



Strategy: *Passion*
& **WARFARE**¹

by Joseph W. Varela

“The history of war through the ages indicates that hate for the enemy is not a necessity for combat effectiveness, and it can be a liability when it leads to unnecessary but dangerous actions in battle. Good troops have plenty of motive without holding their enemy in contempt. In fact, respect for the enemy avoids the cardinal sin of dismissive overconfidence.”

*John A. Lynn*²

Continued: *Passion* & WARFARE

Some defense lawyers refer to prosecutors in derogatory terms. They label government lawyers as “the forces of darkness” and similar vituperations. They caricature them as Darth Vaders, Lord Voldemorts, and Hitlers. Although much of this is tongue-in-cheek, over the years I have heard a good deal of invective leveled seriously at prosecutors, as a group, by ostensibly mature professionals.

The present discussion does not attempt to account for this; nor does it inquire into the fairness or propriety thereof. Rather, the question considered is: Does acrimony make a defense lawyer more effective? Or to put it slightly differently, is embitterment against the prosecutor a hallmark of the dedicated defense lawyer?

In World War II the principal enemies of the United States were Nazi Germany and Imperial Japan. Both nations fielded disciplined, resolute soldiers who fought exceptionally well as individuals and as organized units. Contrary to some opinion, the intensity of battle offered by Germany and Japan was not distinguishable.³ Regrettably, atrocities were committed by and against all parties.

Yet studies published immediately after the war indicated that American soldiers held different attitudes and beliefs concerning the two enemies. In the U.S. Army-sponsored study of new wartime recruits, 51 percent agreed that they “would really like to kill a Japanese soldier,” whereas only 7 percent agreed when the subject was a German.⁴

Historian John A. Lynn identifies some of the reasons. The Germans and Japanese may have fought equally fiercely, but the Japanese almost always fought to the death. Also, it was well known that the Japanese treated captured American soldiers differently as a matter of policy,⁵ although atrocities against civilian populations by both nations rivaled one another’s.⁶ Race was a factor, too.

There was a torrent of scurrilous American propaganda against Germany, Italy and Japan but much of that directed against the Japanese was invidiously racial.⁷ Japanese were caricatured with exaggerated ethnic features, both real and imagined. They were frequently depicted as monkeys, snakes, and rats.⁸

Given all this, Lynn confronts the question of whether American soldiers fought harder in the Pacific theater. He concludes that there is no evidence whatsoever that variations in attitudes toward the respective enemies resulted in differential combat effectiveness:

Were the Marines and soldiers who landed on Saipan in June 1944 any more dedicated or effective than the soldiers who stormed the beaches of Normandy on the other side of the world at the same time? The answer to this question is no...⁹

Lynn goes on to point out that in the American Civil War, the opponents fought without intense hatred towards one another, but that did nothing to lessen the sustained intensity of combat that resulted in the slaughters of Antietam, Gettysburg, and Chancellorsville.

Does the defense lawyer perform better when he villainizes the prosecutor?

The underlying thesis of these essays is that conflict, including litigation, implies universal laws of conduct which have been best explicated by great theoreticians on war.¹⁰ So we turn to such a theoretician for guidance.

Speaking of the qualities that the commander must possess, Clausewitz tells us that inflammable emotions, feelings that are easily roused, are in general of little value in practical life, and therefore of little value in war.



We repeat again: strength of character does not consist solely in having powerful feelings, but in maintaining one's balance in spite of them. Even with the violence of emotion, judgment and principle must still function like a ship's compass, which records the slightest variations however rough the sea.¹

Clausewitz implies that the commander must either possess an even temperament, or must learn to control his emotions in the *sturm und drang* of combat.²

There is more, from one of the great field commanders of all time. Napoleon holds that,

"The first qualification of a general-in-chief is to possess a cool head, so that things may appear to him in their true proportions and as they really are."³

Nowhere do these authorities claim that the successful commander is the one who harbors hatred and contempt for the enemy.

The empirical evidence seems to bear out the theory. If the studies of American combat performance in World War II are any guide, the answer must be that no advantage accrues to the defense lawyer embittered against his opponents.

There are sound reasons that the defense bar should not vilify prosecutors. Aspersions may create unnecessary conflict, may lower the profession in the eyes of the public, may tend to distort the roles of the parties in the system,⁴ or may embarrass those who utter them.⁵ Were there an advantage to be gained, these detriments could, arguably, be a price paid for increased effectiveness in representation of the accused.

But to answer the present question, neither the theory nor the practice of warfare gives us any reason to think that painting caricatures of prosecutors does us, or our clients, any good. Better that the defense lawyer face his opponent dispassionately and battle him in cold blood.

³ The Japanese resistance on the islands is held to be the fiercest combat U.S. ground forces had to face in World War II. But consider the battle of the Hurtgen Forest: The 22nd U.S. Infantry Regiment suffered an astonishing 87% casualties during the 18 days of battle. Their opponents were not fanatical SS or Hitler Youth troops, but regular soldiers of the 275th Nazi Infantry Division. See Robert S. Rush, *Hell In Hurtgen Forest: The Ordeal and Triumph of an American Infantry Regiment* (2001).

⁴ Stouffer, Samuel, et al, *The American Soldier: Combat and its Aftermath* (1949).

⁵ I cannot locate the source, but I recall reading that the death rate among American POWs in German captivity was about 1 percent. In Japanese captivity it was 40 percent.

⁶ The Imperial Japanese had their own historical theory of racial superiority and committed excesses similar to those of the Nazis in its name, including slavery, mass murder, and medical experiments. The notable difference was the industrial method of German extermination.

⁷ The classic work is John W. Dower, *War Without Mercy: Race and Power in the Pacific War* (1986).

⁸ By contrast, the cover of a Nazi Party propaganda pamphlet depicts a Japanese soldier as a noble *samurai* warrior. Albrecht Fürst von Urach, *Das Geheimnis japanischer Kraft* [The Secret of Japanese Strength] (1943).

⁹ Lynn, *op. cit.*

¹⁰ See J. Varela, "Theories of Conflict and the Art of Criminal Defense," *The Defender* (Winter 2005).

¹¹ Carl von Clausewitz, *On War* (1832), trans. Michael Howard and Peter Paret (1976), chapter 3.

¹² Easier said than done. For example, the air war is often described from armchairs as "machine against machine," as if the machines were directed by coldly efficient machine-operators. But as one Eighth Air Force survivor put it, "It was hate, they were trying to kill you, but hate mixed with respect." (J.G. Varela, personal interview, 2010).

¹³ *Military Maxims* (1827).

¹⁴ I've a notion that if someone important to a defense lawyer were victimized, Darth Vader would metamorphose into the Archangel Michael—for the nonce. Apocalypse 12:7 - 9.

¹⁵ Today's prosecutor is tomorrow's defense lawyer, judge, or city councilman.

¹ With apologies to electric guitarist Steve Vai (*Passion and Warfare, Relativity / Epic* 1990).

² *Battle: A History of Combat and Culture from Ancient Greece to Modern America* (2003), chapter 7.