up where there are potential culprits, we’d have something very definite, some legal process by which to apprehend them and pursue them. As it is now, I think, de facto, the US has claimed extraterritoriality on certain categories of terrorist actions and is likely to do that in the event of a biological threat as well. But we don’t have that around the rest of the world, so we don’t really have a forum in which to insist on the enforceability of the BW Convention, even against individuals. That’s Matt Meselson’s proposal; it would be implemented by having the force of law within individual states.

Under those circumstances, I don’t see any reason why the US should not be a party to it. I’m not certain whether we’re ready to have an international court; we don’t know what its standards would be or how to avoid its being used for political demonstrations. We’ve had US presidents put up on war crimes trials of one sort or another. An international court could be dragged into that kind of theater. I think that may be one of the reasons for reluctance for subscription to it. But I distinguish that from what Dr. Meselson’s proposal is; it seems a completely sound one. It doesn’t solve the problem, but I think consolidating some issues of resolve that we really do take BW terrorism seriously.
Regarding international cooperation, you had stated to the UN Committee on Disarmament that international cooperation is one area that is lacking in dealing with biological weapons. Is that still the case?

Look at enforcement with regard to Iraq. That coalition is falling apart at the UN Security Council level and there are also many countries that prefer enhancing their trade with Iraq and getting Iraqi oil over enforcing the Convention. So we’re in trouble. We were part of that trouble some years ago; we were looking the other way when Iraq was using chemical weapons against Iran and I think we set the scene for many later troubles by taking such a cynical view at that time.

If you could suggest one thing to the government that it should focus on, or one thing that needs improving, what would that be?

Coordination of the different response agencies. At this point, structure is all-important. There are lots of resources available or could be made available if [the government] could develop some concerted cooperative effort, but it is so fragmented.

In 1958, Joshua Lederberg was awarded the Nobel Prize for his discoveries concerning genetic recombination and the organization of the genetic material of bacteria. Shortly afterward he joined the new Department of Genetics at Stanford University’s School of Medicine. In 1978, he was appointed President of Rockefeller University. He became a Professor Emeritus in 1990. He is a member of the National Academy of Sciences and continues to research, lecture, and serve on a number of advisory panels.
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An Application of Refugee Law to Child Soldiers

WENDY PERLMUTTER
University of Chicago

An estimated 300,000 children have been conscripted to serve as soldiers in armed conflict around the world, a trend that has grown alarmingly in recent years. This special category of children faces persecution within the armed forces as well as from members of their home and neighboring communities, making it difficult to return to normal life post-war. Efforts have been made to rehabilitate and reintegrate child soldiers into society, but few inroads have been made in asylum law to address the needs of child soldiers who cannot be reintegrated into their nation’s communities. This study provides an analysis of legal barriers former child soldiers face in seeking asylum and refugee status. The author reflects upon international and domestic laws that have affected the transition of this unique population, while highlighting critical areas for further research within this domain.

Approximately 20 million children are members of refugee and internally displaced populations. Many of these children seek refugee status with family members, but there is an increasing number who are unaccompanied by family. Often these children have a well-founded fear of persecution because of their status as children. For over a decade, one class of persecuted children has received increasing attention worldwide. These children are known as “child soldiers.” It is difficult for any study to document statistical evidence because most armies and militia do not admit to their use of child soldiers; however, several reports estimate that between 250,000 to 300,000 children serve as child soldiers worldwide.

The United Nations Study on the Impact of Armed Conflict on Children, known as the Machel report, describes the use of child soldiers as a problem created by adults. The report includes a series of 24 case studies on child soldiers and covers conflicts over the past 30 years. It details how children are deliberately brutalized and given drugs to harden and numb them into becoming more ruthless soldiers.

The Machel report focuses on procedures to rehabilitate and reintegrate children into their own communities perhaps because many of these children do not have the resources to escape and seek refugee status in another country. The report emphasizes that children should be provided with psycho-social support, education, vocational training, and peace education. However, it does not discuss how refugee law should apply to child soldiers. Nor is there another treatise or body of law that defines how nations should respond to the brutal acts by child soldiers when these children seek refugee status. Immigration judges need guidelines to address the unique circumstances in cases of former child soldiers.

This paper addresses many issues in the application of refugee law to former child soldiers who committed brutal acts while engaged in war. The first section, Requirements for Refugee Status, addresses international and domestic legal requirements for refugee status, as applied to child soldiers. The second section, Denial of Refugee Status, similarly addresses international and domestic law for

individuals who are excluded from refugee status. This section cites the findings of studies regarding child development in order to apply refugee exclusions to former child soldiers. The final section, State Decisions, addresses domestic policies regarding the treatment of former child soldiers in several countries. These policies indicate how each of these countries would likely respond to an application for refugee status by a child who committed acts of brutality while in combat.

Requirements for Refugee Status

The 1951 United Nations Convention on the Status of Refugees established international refugee requirements. The 1951 Convention states, "For the purposes of the present Convention, the term "refugee" shall apply to any person who... [as] a result of events occurring before 1 Jan 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."5

The 1951 Convention requires that persons be outside the country of origin, to qualify as a refugee.6 However, the 1967 Protocol, which reiterates the requirements of the 1951 Convention, applies without any geographic limitation.7 Requirements of the 1951 Convention and the 1967 Protocol continue to be followed by most nations.

Children are eligible for the same protection under international refugee law as adults.8 The child must establish that he meets the definition of refugee as codified by the country in which he seeks asylum. For example, a child seeking political asylum in the United States must prove he is unable or unwilling to return to his country of origin or last habitual residence because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.9

Requirement ofPersecution or Well-Founded Fear ofPersecution

Persecution is not defined in the 1951 Convention, nor is it defined by any other international instrument.10 Although States are given wide discretion in interpreting this term, the 1951 Convention clearly intends for "fear of persecution" and "lack of protection" to be interrelated concepts. Those who claim they are persecuted must prove that their native country’s government has not and will not provide protection from the persecution. Furthermore, the asylum seekers must establish the threat of deprivation of life or physical freedom.11

Child soldiers are both unprotected by their country and often have a substantial threat of deprivation of life or physical freedom. First, child soldiers are frequently abducted and forcibly entered into warfare. If they manage to escape, they are likely to be killed, either by the militia from which they escaped or by the opposition that suffered losses at the hands of child soldiers. Frequently, child soldiers murder members of their own villages and their lives are endangered if they return home. Even if they travel to a different village or manage to avoid recruitment, the suspicion that they have been involved makes them targets of attack.12 As a result, many child soldiers have a well-founded fear of persecution.

Although most child soldiers can prove well-founded fear, they must show they expect to experience persecution on account of race, religion, nationality, membership in a particular social group, or political opinion in order to meet the 1951 Convention requirements for refugee status.

Persecution on Account of Membership in a Particular Social Group
Child soldiers would most likely prove claims of persecution on account of membership in a particular social group. Refugee law mandates that members of a particular social group share a common, immutable characteristic. The characteristic is immutable either because members of the group cannot change it or should not be required to change it because it is fundamental to their sense of being. Application of this definition is illustrated in a female genital mutilation (FGM) case, *In re Fauzia Kasinga*. The *Kasinga* court narrowly defined the relevant social group to be "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." This definition includes gender (women), a general age group (young), a particular tribe, a physical characteristic (not had FGM), and a political view (oppose FGM). The specificity of this definition indicates that a similarly narrow definition would be used for child soldiers. The relevant social group could be defined as, children under age 18 who have performed the duties of soldiers and who oppose performing such duties. This definition lacks the element of a particular nationality or geographic area present in the *Kasinga* definition.

A distinction based on nationality or geographic location would be appropriate if child soldiers from different areas had unique characteristics relevant to their claims of persecution. Immigration officials may choose to classify child soldiers from Sierra Leone in social groups distinct from child soldiers from Sri Lanka. For example, if children from Sierra Leone were forced to take drugs to propel them into combat, and children from other areas were not given drugs, the claims of children from Sierra Leone would have an element unique to their social group. However, multiple studies and reports show that child soldiers throughout the world share fundamental characteristics relevant to their application for refugee status. These characteristics are essential to the claims of children that they were compelled to commit acts of combat and had a well-founded fear of persecution if they refused to follow orders or escaped.

The changing nature of warfare has led to increasing similarities across countries in the use of child soldiers. According to recent studies by Amnesty International, at least 250,000 boys and girls under age 18, some as young as five years old, currently serve in armed conflicts in over 30 countries worldwide. Save the Children provides estimates on the number of child soldiers in different warring nations for 1998 (Table 1).

Child soldiers are generally enrolled in governmental armed forces and opposition groups through abduction, coercion, or manipulation. Military groups use child soldiers because they are considered both useful and easily expendable in war. Both state and non-state forces use children because they are less demanding and easier to manipulate than adult soldiers. A child's size makes him vulnerable to being used to clear unexplored areas covered by landmines. His fearlessness makes him a prime target for coercion into ambush attacks and suicide bombings.

Children have been used throughout history in warfare for the reasons listed above, but in recent years the use of children as soldiers has dramatically increased. Amy Beth Abbott describes this phenomenon saying, "Protecting children from grave human rights abuses has been extremely difficult since the end of the Cold War because the nature of the world's conflicts has become increasingly internalized and localized, grounded in nationalist, ethnic and religious dissention." She explains that the changing nature of these conflicts has fostered a hatred for all members of the opposition, including children. This argument is an eloquent description of the shifting political landscape in the past decade; however it does not explain the increasing use of child soldiers. Until
### Table 1: Child Soldiers in Selected Nations in 1998

<table>
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<tr>
<th>Country</th>
<th>Number of Soldiers 15 or Younger</th>
<th>Youngest Age Found</th>
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<tbody>
<tr>
<td>Angola</td>
<td>7,000</td>
<td>8</td>
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<td>Burma</td>
<td>50,000</td>
<td>7</td>
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<td>9</td>
</tr>
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<td>Rwanda</td>
<td>20,000</td>
<td>7</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>5,000</td>
<td>6</td>
</tr>
<tr>
<td>Sudan</td>
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<td>7</td>
</tr>
<tr>
<td>Turkey</td>
<td>3,000</td>
<td>N/A</td>
</tr>
<tr>
<td>Uganda</td>
<td>8,000</td>
<td>5</td>
</tr>
</tbody>
</table>

recent history, wars typically involved combat that used tanks, guns, grenades, and other weapons that required close proximity to the enemy. Although villages were burned and civilians were directly affected, children were protected and kept away from the battlefield. The increasing localization of conflicts grounded in nationalistic or ethnic dissention does not explain why children are increasingly used as soldiers. Abbott's second argument is more compelling. She claims that wars no longer occur on well-defined battlefields. They occur in populated areas where militia can grab children off the street and where children witness the arrest, abuse, and torture of relatives and neighbors. Abbott concludes that the increasing number of civil wars and deliberate attacks against civilians in the 1990s have resulted in the heightened recruitment of children into military and opposition armed forces. 

Perhaps the greatest change is seen in technological developments. Automatic weapons and lightweight arms have increased the ability of child soldiers to aggressively wage war. Modern weapons are inexpensive, lightweight, and simple for children as young as 10 to use. Their proliferation has increased the propensity of militia to conscript children, as guns have become light enough to easily transport and reassemble. Assault rifles such as the AK-47 are widely available and affordable for even the poorest communities. Furthermore, militia groups find that after arming children with these weapons and providing them with alcohol and drugs, they can then exploit children's fearlessness and recklessness and transform these youths into executioners. Military leaders routinely promote drug abuse to induce youths to fight and desensitize them to the savagery of war. 

Ernst Vanboi was 10 years old when Revolutionary United Front (RUF) rebels in Sierra Leone abducted him from his home. His story is seemingly too common among child soldiers. RUF rebels burned his house to the ground, used razors to carve "RUF" into his chest, and forced him to join them on raids. Vanboi was given an AK-47 rifle, which he first used against his own village and family. Later, he fought with the RUF in other parts of the country. Rebel leaders gave Vanboi cocaine, am-
phentamines, and other drugs. The carving in his chest ensured he could not run away without the likelihood of being killed by government troops. He fought with RUF rebels for three years, until the group was demobilized in December 1999 as part of a fragile peace accord ending Sierra Leone’s civil war. Vanboi’s thousands of peers, forced to become child soldiers, emerged with lasting psychological scars. Clearly these youths should be considered members of a particular social group.

Social workers describe how the use of amphetamines and cocaine was a regular part of “military training.” Human Rights Watch found that armed child combatants actively participated in killings and massacres, frequently under the influence of drugs. Often the children have scars on their temples where cocaine and gunpowder were inserted in cuts and then covered with plaster or adhesive tape, as proof of their abuse. These youths shared traumatic experiences; they were abducted and forced to fight because their youth provided militias with qualities of fearlessness and malleability. Child soldiers are members of a particular social group because their age, defenselessness, as well as their membership in a society in civil strife, made them targets for both state and non-state groups to forcibly recruit them to fight. This is an unfortunate change from times where warring groups viewed children as more vulnerable than adults and therefore in greater need of protection.

As described above, the characteristics of child soldiers cut across geographic boundaries. An immigration board may choose, however, to follow the Kasinga court’s definition of a social group and require that the group share a particular nationality or geographic location.

**Persecution on Account of Political Opinion**

Adults, rather than children, usually claim persecution by military organizations in which they participated. Although courts have not made entirely consistent decisions regarding persecution requirements in these cases, they frequently rule against the refugee applicant. Refugee status has been consistently denied in cases of persons seeking to escape the government’s militia. The United Nations High Commission for Refugees (UNHCR) Handbook states that although draft evasion should not provide a basis for refugee status, status is granted where the alien’s desertion or failure to serve is concomitant with other relevant motives for leaving the country, or where he would suffer “disproportionately severe” punishment on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Furthermore, in *M.J. v. I.N.S.* the court added three additional legal requirements for asylum status when the applicant sought to avoid military service. The court held that both international law and the Board of Immigration Appeals mandate such applicants show: 1) a formal, official policy of the government that promotes human rights violations; 2) condemnation of military actions by international bodies of government; and 3) probability of forced engagement in inhuman conduct as part of his military service. Unsurprisingly, this court refused the petitioner’s application because the applicant could not meet these additional requirements.

Courts are often less demanding of refugee applicants seeking to escape persecution by guerrilla groups. Frequently, the facts of these cases are virtually identical to the facts of cases where applicants seek to avoid conscription into the government military. Yet, legal arguments differ because guerrilla groups are rarely recognized as legitimate powers by foreign nations. In *Zacarias v. U.S. Immigration and Naturalization Service*, the court held that since non-governmental groups lack legitimate authority to conscript individuals into their armies, their conscription is equivalent to kidnapping. This conscrip-
tion constitutes persecution on account of political opinion. However, the Supreme Court overruled this decision and denied Zacarias refugee status. The Supreme Court held that a guerrilla organization's attempt to conscript a person into the military does not constitute persecution on account of political opinion. In a similar case, the Board of Immigration Appeals held in Matter of Maldonado-Cruz that a Salvadoran man who escaped from a guerrilla organization was not entitled to refugee status. That court held that being forcibly kept in a guerrilla organization was not persecution on account of a political opinion. However, the Ninth Circuit ruled a year later (prior to Zacarias) that a neutral Salvadoran's fear of the guerrillas, with whom he had been forcibly associated, constituted a well-founded fear of persecution based on political opinion.

Therefore, although the recent Supreme Court decision in Zacarias ruled that escape of guerrilla conscription is not persecution on account of political opinion, there is significant history of rulings in which conscription by guerrilla troops qualified as potential persecution. If courts are sympathetic to the claims of adults escaping guerrilla warfare, they will arguably be inclined to grant refugee status to children escaping these same organizations. It is unlikely a child soldier will be granted refugee status on account of political opinion, particularly if the applicant is escaping a government army rather than a guerrilla group. Child soldiers are more likely to prevail on claims of persecution on account of membership in a social class. However, even if the applicant satisfies these initial requirements for refugee status, he may still be denied refugee status because he qualifies as a member of an excluded class.

DEnIAL OF REFUGEE STATUS

As stated by Guy S. Goodwin-Gill, "Most recent international instruments not only define refugees, but also provide for the circumstances in which refugee status shall terminate or in which the benefits of status shall be denied or withdrawn." Even before the 1951 Convention was drafted to define requirements of refugee status, the International Refugee Organization (IRO) Constitution was adopted in 1946. The IRO Constitution excluded many war criminals from refugee status.

The International Refugee Organization Constitution

This Constitution excluded “ordinary criminals who are extraditable by treaty” as well as “war criminals, quislings, and traitors” and a variety of other “undeserving groups” from receiving refugee status. The Constitution also excludes “those who had assisted the enemy in persecuting civilian populations...and those who had participated in any organization having the purpose of overthrowing by force the government of a UN Member State, or who had participated in any terrorist organization.” Many child soldiers may qualify as war criminals and most are accused of persecuting civilian populations. Yet many would argue that these exclusions in refugee law were not intended to apply to child soldiers. To interpret the intent of refugee laws to exclude war criminals and serious non-political criminals, scholars and legal experts look to the language of the Refugee Convention’s Article 1F(a) and (b).

Crimes Against Peace, War Crimes, and Crimes Against Humanity

The severity of crimes mentioned in Article 1F(a) are reinforced when States refuse to weigh the severity of potential persecution against the gravity of the crime against peace, the war crime, or the crime against humanity. In accordance with this view, the person seeking refugee status cannot be granted such status. For example, in Gonzalez v. Minister of Employment and Immigration, the court also held that the first instance tribunal could apply the exclusion clause without
making any explicit finding as to whether the claim to refugee status was well-founded.34

Crimes Against Peace

The Charter of the International Military Tribunal (IMT) was established to prosecute major war criminals of World War II. The IMT Charter defines crimes against peace as, "namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; [then defines War Crimes]." Not all wars are considered crimes against peace; only "wars of aggression" are included. Defensive military campaigns and wars in response to aggression are not considered crimes against peace.35

Those accused of crimes against peace were almost exclusively leading members of the governments and High Commands of the Axis States and those convicted on such charges were principally the "policy-makers," according to L. Browlie. In International Law and the Use of Force by States, Browlie further notes that neither the soldiers nor civilians supporting the war were intended to be punished under these provisions.34 Therefore, one must conclude that crimes against peace were not intended to apply to any child soldiers.

War Crimes

The IMT Charter characterized war crimes as "violations of the laws or customs of war." It continued to say that the violations include, but are not limited to: 1) murder, ill-treatment, or deportation of civilians; 2) murder or ill-treatment of prisoners of war; 3) killing of hostages; 4) plunder of public or private property; 5) wanton destruction of cities, towns, or villages; or 6) devastation not justified by military necessity. Thus, war crimes are always unacceptable during times of war, whether the war is aggressive or defensive.38

War crimes are breaches of international humanitarian law. Therefore, Article 1F(a) must be interpreted in the context of recent international instruments. The major treaties that inform and strengthen the IMT Charter are the four Geneva Conventions of 1949 and the 1977 Additional Protocols.39

In the 1992 case Ramirez v. Minister of Employment and Immigration, the court proposed a three-part test for complicity. First, the party must be a member of an organization that committed international offenses as a continuous and regular part of its operation. Second, the party must have personal and knowing participation. Third, the party must have failed to disassociate from the organization at the earliest safest opportunity. In Ramirez, although the applicant had not personally tortured anyone, his application for refugee status was denied because he was a participating and knowing member.40

The wanton, brutal killings and maiming by child soldiers appear to fit this category of "war crimes." However, there are several strong arguments against permitting a child who would otherwise qualify for refugee status to be excluded because of prior acts as a child soldier.

First, the 1949 Geneva Convention specifically requires individual responsibility for one's acts. A soldier may claim that he was "just following orders" as a defense; a child soldier using this defense has a more valid claim than an adult because a child has a different sense of individual responsibility. Society generally demands different responsibilities of children than adults.41 Furthermore, even for adults, the Statutes of Tribunals on Yugoslavia and Rwanda state that although a subordinate will not be relieved of his responsibility in the war crime, superior orders may be considered in mitigation of punishment.42
Although this law speaks to criminal punishment and not a determination of refugee status, it shows that international law recognizes that war criminals are less culpable when superiors bear partial responsibility.

In determining whether a child soldier bears individual responsibility, one may look to whether the child had a moral choice. Advocates of children question whether these child soldiers developed into autonomous moral actors before the conflict. Experts in child development advocate that children should be held responsible when the majority of children would think the action wrong. However, when determining appropriate punishment, one must take into account the fact that the particular child's moral development was disturbed in some way and that children respond differently to trauma. Experts should also study the effects of drugs, psychological trauma, and physical abuse when they determine whether the children are able to distinguish right from wrong. 13 A further argument against a child soldier being responsible for his wartime acts involves the natural reaction of a child to the order of an adult. Many children, particularly in war-torn societies, are trained to obey their elders. Soldiers are also trained to obey orders, but even soldiers are not expected to comply with fundamentally unlawful orders. This distinction between soldiers and children should be considered in determining a child soldier's moral autonomy and ability for independent thought. This defense against individual responsibility is most suitable for young children whose peers have not yet attained a stage of independence from their elders. 44

Crimes Against Humanity

Goodwin-Gill defines crimes against humanity as those akin to war crimes but on a larger scale.45 The IMT Charter defines crimes against humanity as either "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population," or persecutions "in connection with any crimes within the jurisdiction of the [Nuremberg] Tribunal."46 If crimes against humanity applied to a smaller group, the term would be indistinguishable from war crimes. Child soldiers have destroyed entire villages; however, they generally commit single rampages at a time. They do not aim to exterminate an entire population but typically follow the militia leaders' command, order by order. Therefore, it appears that if child soldiers fit any of the categories within the Exclusion Clause Article 1F(a), they would be accused of committing war crimes. Child soldiers may also be accused of serious non-political crimes under the Exclusion Clause Article 1F(b).

Serious Non-Political Crimes

Article 1F(b) of the 1951 Convention on the Status of Refugees states it shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. The language in the Refugee Act of 1980 reinforces this provision. Furthermore, the UNHCR Handbook explains that excluding offenders of serious non-political crimes is intended to protect the receiving country from a serious criminal.47 Offenders of political crimes are not excluded.

Legal Distinction Between Political and Non-Political Crimes

Political criminals are not excluded from refugee status under the IRO Convention. There is a presumption in the IRO Constitution against classifying murder, robbery, or other "common law crimes" as political. Courts have consistently ruled that planned homicides or random killings of civilians or State officials fall outside the protection of the political offense. In recent history, courts of the United Kingdom held that the
offenses should have been committed as part of a political dispute or conflict. The United States and other countries follow this approach. Intent to promote political goals must also be taken into account although it is not sufficient to qualify an act as political. 49

Political crimes are distinguished from non-political crimes in Maldonado-Cruz v. Immigration and Naturalization Services. In this 1989 ruling, the court held that the definition of a political crime includes all actions committed during an uprising or any act of war, which are in furtherance of the party’s military objectives. 50 Goodwin-Gill further clarifies this distinction, stating that the nature and purpose of the offense should be examined. First, the immigration judge should determine whether the offense was intended to modify the political organization or the structure of the State. The judge should then determine whether there is a direct causal link between the crime committed and the crime’s political purpose. Finally, if the act is a political crime, the political principle should outweigh the common law character of the offense. However, Goodwin-Gill notes that this may not be the case if the criminal act is grossly disproportionate to the objective, or if the act is of an atrocious or barbarous nature. 51

Application of Legal Distinction between Political and Non-Political Crimes to Child Soldiers

The first prong of Goodwin-Gill’s test is to determine whether an offense was intended to modify a political organization or State structure. A young child does not fully understand the implications of his actions, let alone understand the larger political motives of warring groups. Even if a child understands the political motives of militia leaders, it is highly unlikely he knowingly acts to further their political goals. Furthermore, the majority of child soldiers do not volunteer to fight. Both opposition groups and national armed forces use threats or actual physical force to recruit children. They are physically removed from buses, cars, market places, churches, and even refugee camps. Guerrilla forces often subject recruits to brutality, sexual abuse, and psychological manipulation in order to sever the children’s ties from their communities. Militia leaders often execute individuals who are suspected of rebelling or attempting to escape. Even if a child successfully escapes, guerrilla groups deem him a deserter who will be executed on the spot if later found. 52 The unfortunate reality is that children wage war and commit brutal acts of murder because they have no other choice.

Even when children voluntarily join military ranks, they do not join to help achieve the warring group’s political ideals. Rather, they join because the culture of violence in a war-torn community, the need for security or food, or a desire to avenge the deaths of family members prompts enlistment. Many of these children have not known life without the ravaging effects of war and are unaware of alternatives to life filled with warfare. 53

Goodwin-Gill’s second criterion applies to those circumstances in which politics compel child soldiers to commit crimes. This second criterion, a direct causal link between the crime committed and the crime’s political purpose, is applicable in the following examples:

In Guatemala, an individual is called anti-democratic, and therefore a rebel communist guerilla, if he does not voluntarily join the defense patrols. 54 This pressure causes minors to enlist, despite the state’s laws that the military may not take in involuntary recruits.

In the Congo, children were pressured to join the military to further political goals espoused by President Laurent Kabila. In 1998, the President responded to an attack against the Congolese government by broadcasting radio messages to urge chil-
dren between the ages of twelve and twenty to enlist in the armed forces.55

These examples indicate that children are often compelled by politics to voluntarily enlist in the military. However, a closer look reveals that children do not act because they want to further a political cause. Rather they react to a coercive political environment. As Abbott stated, "One needs to look critically at whether the child did indeed have freedom of choice in his or her decision to volunteer; in any war-torn nation, a child's motivation to become a soldier lies in the roots of the conflict that have come to define the child's life. Children, at a young age lack the capacity to determine their best interests, to independently form opinions or to analyze competing ideologies. A culture of violence defines these children's childhood experiences and the militarization of their culture incites voluntary participation. Existing laws fail to address these underlying issues and as a result, they fail to eliminate the recruitment of child soldiers. Therefore, even if the international community establishes an effective ban on forced recruitment, it alone will not suffice."56

Abbott's prediction has proven true. The Convention of the Right of the Child, an embodiment of international law, set the minimum age for recruitment and participation in any armed conflict at 15 years of age. Recently, it accepted an Optional Protocol to raise the minimum age of recruitment to 18 years of age for those countries that ratify the Protocol.57 However, children as young as five, six, and seven continue to serve in armies across the world.58

In response to Goodwin-Gill's second inquiry, a judge would probably conclude there is not a direct causal link between the crime committed and the crime's political purpose. Although some child soldiers act to satisfy their superiors' political goals, the causal link between these goals and child soldier's crimes is indirect at best. The brutal nature of these violent crimes is grossly disproportionate to any political objective as per Goodwin-Gill's third criterion. Within the context of the three standards to determine a political crime, the criminal activities of child soldiers are most appropriately characterized as non-political.

Determining if a Crime is a "Serious" Non-Political Crime

The UNHCR Handbook provides guidelines for determining how to classify the applicant's prior criminal act. The Handbook says that all relevant factors, including mitigating circumstances, are taken into account. Evidence of a criminal record is one factor that would be taken into account, even if the applicant completed his sentence, was granted a pardon, or benefited from an amnesty. In cases of a pardon or amnesty, the exclusion clause is presumed to be no longer applicable, unless it is shown that the applicant's criminal character still predominates.59 This explanation in the Handbook could be interpreted as establishing guidelines to discern the applicant's character over time.

Some would argue that once the child is exposed to the psychological trauma of being both a war victim (to military leaders) and a war victimizer (to civilians and opposing troops), the child is likely to exhibit characteristics of a serious criminal. Learned behaviors, such as use of violence as a way to achieve one's goals, will persist. Therefore, even if a child soldier were to receive pardon or amnesty, he would continue to manifest wartime characteristics. This exhibition of criminal characteristics could jeopardize the child soldier's application for refugee status.

A counter argument focuses on the malleable nature of a child's character. With proper treatment, a former child soldier can overcome the psychological trauma of his past. Programs, such as the rehabilitation efforts of the International Rescue Committee (IRC), are currently in
An Application of Refugee Law to Child Soldiers

place to counteract the effects of war on children. In Sierra Leone's city of Kenema, for example, over 75 children graduated from IRC homes. Although children are responsive to skills training, psychological counseling is more difficult. Most children will not be reunited with their families, and many have lost understanding of what a family is. One program supervisor said, "[The children] have these terrible feelings that they did horrible things. They tell each other God cannot forgive them for what they did." However, the statements of one child show potential for recovery. A 17 year-old who fought for seven years said, "I did many, many bad things, but God let me go. There was a whole lot of fighting. But life is different now. We are not doing evil. We want to go home."

There are strong arguments on both sides of this debate as to whether child soldiers exhibit criminal characteristics that should jeopardize their application for refugee status or whether the past crimes of child soldiers should be categorized as serious non-political crimes. A noteworthy consideration is that each State determines what constitutes a serious crime, according to its own standards. Therefore, States also have discretion in determining whether the criminal character of the applicant would constitute a threat to the State's internal order.

STATE DECISIONS

States have flexibility in determining whether to exclude an applicant for refugee status when he is a political or non-political offender. Extradition has traditionally been viewed as an addition to the primary rule that permits asylum. Therefore, States have implemented refugee exclusions in differing ways.

In Canada, the Minister of Employment and Immigration tried a case regarding a 17 year-old applicant who participated in the Salvadoran army as a child soldier, escaped, and then sought refugee status in Canada. In the case, Moreno v. Canada, the applicant was a male who was forcibly conscripted into the Salvadoran Army at age 16. He participated in five armed confrontations with guerilla forces, and stood guard outside a prisoner’s cell while the prisoner was tortured. In Canada, the standard of proof required that immigration officials apply the exclusion clause when there are “serious reasons for considering” that certain crimes were committed. The court held that, in this case, the applicant could be accused of no more than being a member of a military regime engaged in crimes against humanity. The applicant was only guilty by association and this guilt was not sufficient to invoke the exclusion clause. Although the court did not apply the exclusion clause, its language was void of reference to the applicant’s age in determining culpability. It appeared this court would treat a child soldier as any adult soldier under similar circumstances.

In the decade since the Moreno ruling, international human rights law has evolved in support of protecting the rights of child soldiers. Judges may incorporate into refugee law the findings from these changes in international jurisprudence.

The primary change in international jurisprudence on the rights of children resulted from the Convention on the Rights of the Child (“the Convention”). The Convention was formally adopted by the United Nations General Assembly in September 1990. The Convention lists rights that States must protect on behalf of children and recognizes the principle of “the best interests of the child.” This protected class includes children seeking asylum.

The Convention also sought to protect children from being drafted into the military. It originally set 15 as the minimum age at which a child could be drafted into military service. A recently adopted Year 2000 Optional Protocol to the Convention raised the minimum age for recruitment
from 15 to 18 for countries that ratify the Protocol.65

The Convention is a decade old and is the world's most ratified human rights treaty. Therefore, it seems incongruous that there remain an estimated 300,000 child soldiers worldwide.66 The answer lies in the structure of the Convention. As it does not contain enforcement mechanisms,67 enforceability within a particular State depends on its domestic laws and the degree to which it is subjected to political pressure.68 The Convention did, however, create the Committee on the Rights of the Child (CRC) to monitor implementation of the special care and protection provisions.69 Each State must make periodic reports regarding the progress made and measures undertaken to implement the CRC.70

The Convention has primarily resulted in the development of "special institutions and other organizations specializing in children's rights" and "national plans of action that outline the state's plans to enforce children's rights in health, education, nutrition, and other areas."71 Although these efforts draw more political attention to problems, such as children in the military, they do little to correct them.72

The response of the US to the Convention has been disappointing to many in the international human rights community. The US was one of only two UN member states to refuse to ratify the Convention. The US initially opposed the Optional Protocol, which raised the age that children could be used as soldiers to age 18, because it wanted to continue recruiting students immediately upon their graduation from high school, even if they had not yet turned 18.73

In January 2000, the US agreed to a compromise. It would accept the rule barring the forced recruitment of children under 18 into the military only if proponents of the ban allowed continued voluntary recruitment of children under 18. This compromise is problematic in most of the nations using child soldiers for it is difficult to distinguish voluntary from coerced recruitment in the nations plagued by civil war.74 Therefore, it is unclear whether this compromise result will provide additional support to child soldiers.

The political reasons for the US failure to act may be indicative of how they will respond to applications for refugee status from child soldiers. If the US continues to support age 17 as suitable for enlisting in the military, it may be unwilling to treat applications of 17 year-old child soldiers differently from the application of an adult soldier. Immigration and Naturalization Services (INS) is an independent agency not directly influenced by the United States Armed Forces. However, media stories of hypocrisy in the international community might create sufficient pressure for the US to abandon its treatment for 17 year-old soldiers as adult soldiers. In all probability, if the US was willing to withstand scrutiny for failure to support the Convention for many years, the government may be willing to accept scrutiny for a less high profile issue of decision-making for individual refugee applications.

Despite the failure of the US to protect 17 year-olds from joining the military, the US has followed Canada's lead by providing other protections for children. Canada issued guidelines to the Immigration and Refugee Board (IRB) entitled, "Child Refugee Claimants: Procedural and Evidentiary Issues." Better known as the 'The Canadian Guidelines,' this report required the appointment of a representative to act as a guardian for child refugees seeking asylum. Adopting the language of the Convention on the Rights of the Child, Canadian Guidelines stated the decision regarding refugee status must "reflect the best interests of the child." Each child's unique circumstances are accounted for in the proceeding. Procedural steps followed by the IRB reinforce sensitivity to the age of the child in both understanding
the child's situation and in determining refugee status.7

In its "Guidelines for Children's Asylum Claims," better known as U.S. Guidelines, the US also addressed procedural concerns and methods to best elicit facts and evidence from child applicants. However, the U.S. Guidelines went further and incorporated legal standards to address issues unique to children.6 Most importantly, the report explicitly states that special attention be paid to "child soldiers." Moreover, the INS Resource Information Center (RIC) was required to issue information regarding conditions of specific countries in order to inform asylum officers. This includes: the legal and cultural situation of children in their countries of origin, the incidence of exploitation and other victimization, and the adequacy of state protection afforded to children." This sensitivity to the special circumstances of children indicates that Canada and the US may be more prone to provide refugee status to former child soldiers than adult soldiers. Some may argue that the guidelines established by the two countries are not intended to be more forgiving to the crimes of children; they are only intended to be a guide to accurate fact-finding and better treatment of children while children are being assessed for refugee status. However, this sensitivity to the limitations of a child's understanding, and special treatment accorded as a result, would likely influence the immigration judge in determining whether a child soldier should be held culpable for his actions and be excluded from refugee status. In the only known case where a child soldier sought refugee status in either of these two countries, he was not excluded from refugee status because of his acts as a soldier.8 The judge may have failed to discuss Moreno's age because it was unnecessary in determining refugee status under the law. The failure to discuss the applicant's age indicated only that he did not fit exclusion requirements under Canadian law, whether he was a child soldier or an adult soldier. Although Canada and the US appear to treat the status of child soldiers more delicately than the claims of adults, there is a movement to hold child soldiers accountable for their crimes and hold trials regarding the crimes committed by these soldiers.

In October 2000, the UN supported Sierra Leone's trial of 15 year-old child soldiers. Secretary-General Kofi Annan presented a plan to bring child soldiers under the jurisdiction of the special war crimes court for Sierra Leone that is dominated by international judges. The plan would provide children with their own trial location and privacy would be ensured similar to the juvenile justice system. Sentences would not involve imprisonment, but any conviction would accompany mandatory rehabilitation. This system is similar to the procedure being used by the Rwandan government to try children aged 15 to 18 for alleged involvement in genocide. However, the UN war crimes tribunals for former Yugoslavia and Rwanda do not have official provisions to try children. Annan left the ultimate decision to the Security Council as to whether minors should be tried in Sierra Leone.9 The Security Council determined that the Special Court will have jurisdiction over those "most responsible" for violations and who are between 15 and 18 years old. This decision is criticized by many involved in the care and rehabilitation of child soldiers in Sierra Leone.10

This movement to hold children responsible for the war crimes they commit indicates that many nations may choose to apply Exclusion Clause Article 1F(a) or (b) to child soldiers seeking refugee status. If children are considered culpable for wartime acts and are tried for war crimes, they will likely be excluded from refugee status under Article 1F(a). However, the Security Council determined that only children between ages 15 and 18 are under the jurisdiction of the Special Court estab-
lished for Sierra Leone. This indicates that nations may adopt a similar age cut-off for children eligible for refugee exclusions. In addition to age restrictions, confidentiality requirements for minors would also reduce the number of applicants denied refugee status under an exclusion clause. Given the confidential nature of minors’ judicial records and the difficulty of finding victims or witnesses to testify against them, it would be difficult to prove that the child committed war crimes. Finally, even if immigration officials prove that a child committed war crimes or other illegal acts under the Exclusion Clause Article I(F)(a) or (b), the host country would probably choose to waive the Exclusion Clause for the child. Nations and international groups generally agree that with proper treatment, a child soldier can overcome the trauma of his past. If a child soldier has not undergone rehabilitation, a court would likely require he do so. A nation should not refuse an applicant refugee status if a child soldier no longer exhibits criminal characteristics and is not a threat to society. In most cases, former child soldiers will not be denied refugee status under The Exclusion Clause. It is likely most nations will provide all children with refugee status who meet the requirements of the 1951 Convention, even if the host nation holds child soldiers responsible for the crimes committed during war.

**Conclusion**

Child soldiers encompass over 300,000 citizens in more than 30 nations. The Convention on the Rights of the Child is the most widely ratified treatise to date. Despite the press and attention received by the plight of child soldiers, few steps have been taken to end the recruitment of children into the military. No steps have been taken to address the legal ramifications of how the crimes committed by child soldiers should be treated when these children apply for refugee status.

It is logical to assume that if there were many child soldiers seeking refugee status, this issue would have been addressed in courts and a clear standard would be established. States have not established a legal criterion for child soldiers who committed criminal acts because few child soldiers seek refugee status abroad. Child soldiers typically remain in the care of human rights groups near the borders of their own countries and are frequently rehabilitated over several months in group homes and then reintroduced into society. Even the **U.S. Guidelines** that explicitly refer to child soldiers as a group to which the procedures established for immigration officials should apply, lack a section regarding Exclusion Clause I(F)(a) and (b).

Conceivably, drafters of these guidelines did not consider the possibility that children would be excluded from refugee status because of their crimes committed as soldiers. Or perhaps drafters assumed that child soldiers who committed monstrous crimes would be treated as any adult under the exclusion provisions to refugee law. The ambiguity of these guidelines points to the need for the establishment of an explicit law ex ante to address the crimes of child soldiers who seek refugee status.

The *Machel report* emphasizes the importance of rehabilitation of these children. If a standard is created while a child soldier is in the process of applying for asylum, the juvenile will likely be subjected to additional notoriety and delay of the outcome of his case. Dragging a child through the US court system will not only postpone the healing process for the child, but may cause additional damage to his psychological well-being. Although the international community has addressed the illegality and problems that stem from using children as soldiers, it should now address these controversial issues within the context of refugee law. If child soldiers cannot be reintegrated into their own communities because wartime scars are too deep, then
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other nations should accept and integrate them into their communities. International law protects children from being recruited into militia groups. Nations should develop domestic laws and protocols to protect these children from persecution that results after they escape these same militia groups. Nations should grant former child soldiers refugee status.

Notes


4 Ibid.


6 Ibid.

7 Ibid., 19.

8 Bhabha and Young, 87.

9 Ibid., 99-100.

10 Goodwin-Gill, 66.

11 Ibid., 67-68.

12 “The Defense Monitor” generally.

13 Bhabha and Young, 111; Goodwin-Gill, 47.


17 Ibid., 506-08.

18 Ibid., 508-09.

19 Ibid., 509-10.

20 Ibid., 510-11; and “The Defense Monitor” generally.

21 Farah, A1.

22 Ibid.

23 Bhabha and Young, 87.


25 Ibid.

26 www.unhcr.ch/refworld/cgi-bin/ refcasgo.pl under Zacarias, or 908 F.2d 1452 (9th Cir. 1990).

27 Musalo, Moore and Boswell, 743-752.

28 www.unhcr.ch/refworld/cgi-bin/ refcasgo.pl under Maldonado-Cruz, or 883 F.2d 788 (9th Cir. 1989).

29 Goodwin-Gill, 80.

30 Ibid., 95.

31 Ibid., 59.

32 Ibid., 95.

33 Ibid., 97.

34 Ibid.

35 Musalo, Moore, and Boswell 735-36.

36 Ibid.


38 Musalo, Moore, and Boswell, 736.

39 Ibid., 737; Goodwin-Gill, 98.

40 Ibid., 101.

41 Ibid., 100.

42 Ibid., 100-101.

44 Ibid.
45 Goodwin-Gill, 99.
46 Musalo, Moore, and Boswell, 736-37.


48 Musalo, Moore, and Boswell, 753.
49 Goodwin-Gill, 59-61.
50 Musalo, Moore, and Boswell, 753.
51 Goodwin-Gill, 105.
52 Abbott, 513-15.
53 Ibid., 516.
54 Ibid., 516-17.
55 Ibid., 517.
56 Ibid., 517-18.
57 Trojnar, 9.
58 Farah, A1.
59 Ibid., 103.

60 “The Defense Monitor” generally.
61 Goodwin-Gill, 104.
62 Ibid., 59-60.
63 Moreno, Minister of Employment and Immigration, 21 Imm.L.R.(2d)221. Federal Court of Canada, Court of Appeal, September 14, 1993.
64 Bhabha and Young, 89-91.
65 Trojnar, 9.
66 Ibid.
67 Abbott, 524.
68 Hampson, sec. 2.2.

69 Article 38 of CRC states: 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in the hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict. See Francoise J Hampson, “Legal Protection Afforded to Children Under International Humanitarian Law: Report for the Study on the Impact of Armed Conflict on Children.” University of Essex, UK, May 1996. Sec. 2.2.
70 Abbott, 524.
71 Trojnar, 9.
72 Ibid.

74 Ibid.
75 Bhabha and Young, 89.
76 Ibid., 90.
77 Schoenholtz and Muther, Jr., 531.
78 Moreno, 21 Imm.L.R.(2d)221.

81 Media publicity can violate laws that mandate that the identity of a juvenile involved in the court system must be kept confidential.
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The National Center for Education in Maternal and Child Health provides national leadership to the maternal and child health community in three key areas—program development, policy analysis and education, and state-of-the-art knowledge—to improve the health and well-being of the nation’s children and families.

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In the 21st century, globalization will pose the greatest contemporary public policy challenge for the public bureaucracies of industrialized and developing countries. While globalization brings tremendous opportunities, according to free trade economists, policy makers, and academics, it also has the effect of constraining governments' capacity to engage in the business of servicing the public’s entitlements. The article argues the Organization for Economic Cooperation and Development (OECD) countries have embraced the New Public Management (NPM) paradigm as “the” panacea for addressing the inefficiencies of government and as a means to align their governance practices with the principal ideological constructs of globalization. This trend is evidenced by the proliferation of NPM principles and practices throughout the Western democracies. Even more importantly, NPM is perceived as a way these governments can mitigate the threats of globalization to their governance roles. Strategic maneuvers, on the part of these bureaucracies, have tremendous implications for how public policy is designed and in whose interests it is implemented.

The New Public Management (NPM) paradigm enables the state to manage its role in the globalization process. NPM plays a valuable role as a policy tool and as a means to advance efficiency, prudence, and efficacy in state management. This occurs at a time when these values have emerged as a driving force behind the mass-liberalization of national economies and the international political economy (IPE). NPM serves most importantly, then, as a means to secure a role for the state in our globalizing world.

The adoption of NPM principles to further efficiency in Western governments may not have the expected results. Consider that NPM’s alternative service delivery techniques can undermine the existing public sector and its service-delivery capabilities. The Georgetown Public Policy Review, 6:2 (Spring 2001). Copyright © 2001

Author’s note: Thanks are due to several persons who provided insight into and/or commented on earlier drafts of this article; I am especially indebted to two anonymous referees for their invaluable advice. I alone am responsible for any shortcomings or errors in this article. The views and opinions reflected in this article are the author’s and do not necessarily represent the views/position of OECS.

A related article by the same author was published in The Round Table (2000), 353: 81-106.
tent to which public policy upholds and advances the public interest.

This article investigates the literature related to out-sourcing and reviews recent developments in the Canadian bureaucracy and the Canadian Federation at large. This review argues the public interest is being compromised by the design and delivery of public policy rooted in private sector values and management techniques.

GLOBALIZATION, NPM, GOVERNANCE, AND THE PUBLIC INTEREST: THE ISSUES IN CONTEXT

Globalization and NPM Defined

Globalization is a ubiquitous term in the international policy sciences. It has acquired a generalized application in recent years because it is more a descriptive than an analytical concept. It is widely understood as the increasing and intractable deregulation and integration of cross-border economic, political, and socio-cultural activities amongst various state and non-state actors and the standardization of legal and social frameworks governing these activities.

The tremendous influence of globalization on the IPE is evidenced by the increasing share of world trade in the world Gross Domestic Product (GDP), which has been rising at unprecedented rates in recent years. Because most prominent transnational actors in globalization are thought to be financial and corporate entities, globalization is associated with trade, financial flows, and technology spillovers. Recent innovations in technology have played a role in the transformation of the global system as they have enabled private decisions regarding production, finance, and investment to take place relatively free of state intervention.

NPM has been a much debated concept, especially since its application in the last two decades in both developed and developing countries. NPM encompasses three interconnected themes. First, it involves the transfer of private sector models of management to the public sector in order to implement efficient resource deployment. Second, NPM is regarded as a necessary response to public bureaucracies’ limitations, especially in the Western democracies. Institutional and exogenous pressures related to developments in the IPE strain governments’ programming capacity and ideological sense of purpose. Third, NPM provides revised techniques and values with which governments can better manage change in public administration, ultimately impacting governance frameworks.

The Changing Dynamics and Modalities of Governance Frameworks

Governance should not be equated with government, per se; rather, it entails public administration within a political context, with adherence to the concept of the public interest. Government, on the other hand, can be viewed as an institution rather than a process. Conceptually, governance encompasses the complex mechanisms, processes, relationships, and institutions by which citizens articulate their interests and mediate their differences through collective action. Central to the issue of governance is the concept of power, who exercises power, and how that power is exercised.

While governance institutions reflect a nation’s socio-economic, historical, and cultural realities, these institutions generally comprise: the legal system (which includes courts and the judiciary), democratic institutions (which include legislative bodies and other representative institutions), civil society (which include community based organizations or non-governmental organizations, churches, etc.), economic markets (which include labor and business groups), and the public sector (made up of its constituent parts at the national, subnational, and local levels).
The Transformation of Governance Paradigms and Modalities

While the level of development of governance institutions varies between developed and developing countries, the dynamics and modalities of governance structures are changing in both. The catalysts for this change in the developing world are the structural adjustment programs (SAPs) of the International Monetary Fund (IMF) and the World Bank, which are meant to restructure the public sector and reinvigorate stagnant economies. SAPs jump start economic growth by building frameworks necessary for the private sector to assume more of a role in national development. As a result, many developing countries are forced to alter their administrative models, historically grounded on state intervention in economic matters, through privatization or downsizing. This practice has steadily removed the visible hand of the state from both economic management and public sector administration.

In Western industrialized nations, governance modalities are changing in response to modern fiscal pressures. The revolution in how Western democracies design, manage, and implement their economic, governance, and regulatory mandates is part of a larger effort to revise the state’s role in society. This new governance paradigm appears congruent with the objectives of globalization and its requirements for less government involvement in society. However, such a paradigm poses a serious threat to social safety nets and the re-distributional objectives of public policy. As R. Landry points out, “the introduction of business-like managerial practices in the government does not always take into account the many constraints confronting government bureaucracies. By and large, the goals of public bureaucracies are more ambiguous than is the case in private bureaucracies.” He argues further that “equity is often more important than efficiency in the operation of public bureaucracies.” Yet, evolving governance frameworks are undermining equity considerations in policy design and implementation in favor of efficiency.

The Dynamic Interplay Between Globalization and NPM

While policy makers and academics agree there is administrative reform in the NPM approach to public management, there is little consensus as to the underlying factors triggering such reform. Particular confusion surrounds the factors that have led to radical changes in state functions, service delivery responsibilities, and core values of public service. Scholars have devised insufficient explanations for these changes in governance. For example, many have described the changes as being a result of the “Quiet Crisis” (i.e., a growing inability of public bureaucracies to service citizen’s entitlements satisfactorily) and the new fiscal realities governments face. Absent from the debate over these issues is the influence of forces exogenous to the domestic economies and societies of Western bureaucracies, which are brought about by globalization.

Increasing economic interdependence and the convergence of ideological values and policy prescriptions among the OECD countries have fostered the proliferation of NPM concepts and practices. NPM enables the state to manage its changing role in a globalizing world. The popularity of NPM instruments and principles in the past 15 to 20 years has coincided with the dramatic systemic changes taking place in the IPE, i.e., globalization. Indeed, the marketization of the public sector and its adoption of NPM doctrines to facilitate this transformation reflects the state’s efforts to contend with and respond to the pressures of globalization. This effort by the state involves fostering a more entrepreneurial spirit in state functions. Efficiency is becoming the primary determinant of a state’s viability in a world where its boundaries are increasingly irrelevant and its regulatory roles inconsistent with a liberalizing international economy.
The Universal Agenda to Adopt the NPM Paradigm

In recent years, most Western bureaucracies have experienced growth in the use of market-type mechanisms to address the shortcomings of public service delivery systems, policy instruments, and management ethos. The principal thrust of this public management reform has been the delegation of state responsibilities and functions and an emphasis on "outputs." Service delivery instruments have changed to accommodate such administrative reforms and entire agencies have been created to oversee the marketization of the public service through privatization and retrenchment.

Some governments have made more progress than others in reshaping their operations and service delivery techniques. Because approaches to incorporating the NPM doctrines vary, scholars have questioned whether there really is a universal agenda to adopt such a paradigm. A.B. Cheung, for instance, raises serious doubts as to how universal the NPM revolution actually is, since he sees no obvious trend in how Western governments are implementing NPM instruments. Similarly, K. Kernaghan and M. Charih argue NPM is "neither a coherent nor sufficiently inclusive philosophy of public administration; it is, however, the centerpiece of contemporary dialogue on public service reform." Further, Cheung questions whether the NPM doctrines provide anything new or whether they offer insight into old issues. Similarly, M. Barzeley notes that the NPM revolution, which began in England in the latter part of the last century and continued in the United States, is a continuation of past reform efforts to professionalize the public service by, for example, incorporating merit-based systems into governance frameworks.

In contrast, other scholars view NPM as doctrinal, in large part because of its characteristic performance-based administrative techniques. These include financial and management reforms that stress greater management autonomy, explicit standards and performance measurements, emphasis on output controls, dismantling public sector entities, greater competition via term contracts and public tender procedures, assimilation of private sector management styles, and efficient resource use. Many of these NPM characteristics stem from public choice and agency theories. It has been argued that NPM has a role in contributing to financial and management reforms in Western bureaucracies and is seen as the ideal vehicle for the reinvention of the public service.

NPM creates a new governance model, which realigns state functions and management structures through devolution and decentralization. P. Aucoin argues that "what has been taking place in almost every government in developed political systems and highly institutionalized administrative states is a new emphasis on the organizational designs for public management...This internationalization of public management parallels the internationalization of public and private economies." Such sentiment is echoed by A. Yeatman who argues, "a major process of reforming public management has been occurring in the liberal democratic state jurisdictions over the last fifteen years or so." NPM has universal appeal because it is perceived to create a state that is competitive, flexible, market-oriented, and better equipped to contend with external change in the global economy.

While this bureaucratic reform is not uniform, all OECD countries are adopting NPM instruments. The extent to which they are is more a reflection of cultural, political, and historical factors unique to each country, than it is a lack of collective commitment to incorporate universally accepted responses to globalization.
Rather than recoiling in the face of a globalizing world, the state in the West is securing a role for itself as an intermediary in the transnationalization of private sector production, marketing, distribution, and financial deregulation activities. In this sense, the state has become a benefactor to the market. Of course, the state’s role as intermediary in the globalization process is not all-encompassing, such as with capital markets. Due to developments in the IPE, such as the transnationalization of capital, the state’s power as a facilitator is being fragmented.

The state, especially in the industrialized countries, is moving away from its role in advancing social agendas, notably the welfare state, and has assumed a more explicit role protecting the interests of actors in the market. Not only is this move reflective of the fact that revenues from taxes are no longer commensurate with the cost of social services, but also of the changing wealth of nations. An increasingly prosperous citizenry in the developed countries is forcing many states to question the relevance of social programs that were largely designed and developed as a response to the tremendous human suffering during the Great Depression, World War II, and the subsequent reconstruction period. While the citizens of almost every developed country had to endure tremendous hardship during these years, they quickly amassed considerable wealth in the post-war boom. The systematic scaling down of a "universal" welfare state is as much a response to this development as it is to the notion of the "minimalist" state typically associated with globalization.

Governments are no longer the guarantors of the social democratic state. Instead, the state in Western democracies is increasingly assuming the role of enforcer of public policy initiatives framed at supranational levels. Policy makers seem to believe that recent developments in the market, associated with globalization, must not only be met with their blessing, but also must be facilitated by the state. In the long run, the state will be able to ensure it does not become irrelevant in a world where the primacy of the market is overshadowing the importance of its regulatory roles. While not explicitly regulating the actions of the market, the state is content to monitor and play the role of an oversight entity vis-à-vis its enforcement powers. The state’s role in this millennium will be to facilitate the continued global integration of markets. The state will also intermediate between transnational and state actors so as to establish codes of conduct in liberalizing trade, finance, and macro-economic frameworks.

The international economy demands a more competitive state that is willing to emulate management principles embedded in the private sector. However, is the state’s move to emulate the market compatible with its obligations to service its citizens equitably? It is in the interest of non-governmental organizations (NGOs), governments, the private sector, and civil society to ensure that pursuing a different approach to its governance responsibilities does not compromise the state’s obligations to the citizen’s welfare. These various actors must ensure public policy is formulated and implemented with attention to the public interest.

**In Search of the Elusive Public Interest**

The public interest is not just the interplay between interest groups in policy sub-systems, but rather the pursuit of a "moral good" in the formulation and execution of public policy. Advancing the public interest has short- and long-term implications. Many scholars have noted how critical it is that public servants protect the public interest in their actions and deeds. Although the term "public interest" has widespread emotional appeal as it alludes to what is in the public good, the design and operational features of public policy rarely please everyone. However,
diverse viewpoints and competing interests in the agenda-setting process have historically ensured the public interest is served. With the recent entrenchment of ideological and methodological homogeneity in governance, representative policy making is compromised and, as a result, so is the public interest.

Many commentators speculate that the citizens of the OECD nations will face an uphill battle in ensuring their governments maintain a balance between the pursuit of efficiency and the protection of social welfare. While I do not object to the adoption of the entrepreneurial spirit in the public service, an important line must be drawn as to what are acceptable instruments and methodologies exercised to pursue public policy. One must be careful to recognize that the public servant and the private sector executive are not cut from the same cloth. While the former plays an important role in re-distributive initiatives for the public's benefit, the latter plays a role in amassing wealth for private gain. If the two roles are not balanced and if the roles of the public servant begin to reflect those of the private sector, the public bureaucracy risks undermining the design of public policy in the public interest.

BEYOND THE DRIVING THEMES OF NPM: A CRITIQUE

Entrepreneurial Risk-Taking vs. Democratic Stewardship: Are They Reconcilable?

Because of the adoption of the NPM paradigm, market-driven management views in the public sector have emerged as an all-encompassing approach in the practice of public management. By grafting private sector managerial concepts onto the public sector, neo-managerialism has changed the public management model. In this model, public managers assume the role of entrepreneurial leaders who function best in a market and results-oriented environment. D. Osborne and T. Gaepler argue that this will be the case because these managers will be in constant pursuit of the bottom line. However, under these conditions does democratic accountability of managers who serve the public interest conflict with their motivations of self-interest and opportunism? This is a pervasive and inescapable problem, which the entrepreneurial-bureaucrat model raises time and again.

Many authors argue NPM has promoted innovation and radical change in the public service and, hence, is worth pursuing even though democratic accountability may be compromised. M. Schneider and G. Peters describe public entrepreneurialism as the catalyst for more effective government. However, these authors are oblivious to the fact that the public entrepreneur's penchant for rule breaking and manipulation of the policy process undermines the principle of governance for the people.

Strategic management in the public service, as pursued within the framework of reinventing government and performance management, has several shortfalls aside from the accountability issue. First, while measuring performance quantitatively is relatively straightforward, it is directed at short-run results, which do not provide meaningful assessment of the success of longer-term policy mandates. Second, advancing policy change through the use of strategic planning and total quality management techniques fails to provide sufficient explanation of the outcomes in the strategic planning process, which are critical in evaluating the success of any policy. Furthermore, if the public entrepreneur places a premium on innovative changes, he may undermine the core values of the public service. Consider the ramifications of a public entrepreneur who thinks he owns the policy process or a particular program. The manager, no longer a servant of the people, may pursue the bottom line at the expense of equity and fairness.
While I do not argue against the pursuit of some form of entrepreneurial spirit in the public service, I do not condone the formalization of such spirit in the neo-managerialist approaches to public governance. The indiscriminate substitution of market mechanisms for state regulation contributes to accountability, transparency, and public participation problems and jeopardizes public service values.

Privatizing the Welfare State: How Much Can Governments Save?

A central feature of the NPM paradigm is contracting out or outsourcing, which is the provision of public services by private sector contractors. Empirical studies show that cash-strapped governments can benefit from such arrangements and provide services more efficiently. Increasingly, however, contracting-out arrangements have come under fire. Two issues should be addressed: whether contracting out saves the government more money and the extent to which such arrangements undermine public accountability.

Despite examples of success of contracting out in terms of reducing costs, in many cases cost reductions are not significant. Contracting-out arrangements may result in privately contracted parties exerting equal, if not more, pressure for higher spending by governments than public employees. P. Starr argues that public spending coalitions have not been broken up despite privatization efforts. Claimants to the public treasury may increase as a result of contracting out. For example, privately contracted highway construction in the US often does not reduce the pressure for bigger construction appropriations on state governments. There are often no significant cost differences in service delivery by either government or private parties. Further, he argues that any lower costs associated with private contractors reflect low variable expenses, such as lower wage rates and the employment of part-time workers without employee benefits. Thus, Starr contends cost reductions may occur because of factors extraneous to quality and efficiency criteria.

Moreover, costs to government do not end when services are contracted out because the government is still obligated to regulate the service. If the private contractors involved are unable to provide the service, because of quality or cost issues, the government must cancel the contract and make alternative arrangements. Meanwhile, services are disrupted and costs increase. While a government will only contract out a service in a competitive environment, the market may exhibit monopolistic tendencies that compromise the efficacy of service delivery over time.

Other scholars provide quantitative evidence that questions the efficacy of outsourcing. G. Hodge conducted an international meta-analytic study of the success of contracting out. The performance framework for his analysis includes five criteria: economic, social, democratic, legal, and political. He evaluates the success of contracting out in terms of better services, lower prices, increased choice, and the adherence of contracted services to equity considerations. He also considers economic efficiency of outsourcing in both the bidding process and service provision. While Hodge observes it is possible for contractors to provide services cheaply with no loss of quality, he voices concern about corruption that could result from the contracting-out process. He notes, "The risk of corruption is more a risk to the democratic process itself through the influence of political processes."

Hodge's study found noticeable financial advantages from the contracting out process, especially in such services as garbage collection, cleaning, and maintenance. However, he states that while the process has had some success (especially at the municipal government level), this success is limited to only certain types of
government services, and does not warrant the privatization of the gamut of government services. According to Hodge, cost reductions were often not as substantial as the NPM rhetoric suggests. In addition, contracting out complicates and disrupts the general oversight of government provided services and diminishes public accountability. Further, the contractor is held accountable according to the terms of the contract, which is significantly different from the accountability structure for public servants in the delivery of services.

In the contracting out model, service providers are directly accountable to public servants and not to the citizens receiving the service. The ramifications for citizens' redress in the event of service delivery problems are obvious. While ministerial responsibility has its shortcomings, it provides some assurance that someone will be held accountable. While contracting-out may enhance transparency by shifting service delivery standards, it clearly has significant disadvantages that go beyond cost considerations and encompass accountability issues.

NPM AS A STRATEGIC POLICY TOOL IN AN INDUSTRIALIZED COUNTRY: CANADA'S RESPONSE TO GLOBALIZATION

The Decentralization Push and the Centralization Pull

Canada faces two opposing tendencies in the NPM revolution. On the one hand, the harbinger of Canada’s public sector reform has been the Programme Review that promotes effective and cost efficient delivery of government programs and services. The result was a dramatic decline in program spending in 1999, which accounted for about 12 percent of GDP and constitutes the lowest recorded level of program spending as a proportion of GDP in 50 years. The Canadian provinces are having to shoulder a larger financial burden in delivering services due to drastic cuts in federal transfer expenditures, such as the Canada Health and Social Transfer (CHST). Such intergovernmental transfers have been reduced by one-third, from 19.3 percent in 1994-95 to 12.5 percent in 1997-98. These developments reflect an erosion of the federal government’s larger commitment to upholding a substantive feature of the Canadian welfare state and have substantially decentralized the Canadian Federation.

At the close of the 1990s, the federal government was struggling to maintain its record in its social policy commitments. While social spending grew significantly in the post-war years, in both nominal and real terms, the sustainability of the federal government’s social policy commitments and the efficacy of its programming in this regard is seriously under threat.

There is growing reticence on the part of the federal government regarding its social policy role. The 1999 Social Union Framework Agreement (SUFA) was an attempt to address the Federal government’s lack of a coherent vision for social policy. Similarly, the Ministerial Council on Social Policy Renewal—created in 1995 by provincial premiers—represented an effort to establish a venue highlighting responsibilities and roles in social policy. The Ministerial Council was also charged with negotiating social program reform and reaffirming government jurisdictional responsibilities in program delivery. The federal government’s leadership in social policy continues to be compromised as a result of collaborative bottlenecks with provincial jurisdictions and declining political will to meet its obligations to the Canadian public. The cumulative effect is that efficacy of social policy programming is compromised. Furthermore, the federal government may choose to remain reticent because it believes leadership in social policy is a function of provincial jurisdiction. This ultimately compromises social policy goal-setting, programming, and implementation.
Compounding this state of affairs is the weakening of the social democratic state as a result of the federal government’s declining financial contributions to social programs, many of which were rolled into the CHST block grant throughout the 1990s. All this has had the effect of decentralizing the Canadian Federation, as provinces have had to assume increasingly more financial responsibilities. This is especially the case with social union and the labor market issues where the provinces have had to compensate for the federal government’s declining commitment. This notwithstanding, the social union framework is about power and money (directly related to the federal government’s spending power in the area) and the federal government is keen to maintain its role as the source of funds. However, partnership arrangements between the provinces and the federal government throughout the 1990s became increasingly imbalanced as the provinces assumed more of a responsibility in program financing.

On the other hand, Canada’s willingness to adopt international economic policies in response to globalization appears to be centralizing the federation. Canada’s participation in trade agreements such as the North American Free Trade Agreement (NAFTA), the Uruguay Round (UR), and other multilateral agreements centralizes its policy-making machinery. Such agreements undermine the importance and relevance of domestic trade agreements such as the Agreement on Internal Trade (AIT). While the provinces will be forced to assume more of a role in social program delivery, the federal government will strengthen its control over trade and monetary and fiscal policy.

The Normative Appeal of NPM

NPM is complementary to the public service reforms that have emerged in Canada from the 1990s. By reinventing government for efficiency, the state intends to safeguard its interests in a globalizing world. The principles of NPM in Canada have an a priori appeal to the entrepreneurial bureaucrat who increasingly has to do more with less.

The federal and subnational governments in Canada face significant fiscal constraints, while having to provide entitlements and cater to program-related demands of the Canadian public. These governments, then, are faced with difficult and important public policy choices. While plagued by significant domestic and international pressures, the Canadian provincial and federal governments need to be pragmatic. They must decide between dispensing with their public service responsibilities in an effort to incorporate neo-managerialist principles and addressing social policy issues with a great deal of pragmatism. Ultimately, the outcomes of these decisions will determine the character of Canadian federalism in the 21st century. The Canadian state already faces a crisis of legitimacy, in large part because of the increasing tendency to contract out public services. The government is using tax dollars to contract out services instead of providing those services directly. This has impacted the state’s ability to equitably fulfill its citizens’ needs and at the same time has plagued governance with distorted accountability frameworks.

Conclusion

There is a global agenda to incorporate market-type mechanisms, as reflected in the doctrines of NPM, into the governance frameworks of Western states. As has been the case with the market, the state’s response to globalization has been deregulation. While the deregulation of the market is driven by neo-liberal doctrines aimed at liberalizing financial and capital markets, the deregulation of the state is driven by the NPM doctrine. In important ways, these deregulation agendas represent two sides of the same coin.

Many governments within the OECD do not simply view NPM as a juxtaposi-
tion of prescriptions for efficiency gains, but rather as a measured and calculated response for public sector bureaucracies to respond to the imperatives of globalization. In this sense, NPM is an effort by the state to preempt globalization’s anti-state thrust and adjust its role so as to ensure its viability in the changing mosaic of the IPE. Debates continue as to the degree to which such a governance paradigm risks further alienating the public and undermining the core values of Western bureaucracies. Neo-mangerialist approaches to public sector management, which advance the notion of the entrepreneurial bureaucrat, are not congruent with the public interest and democratic stewardship. Core public service values such as truthfulness, equity, and fairness may be compromised in the pursuit of the bottom line. Suffice it to say, because the priorities of many governments largely reflect economic interests, many policy makers around the world are inclined to aggressively adopt NPM as the panacea for approaches to governance. Such an inclination may be premature as there is no conclusive empirical evidence to substantiate political claims that NPM instruments are having the desired effects. While NPM practices seem an appropriate way for the state to secure its role in a globalizing world, they more often than not undermine the very reason for having a government that protects and serves the public interest.

Notes

2. Ibid.
4. The tremendous influence of globalization on the international economy is evidenced by the increasing share of world trade in the world Gross Domestic Product (GDP), which has been rising at an unprecedented rate in recent years. However, another more visible sign of dramatic systemic changes in the international economy is the increased liquidity of global equity markets. This has been made possible by comprehensive programs of economic liberalization being pursued in Western countries, and to a lesser extent the emerging markets, especially in East Asia.


13. In reference to enforcement powers, in this context I am alluding to enforcement powers as they relate to the market. It is abundantly clear that the state will continue to exercise monopoly control in regulating and enforcing matters of national security and defence policy.


17. This radical change is associated with what many observers perceive as a reinvented government that will be customer centered, empower its employees, and foster excellence through innovation.


26. Ibid., 101.


28. Ibid.
29. The CHST comprises cash transfers and tax points. The intention of the CHST was to stabilize the cash portion of the transfer; however, the transfer has continued to include less of a cash portion in recent years.


32. In fact, the Canadian government’s continuing decline in support of the social welfare state is also reflected in the unprecedented social-program downloading which has become commonplace in the 1990s. As a result of such downloading, which fiscally stressed governments at all levels are implementing, not-for-profit organizations in civil society have had to assume a larger role in the provision/delivery of services centered around the social sector. Hall maintains that, “As government downsizing has acquired momentum, social-program downloading has become a common component of political argument.” (Hall and Reed, 1998: 3).


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Steven Levy, *Newsweek*’s chief technology writer, has been covering the topic of computer security for several years. Levy’s deep knowledge of this area and his expertise in writing about technical issues for a popular magazine are put to good use in his most current book, *Crypto*. The book is an eminently readable history of recent advances in cryptography; that is, the mathematical manipulation of data in order to hide it from everyone except the intended recipient(s). While this may seem like a rather esoteric subject, cryptography plays a critical role in our everyday lives—from allowing us to purchase goods over the Internet to protecting our cell phone conversations from eavesdroppers. Although *Crypto* does a good job explaining how cryptography works, the book’s true value lies in Levy’s exploration of the impact of cryptography on society. Levy is particularly adept at describing the struggles between those who believe that the spread of cryptography could seriously harm US national security and law enforcement, and those who believe that cryptography can enhance democracy by providing privacy and security for personal communications.

*Crypto* begins by describing the development and commercialization of public key cryptography (also known as public key infrastructure or PKI) in the 1970s and 80s. Levy does an excellent job explaining how PKI works, and how it differs from the other methods of cryptography that have been used for hundreds of years. More importantly, he delves into the personalities of the creators of this technology in order to show how their passionate belief in privacy leads them into direct conflict with parts of the US government.

The bulk of *Crypto* focuses on the ensuing battle between an interesting assortment of computer scientists, engineers, mathematicians, and privacy activists on the one hand, and the National Security Agency and the FBI on the other hand. Levy’s account of this battle is detailed, nuanced, and proves fascinating reading. He does a good job of explaining how a new and rather esoteric technology led to a fundamental conflict between two pillars of US democracy: the right to privacy vs. the right of the government to invade that privacy.

Levy gives a particularly nice account of the disagreements with the US government itself about how to respond to this new challenge. The net result of these disagreements is that the United States wasted a golden opportunity to hold an open national debate about the issues surrounding PKI. In the end, US policy swung from one extreme to another, and the crucial debate that was needed to find a satisfactory solution to this policy dilemma has never taken place.

There are three primary lessons that can be taken away from this book. The first is that technology can dramatically alter the social and political structure of a society. The second is that individual people can take on the most powerful governmental organizations and win. Finally, the parochial and narrow-minded interests of one or two government agencies can potentially undermine the best interests of the government and country as a whole.
Levy's book does not preach; rather, it lets the story unfold naturally through the characters. Although Levy doesn't do as good a job explaining some of the more complex cryptographic concepts in the later chapters as he does in the earlier chapters, the story is generally easy to follow and the technologies are described well enough that most readers should grasp how they work. Overall, Crypto is an excellent book for anyone interested in the relationship between technology and public policy.

IRVING LACHOW
Digital Signature Trust


As recently as the 1930s, the federal government was at the forefront of change in the national economy. Under Franklin D. Roosevelt, numerous federal programs were enacted such as the Tennessee Valley Authority, the Civilian Conservation Corps, and the Civil Works Administration. In the 1960s, government yet again led the nation into a period of domestic reform under Lyndon Johnson's Great Society program, and the nation later rallied behind his War on Poverty campaign. However, after this period of popular government activism, the federal government stopped sponsoring new domestic programs. Despite the entrepreneurial leadership of Ronald Reagan, Bill Clinton, and Newt Gingrich, the federal government was gridlocked and comparatively little was accomplished.

What had happened? Why was government in a state of paralysis? The answer, according to National Journal reporter Jonathan Rauch in his book Government's End, began with a rapid proliferation of interest groups which he terms "hyperpluralism." The beneficiaries of new federal programs inevitably form interest groups that both defend the existing programs and demand increasing benefits. The New Deal and Great Society campaigns created the government programs that initiated this self-perpetuating cycle, and the result was the proliferation of the numerous interest groups characteristic of contemporary American society.

Rauch maintains that interest groups need a period of relative stability in order to propagate. The end of World War II provided American interest groups with this crucial period of relative stability, when the United States entered a period of prosperity unmatched in its history. This created a plethora of interest groups and led to what Rauch calls "demosclerosis." Rauch effectively cites numerous anachronistic government programs to support his claim that the proliferation of interest groups has disabled the federal government. Among his convincing references are failed attempts at bank reform, the Veteran's Administration hospital system, the sugar subsidy, and the wool and mohair subsidy. In each case, interest groups created long ago have repeatedly succeeded in obstructing government reform of outdated federal programs.

Despite his acute observations, Rauch fails to adequately emphasize the plutocratic nature of contemporary interest group politics. He believes that in modern American society "everyone is organized, and everyone is part of an interest group," and that the days of aristocratic dominance of interest groups in government are waning. However, Rauch does not acknowledge that, in spite of the increasing representation of poor and middle-class constituencies in congressional lobbies, these interest groups have an inherently more difficult time forming and influencing
government as a result of their large numbers and financial constraints. These enormous barriers remain to this day and keep poor interest groups well behind their wealthier counterparts in the lobbying game.

Although numerous attempts have been made at limiting the power of interest groups, nothing can feasibly be implemented to dramatically alter their role in influencing government. Innovative remedies such as campaign finance reform may ameliorate the situation, but at the end of the day government will remain calcified beyond repair. However, in Government's End, Rauch suggests that the consequences of hyperpluralism and demosclerosis are not necessarily adverse or dramatic. In other words, life for the vast majority of Americans will remain unaffected as society naturally adapts to circumvent the outmoded policies of the federal government.

Vijay Sekhon
University of California, Berkeley


Many scholars who would never have found interest in the Internet are seeing it integrated into their disciplines as well as their daily lives. In particular, economists are finding the need to revisit the concepts of competition and industry structure as well as other dimensions of economics where transaction or search costs have loomed large. Fundamental economic theories, predicated on an unachievable world of negligible transaction or search costs, can now be tested as the once purely conceptual is wired into the walls.

The Internet Economy: Access, Taxes, and Market Structure is a good, if perhaps not well-titled book, that addresses the intersection of the Internet and economics. A more descriptive subtitle might have been "An Exploration through an Overview of Empirical Studies and their Implications." There is no particular focus on information economics, that is, the buying and selling of digital-only goods. The focus is instead on market structure, pricing, and theoretical implications of the Internet for economics as viewed through an overview of empirical studies.

This text does a fine job of surveying a fragmented, inchoate field. I would particularly recommend it to economists seeking to explore the impact of the Internet on their particular area of interest. Graduate students seeking a hold on the area would also benefit from this book. Currently, there is no single set of journals, conferences, or organizations where studies of Internet economics are synthesized. The Telecommunications Policy Research Conference (TPRC), the Association of Internet Researchers (AoIR), and the Academy of Management all have produced worthwhile works in the area, yet are rarely found in the same academic category. This text is useful in addressing the fragmentation by gathering the studies in one place.

The book addresses quality of service economics, as well as the pricing and competitiveness implications of Internet commerce. Disintermediation, reintermediation, and network effects are well explained. There is, however, no discussion of access or the digital divide, as may be expected given the book's title. The discussion of taxes is primarily focused on the impact it would have on the growth of Internet economics, but it adds little given that the research on the influence of taxation on the growth of Internet commerce is well covered elsewhere.

In terms of information e-commerce, that is transactions consisting only of data
bits, the topic of access costs is addressed with an overview of the four major approaches to quality of service: integrated service, differential service, fat pipe strategies, and real-time auctions. The technical feasibility of the different approaches is not addressed; the issues of information property and intellectual property protection are not considered. A further weakness is the introductory section on the Internet, which by its nature cannot be current given the inherent delay between authoring an academic book and the end of the publishing process.

The value of this book is in its overview of the first papers on Internet economics and the theoretical overview of the state of the discipline. Subsequent editions or a complimentary web site would make this slim but useful volume an even more useful addition to the field of Internet economics.

JEAN CAMP
Harvard University


If this year's headlines are any indication, the subject of globalization continues to stir passions, from the World Economic Forum in Davos, Switzerland to the World Social Forum in Porto Alegre, Brazil. Meanwhile, in the halls of academia, there is a growing recognition of the emerging power of non-governmental organizations (NGOs) in the international relations arena traditionally reserved for nation-states. Combine the two topics, and an intriguing study is inevitable. This is just what Ann Florini, director of the Carnegie Endowment's Project on Transparency and Transnational Civil Society, has compiled in an edited volume of case studies on the emerging "transnational civil society."

Florini steers a steady course past the shoals that have sunk many recent civil society enthusiasts, who argue that by creating "social capital," civil society can solve many problems of governance. Florini focuses primarily on the effect of transnational civil society organizations in altering behaviors and policies and thus avoids the empirically troublesome debate over whether civil society actually contributes to democracy or other goals of governance. (For beginners, a comprehensive annotated bibliography at the end of the book also offers a useful introduction to ongoing debates on this and other debates within the civil society literature.) Her work concentrates instead on the influence of single-issue organizations or networks, such as Transparency International, the International Campaign to Ban Landmines (ICBL), and the Zapatista Network.

Florini seems fully aware that civil society may not always have solely positive effects, and does not dance around the potential problems posed by new organizations. As she points out, the values that drive some members of transnational civil society—such as terrorists—are not widely held, and many are not the sort the reader would presumably cherish. Just as importantly, Florini and her contributors are careful to avoid the cheerleading for civil society organizations that the book's title might otherwise suggest. Perhaps by virtue of the fact that most of the contributors are practicing members of the organizations they write about, they are realistic about the limitations legitimate civil society organizations face. The essays recognize the difficulties of transnational civil society organizations, acknowledging, for example, that the perception that such institutions have an elite, Western bias may ultimately undermine their effectiveness. Florini points out the presence of occasional non-democratic
processes within transnational civil society organizations; she also points out the potential downsides to the not-infrequent goal of influencing the internal politics of a sovereign nation. Most importantly, the book identifies a key paradox facing transnational civil society in a globalizing world: as NGOs work to combat transsovereign problems, they may also undermine sovereignty and unintentionally create circumstances that allow transsovereign problems to flourish.

This excellent collection is a testament to Florini’s belief that the power of transnational civil society cannot be ignored in a world in which the information revolution, growing economic integration, and a rising population are contributing to unprecedented globalization. Although the nation-state and the transnational corporation remain primary players, civil society is increasingly crossing boundaries, inserting itself, and using an international presence to leverage its power against national governments. If transnational civil society organizations are able to maintain their credibility, they may be able to gain a power of moral suasion that can counterbalance traditional military and economic forces. But as most of the contributors implicitly point out, transnational civil society must aim to maintain its moral authority, legitimacy, and claim to authoritative knowledge even as it seeks expanded influence.

The essays are well integrated and offer a history of the ascendancy of various types of transnational civil society organizations. These range from a single person with a powerful idea, such as Peter Eigen and Transparency International, to the array of groups who worked to fight nuclear proliferation and big dams, to the more recent phenomena of networks of independent national civil society groups. The essay on the ICBL points out a supreme irony of the new power of transnational civil society: at the time Jody Williams won the Nobel Peace Prize, the network had no street address or even a bank account.

The power of The Third Force lies in the concrete examples it offers of how a well-intentioned campaign can make a difference, even when facing strong national governments and well-financed private sector opponents. The one drawback to this otherwise excellent collection of practical essays is that it offers little in the way of long-term practical guidance. The experience of the groups detailed here is useful in drawing up strategies and tactics for incipient transnational civil society organizations. But it might be useful to have more concrete examples of the sort alluded to in a brief discussion of Greenpeace’s credibility loss during its efforts against French nuclear testing in the early 1990s. Perhaps this book will be followed with a second volume detailing the life cycle of transnational civil society organizations and ways in which professionalization and internal democratization can be implemented to increase their effectiveness. Until such a volume appears, however, the Third Force is an excellent and comprehensive beginning for those interested in the influence of a powerful new force in international public policy.

Matthew Taylor
Georgetown University


At the conclusion of the last World War, the Allies found they had some unexpected sources to thank for their victory: innovations like the large scale production of penicillin, the invention of RADAR, and the atom bomb demon-
strated as few things had before the profound impact that scientific research could have on human affairs. Successes like these in solving complicated problems prompted government to fund basic research in the belief that applying the scientific process to unraveling the workings of nature would inevitably lead to technological progress. Initially, the government provided funding without controlling how it was spent. As the need to measure a tangible return in government’s growing investment in science became evident, boundary organizations were created to moderate the interaction between scientists and politicians.

David Guston explores the evolution of the relationship between government and scientists using a principal-agent framework in Between Politics and Science. He analyzes historical events and their role in influencing this relationship, arguing that the evolution of this relationship improved accountability and performance.

At the outset, scientists were unregulated in their work because it was felt that only they could grasp the complexity of scientific undertakings, and that their drive for knowledge would inevitably result in productive and ethical work. The assumption that scientific work occurs beyond the reach of human nature, Guston says, was naive. To support this contention, he cites trends and watershed events within the National Institutes of Health (NIH)—a leading recipient of government funding for scientific research.

Throughout the book, the author relies on NIH to build his analysis using the construct of a principal-agent relationship. The government, acting as the principal, initially entrusted scientists, its agents, unconditionally to carry out a task that the government was not able to perform on its own. Because of the asymmetry in knowledge between principal and agent, government failed to build accountability into the relationship from the outset. Rather, it left this responsibility to the agent. Numerous incidents called into question the ability of the agents to regulate themselves, leading to the creation of “boundary organizations.” These organizations function as buffers between principal and agent and monitor the performance of scientists on behalf of the government while preventing it from micro-managing science. At NIH, the boundary organization includes scientists, investigators, and attorneys who together can understand the work of scientists.

Guston’s style is accessible and the events recounted are necessary anchors for his discussion. His presentation follows historical events linearly as he explores the evolving principal-agent relationship of government and scientists. His approach clarifies the relationship between scientists and government to the reader, but does not provide strong evidence that the evolution of this relationship improved accountability or performance. To provide additional support to his thesis, Guston could have provided more quantitative measures of accountability within the NIH, since he focused on this agency.

The numerous anecdotes provide a rich fabric for him to build his analysis. However, the numerical data presented cover short spans of time, challenging the reader to place them in the much longer historical context the author examines. This leaves the reader wondering whether other measures exist that the author could have explored in his analysis.

EMILE ETTEDGUI
RAND
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